EXHIBIT 1

The New Policy Provisions for General Liability Insurance

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INTRODUCTION

In May of this year, the National Bureau of Casualty Underwriters filed with insurance departments and simultaneously distributed to its companies revised standard provisions for comprehensive general, manufacturers' and contractors', and owners', landlords' and tenants' liability policies. The revised provisions will be effective February 1, 1966. Automobile liability policies which are affected by the changes introduced for general liability insurance have also been revised and will be effective at the same time.

The lag between distribution and effective dates is to give companies sufficient time to become familiar with the new forms, to determine upon the format to be utilized—the provisions of the policy are standard, the policy style and format are not—and to arrange for printing. It also serves as a shake-down period in which questions from companies and others may be resolved.

There were many factors which initiated revisions of the general liability policies. Probably the most important were adverse court decisions. Courts were finding it all too easy to adopt hypercritical attitudes towards the "complex" policy format, particularly the schedule liability policy format, and to reach unintended results in all areas. Not atypical of such attitudes is the following:[1]

> . . . The policy contains such a bewildering array of exclusions, definitions and conditions that the result is confounding almost to the point of being unintelligible . . .

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[1] *Moretti* v. *Midland National Insurance Company*, 190 N.E. 2d, 597 (Ill. 1963).

18 The CPCU Annals 197 (1965)

> . . . In summary, the plaintiff gave the defendant coverage in a single, simple sentence easily understood by the common man in the market place. It attempted to take away a portion of this same coverage in paragraphs and language which even a lawyer, be he from Philadelphia or Bungy, would find it difficult to comprehend . . .[2]

The revisions, therefore, not only reflect material changes of substance but also changes in form.

FORMS

The Bureau's standard provisions portfolio of policy forms will no longer contain policies as such. Instead, there will be a basic unit embracing all of the provisions common to liability policies, *e.g.*, supplementary payments, definitions and conditions. In addition, there will be coverage parts, *e.g.*, comprehensive general liability, owners', landlords' and tenants' liability and manufacturers' and contractors' liability parts, any one or more of which will form a complete policy contract when combined with the basic unit.

Considerable latitude will rest with the companies in combining these parts into a cohesive contract without affecting the standardization of the substantive parts of the contract. Sections of the form, for example, may be arranged to reflect company tastes and requirements or a single policy unit may be developed combining the basic unit and any coverage part. The many options enable companies to fit the needs of each policyholder through assembly of the basic unit and the pertinent coverage parts.

Only one rigid rule must be followed, *viz.*, the exclusions of coverage must follow immediately after the statement of coverage. This requirement results in giving emphasis to the exclusions equal to that given to coverage. It hopefully avoids the inclination to deny the existence of limitations of coverage on the ground that such limitations are lost in the welter of other policy provisions. It is intended also to establish the fact that there is no duty to defend a claim for an excluded injury.

Important changes have been introduced in the coverage parts for owners', landlords' and tenants' liability and manufacturers' and contractors' liability insurance. The schedule approach to coverage in these forms has been discarded. The intricacy of a single policy designed to provide any one of several kinds of general liability insurance resulted in considerable ambiguity of expression. It literally gave courts a field day in construing these contracts. In many cases, the courts were un-

[2] *Peerless Insurance Company* v. *Clough*, 193A. 2d, 444 (N. H. 1963).

willing to enforce exclusions even though, to the insurer at least, such exclusions clearly were applicable.

There will be two owners', landlords' and tenants' liability parts. One part combines coverage for premises and elevators. The other part combines coverage for premises, elevators and structural alterations, new construction and demolition. It will be possible, however, to exclude elevator coverage in whole or in part by endorsement. No separation exists among the several exposures except the separation required for the purpose of determining premium. The result is a simpler and more effective policy contract.

While there will be a separate coverage part for product liability insurance it is anticipated that this part will be utilized only where it is necessary to write product liability insurance apart from any other kinds of insurance. In all other cases, it is expected that companies will use the comprehensive general liability part which extends the full range of general liability insurance including product liability insurance. This approach is indicated particularly because of the recent elimination of the comprehensive surcharges.

SUBSTANTIVE CHANGES

The comments which follow will treat only with salient changes in coverage and clarifications of coverage.

Occurrence

Undoubtedly, one of the more dramatic changes in the new policies is the introduction of an "occurrence" basis of coverage. "Occurrence" is defined as follows:

> "Occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

It will be observed that "accident" has been retained in the definition. It is meant to be helpful in denoting time of coverage and application of policy limits, particularly in situations involving a related series of events attributable to the same factor. In this kind of a situation, only one accident or occurrence is intended for application of policy limits. Retention of "accident" is limiting in this sense and in no other.

The definition embraces an injurious exposure to conditions which results in injury. Thus, it is no longer necessary that the event causing the injury be sudden in character. In most cases, the injury will be simul-

taneous with the exposure. However, in some other cases, injuries will take place over a long period of time before they become manifest. The slow ingestion of foreign matters and inhalation of noxious fumes are examples of injuries of this kind. The definition serves to identify the time of loss for application of coverage in these cases, *viz.*, the injury must take place during the policy period. This means that in exposure-type cases, cases involving cumulative injuries, more than one policy contract may come into play in determining coverage and its extent under each policy.

Finally, the definition requires that the injury be fortuitous from the standpoint of the insured. A number of cases have held, contrary to intent, that the unexpected nature of the injury is to be determined from the point of view of the injured party. This phase of the definition also makes it unnecessary to include any reference to assault and battery.

Property Damage

For the first time, "property damage" will be defined. Existing policies rely considerably on "caused by accident" to deny coverage for damages which are limited to intangible rights or interests. The new policies embrace a broader sweep of casualties (see discussion on "occurrence"), but it still is not intended to cover intangible losses such as loss of profits from an unsuccessful business venture. The definition accomplishes this by requiring that there be a loss involving tangible property. It reads:

> "property damage" means injury to or destruction of tangible property.

It will be noted that the definition does not require that property be physically injured for coverage to apply. For example, if the insured's crane buckles and the street must be closed off, loss of use claims from business owners on the street would be covered.

All consequential damages arising out of property damage will continue to be covered.

Territory

Considerable broadening has taken place in the territory covered by the new policy contracts. At present, the policies apply only to *accidents* within the United States, its territories and possessions, and in Canada. The new contracts will apply to *bodily injury or property damage* occurring not only within these areas, but also in international waters, that is, beyond the three mile limit, and in air space, provided the injury or

damage does not occur in the course of travel or transportation to or from foreign jurisdictions. The effect of this change is, for example, to cover injuries in the course of travel or transportation to or from the United States and Canada but not to or from Europe, to cover offshore operations like Texas Towers and offshore drilling operations. Moreover, the reference to bodily injury and property damage rather than accident makes it clear that for coverage to apply, the actual injury or damage must occur in the described territory and not the remote cause which resulted in injury or damage.

A further broadening is accomplished as respects products sold for use or consumption within the United States, its territories or possessions, or Canada. In such situations, the policy will apply to bodily injury or property damage occurring anywhere in the world, provided the original suit for damage is brought within the United States, its territories or possessions or Canada. The result of this change is to provide coverage, for example, to the retail store risk which sells a product which is taken and used abroad where an injury takes place.

Automobiles

The coverage provided for automobiles has undergone several material changes. Presently, coverage for on-premises accidents is provided under general liability policies even though the automobiles may be owned or operated by, or rented or loaned to the insured. The new policies, except as indicated hereafter, will exclude coverage for automobiles which are owned or operated by, or rented or loaned to the insured, or which are operated by any person in the course of his employment by the insured. Such coverage is afforded under automobile liability policies and no logical reason existed for continuing this fringe on-premises coverage for these kinds of automobiles under general liability policies. Its continuance would have served only to compound difficulties where automobile policies also cover the injury involved.

There are two exceptions to this exclusion. The most important relates to *mobile equipment*, a rather extensive exception which will be treated with in the next section of this summary. The other excepts on-premises accidents which are attributable to the parking of an automobile on premises of the insured if the automobile does not belong to the insured. This latter exception was introduced to provide appropriate protection for risks such as hotels, restaurants, clubs and commercial parking areas which might not appreciate the need for such protection by way of an automobile liability policy if the coverage were not provided.

The exclusion, moreover, is offset by a broadening of coverage in that the policies will cover the loading and unloading of automobiles or aircraft of independent contractors by the insured, not only on the insured's premises, as at present, but also away from the premises. This latter extension of coverage serves to eliminate the gap which might otherwise exist in the insured's over-all insurance protection.

Accidents away from the insured's premises which are due to completed loading operations of vehicles of independent contractors by the insured will be embraced by completed operations coverage.

Mobile Equipment

For one reason or another, automobile insurance may not be required for some land motor vehicles. To provide for this contingency, and also to provide for certain kinds of contractors' equipment, it has been necessary to introduce a broad exception to the automobile exclusion, viz., *mobile equipment*. Mobile equipment is covered by the general liability policies. It is defined as follows:

> *mobile equipment* means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned or rented to the named insured, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers and other road construction or repair equipment; air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment.

An analysis of this definition indicates that:

1. A land vehicle which is not subject to motor vehicle registration is covered. Such a vehicle might be one which is used only on land not owned or leased by the insured, for example, vehicles on lumber camp premises or on government property for long periods of time. It might also be a discarded vehicle on the insured's premises.

2. A land vehicle which is maintained for use exclusively on premises which are owned by or rented to the insured is covered. The fact that the vehicle might go off the premises occasionally, for example, to an automobile service station for repairs, would not bar coverage if it were involved in an accident at that time. Farm vehicles fall into this category.

3. A land vehicle designed for use principally off public roads is covered. Earth moving equipment would be vehicles of this nature not falling into divisions 1 and 2.

4. Specific contractors' equipment is covered. In summary, it can be said that contractors' equipment is covered basically if it is not used primarily to carry people or property, or if it does not constitute special equipment which presents a particular over-the-road hazard such as street sweepers, sprinklers or snowplows.

The transportation of any of this equipment by an automobile continues to be excluded.

The fact that a vehicle included in the foregoing may be required to be registered is not a consideration for determining whether the general liability policies will provide coverage. The policies will cover regardless of such requirement. Moreover, the policies will include provisions, including an omnibus provision, to permit certification of registered mobile equipment under such policies in terms of the various financial responsibility laws.

It is expected that manual provision will be introduced which will enable coverage to be provided for other kinds of *mobile equipment* which by reason of their operation exposure, as distinguished from locomotion, may not be covered readily under automobile liability policies.

Product Liability

If there were no other reason for revising general liability policies, the need for clarification of the scope of product liability coverage would have been sufficient reason of itself. Court decisions, in this area, have been particularly contrary to underwriting intent. It has been ruled, for example, that the completed operations hazard does not apply separately from the products hazard. This has resulted in courts holding that since contractors do not deal with products as such, there can be no need for completed operations coverage. Put another way, the courts have said that manufacturers' and contractors' liability insurance covering operations in progress embraces also liability after such operations have been completed. In other decisions, it has been held that the negligent act, for example, the introduction of the deleterious substance in a product, which upon use or consumption causes injury, is the accident and not the actual injury. In effect, these cases nullified the need for product liability insurance.

A complete overhauling in format and expression has, therefore, taken place. The following are the significant changes:

1. The *batch* clause has been eliminated. This clause read:

> All damages arising out of *one lot of goods or products* prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one accident.

The problem in many cases in determining what constituted *one lot of goods or products* made retention of this language untenable. Reliance will be placed upon the aggregate limit to establish a cut-off of coverage in the kind of catastrophic incidents where the batch clause had been expected to be effective.

2. The definitions of the *completed operations* hazard and *product liability* hazard have been separated. This has been done to avoid the suggested ambiguity in the situations referred to, *viz.*, that the completed operations hazard applies only to insureds who install or handle goods or products. The definitions, in addition, require that the injury or damage which is the subject of suit must occur during the policy period to be covered. Previously, reference was made to *accident* as the trigger for coverage. But, as indicated, since accident has been interpreted by many to mean the negligent act rather than the injury, a more specific expression of intent was necessary.

3. The definition of *completed operations* has been amplified so that a more precise time is established at which the insured operations will be considered completed. It provides that operations are completed at the earliest of three times as follows:

(a) When all operations under the contract have been completed or;

(b) When all operations at one job site are completed. This assumes a contract which involves work at more than one job site, for example, highway construction jobs at several locations, or;

(c) When the portion of the work out of which the accident arises has been put to its intended use by the person for whom the work is being done, for example, the completion of one floor of a building which is occupied by the lessee or tenant.

4. A new exclusion which might be called a *business risk* exclusion has been introduced. It is new only because of the fact that the concept now appears in print; it always has been intended. The exclusion operates to deny coverage when the product or completed work fails to perform the function or serve the purpose intended by the insured and is the result of a design error. More specifically, no coverage applies if the failure is due to a mistake or deficiency in design, formula, plan, specification, advertising material or printed instruction.

Production errors—for example, errors due to employee negligence and not to fault in design—continue to be covered. Design errors will also be covered if the injury which results is the positive result of active malfunctioning. If, for example, the product of the insured, an insecticide manufacturer, failed to kill the bugs for which it was intended, *property damage* claims for the failure and damages which ensued would be covered only if a production error and not a design error were involved. If the insecticide damaged the crop in connection with which it is used, such damage also would be covered since it results from active malfunctioning. Or, if the insured were a manufacturer of a rust inhibitor for automobile radiators and it failed to function as intended, the *property damage* is covered if the failure were due to a production error. If the inhibitor actually corroded the radiators, there also is coverage because the damage can be said to be attributable to positive malfunctioning. The same principles apply to work performed by the insured.

5. The final clarification of substance affecting product liability insurance is the introduction of what generally is known as a *sistership* liability exclusion. It is intended to denote liability for damages claimed on account of steps taken by the insured, for example, to withdraw from use or to repair or replace identical products which are defective or believed to be defective in order to avoid injury. A defect may not have caused injury but may be recognized as a potential factor for injury because of accidents involving the same or similar products of the insured. For example, if the product of the insured is withdrawn from dealers, distributors, or purchasers because of a known or suspected defect, claims for damages because of the loss of use of the product, for damage to reputation, cost of withdrawal and similar costs are not intended to be covered. In a very real sense, therefore, this exclusion serves to implement the definition of *property damage* commented upon previously.

Contractual Liability

The present policy excepts from the contractual liability exclusion and, therefore, covers certain kinds of written contracts. These include easement agreements which do not involve railroad grade crossings, agreements required by municipal ordinance not involving work for the municipality, elevator maintenance agreements and lease of premises agreements.

Newly included in this exception are sidetrack agreements. In addition, coverage will be provided basically for more kinds of easement

agreements. Any such agreement will now be covered, even grade crossing agreements, if it is not in connection with construction or demolition operations on or about a railroad.

In essence, the kinds of agreements covered basically by the policy contracts will be those which do not involve construction or demolition work, although not all of these kinds of agreements are covered. The coverage will be provided without additional charge.

The character of these agreements is such that liability accruing through the third party beneficiary route was not considered to be of any importance. The third party beneficiary exclusion, therefore, has been eliminated.

Other agreements will be covered by a separate coverage part and for a premium charge, and the third party beneficiary exclusion will continue to apply.

Liquor Law Liability

The liquor law liability exclusion has been revised to parallel the exclusion presently applying in the states of Florida, New Jersey and Pennsylvania. The result is a broadening of the scope of the exclusion so that in addition to applying to liability imposed by a liquor or dram shop law, it applies to common law liability arising out of the improper sale of alcoholic beverages. This change recognizes the developing exposure in the common law field of responsibility.

Ordinary product liability cases, for example, injury due to a deleterious substance in the beverage, will continue to be covered under product liability insurance. And, as at present, the exclusion will run only to risks in the business of selling or serving alcoholic beverages and to owners and lessors of premises in which such business takes place.

Water Damage Liability

The policies will no longer contain a legal liability water damage exclusion. It has been eliminated countrywide with limited exception contemplated for Greater New York. The additional coverage will be afforded, without any increase in rates except with respect to a negligible number of owners', landlords' and tenants' liability classifications where a substantial exposure exists.

Conditions

Inspection. Recent court cases holding insurance companies liable for negligence in the inspection of a risk have prompted a complete revision of the inspection condition of the policy. It will read:

> The company shall be permitted but not obligated to inspect the named insured's property and operations at any time. Neither the company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such property or operations are safe.

The purpose of this provision is to make it clear that the company is not undertaking to be responsible for inspections. Its failure to inspect, therefore, cannot be the basis for liability, nor can it be said that its inspections were relied upon when made.

Other Insurance. The "Other Insurance" condition also has been revised to provide for a more equitable distribution of loss between companies when more than one policy covers the loss. At present, a loss is divided between the companies in the proportion that the applicable limit of each policy bears to the total applicable limits. Thus, if the loss were $24,000 and company (A) had an accident limit of $5,000 and company (B) an accident limit of $25,000, (A) would pay 1/6 of the loss or $4,000 and (B) 5/6 or $20,000.

The revision results in the companies dividing the loss equally up to equal limits of liability (in effect, this is the limit of the smaller limit policy). In the foregoing example, this means that company (A) would pay all of its limit and company (B) the remainder of the loss.

However, where the other policy does not have the same "Other Insurance" provision as in the new policies, the present provision is retained in order to avoid the gap or overlap which otherwise would occur.

Insured's Duties. A new provision has been added to the condition which describes the insured's duties in the event of an occurrence, claim or suit. It requires the insured to take reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, at his own expense. This provision serves to implement the *occurrence* definition which provides in part that the bodily injury or property damage must not be expected nor intended by the insured if coverage is to be afforded.

Financial Responsibility Laws. Finally, a financial responsibility condition has been introduced in contemplation that general liability policies will be used to certify registered *mobile equipment* under the various financial responsibility laws.

CONCLUSION

The revised provisions for general liability policies give more coverage than those they replace in many particulars. It is anticipated, also,

that they will prove to be clearer and thus effective in carrying out intent. In *Brinkman* v. *Liberty Mutual Fire Insurance*, 231 ACA 67 (California) after noting the rule that policy ambiguities are interpreted against the maker, the court added:

> However, the rule is equally well established that where the terms of the policy are plain and explicit, the court will indulge in no forced construction so as to cast a liability upon the insurance company which it has not assumed.