

Professional Liability Insurance Policies

By Freelerck C. Berry, Jr.

1. INTRODUCTION.

All lawyers' professional liability policies have at least one thing in common. That is, they all list various exclusions from coverage. Knowledge of the exclusions contained in your professional liability insurance policy should, at least, influence you as to the types of legal work you do not perform. The most commonly excluded area of practice is securities law. Quite often lawyers' services involved with the 1933 Securities Act, the 1934 Securities Exchange Act, state Blue Sky statutes, and all rules promulgated thereunder are excluded. A trend is developing among carriers to also exclude services involved with the Employee Retirement Income Security Act of 1974 (ERISA).

Lawyers' professional liability insurance policies generally cover liability resulting from acts, errors, or omissions arising from professional services rendered in the scope of the insured's capacity as an attorney. Coverage is usually defined as including services which should have been rendered by the attorney. As in most other types of insurance policies, lawyers' professional liability insurance policies differ in their terms, conditions and exclusions. Some policies indemnify the insured for personal injury such as defamation and off-premises liability for bodily injury or property damage. Some other coverages include breach of contract liability and fiduciary duty liability.

When a law firm buys a professional liability policy, coverage is afforded to all partners or shareholders. Terms differ with respect to when a new associate or employee is covered and how long a departing attorney may be covered.

Almost all professional liability

policies exclude some types of fraud from their coverage. These policies generally exclude "fraud", "common law fraud", or "dishonest, criminal and malicious acts of the insured". Furthermore, coverage for liability arising out of a lawyer's service as a corporate officer or director or in a fiduciary capacity is excluded in some policies but included in others.

Claims expense are generally included in most insurance policies. These are defined as including all of the costs incurred by the insurer except wages paid to the insurer's employees. Most claims expense are directly attributable to attorneys' fees and investigation costs. Generally these claims expense are a part of the liability limit. Accordingly, if a lawyer had a \$200,000 liability limit and \$25,000 was spent for claims expense, \$175,000 would remain to pay any judgment rendered against the insured. It is important to note that some policies require the insured lawyer to pay the claims expense up to the deductible limit. For example, if a lawyer had a \$5,000 deductible and his insurance company successfully defended him in a malpractice suit while spending \$25,000 in legal fees, the insured lawyer would be required to pay his insurance company the \$5,000 deductible. Other policies, however, only look to the insured to pay a deductible when a claim is paid.

2. THE "CLAIMS MADE" AND "OCCURRENCE" DISTINCTION

The most important change in the professional liability policy form since its development has been a shift from the "occurrence" form to the "claims made" form. The "occurrence" form provides

coverage for any act, error, or omission committed during the policy period, whenever the claim is actually made. In the "claims made" form the insurance company is not required to pay the claim or defend the insured lawyer unless the claim was first made while the policy was in force. With the "claims made" policy form, therefore, a lawyer loses all coverage when he terminates his professional liability insurance policy. A decision to drop "claims made" coverage, therefore, becomes particularly difficult for lawyers who plan to retire, go on the bench, or accept full-time employment with an institutional employer. Some insurance companies, however, have recently offered an extended reporting endorsement or "tail coverage" on their claims made forms. Thus, for a single premium payment (100% to 225% of one year's premium), the insurance company will extend coverage for acts and omissions that occurred during the time the policy was in force even though the claim is not first made until after standard coverage expired.

Some claims made policies do not provide coverage for claims arising out of acts, errors or omissions committed prior to the first effective date of the policy. Others will cover prior acts first claimed after the policy was in force if the insured pays the entire first year premium. It is important to note, however, that prior acts coverage is not afforded if the insured had knowledge of the pendency of a claim at the inception of the policy. Furthermore, the claims made form does not cover prior acts if some other insurance policy is available to pay the claim.

Some professionals who have found

FREDERICK C. BERRY, JR.
Frederick C. Berry Jr. received his Bachelor of Science (in Insurance) from Arizona State University in 1969 and his J.D. from Arizona State University in 1973. He served as an Associate Editor of the Arizona State University Law Journal from 1971 to 1972. From 1976 to 1978 he was Deputy Director of Insurance for the State of Arizona. He is a member of the State Bar Committee on Lawyer Professional Liability and the Committee on Insurance. Mr. Berry is a member of the law firm of Berry & Martori, Ltd. in Phoenix.



A. Who is Covered?

AMERICAN HOME

Sole proprietors, partners of a partnership, stockholders or members of professional corporations or professional associations.

Any lawyer who is an employee of the named insured.

Any lawyer who was previously a named insured (other than sole proprietor) who terminated his relationship with the firm, but only for professional services rendered prior to termination. Changes in firm must be reported to company within 30 days.

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Sole proprietors, partners of a partnership, stockholder employees.

Any persons who become an employed lawyer or other employee of a named insured, or associates with the insured while acting in a professional capacity on behalf of the named insured.

Any former partner, officer, director or stockholder employee while acting in their professional capacity on behalf of the named insured.

Any lawyer who becomes a partner, director, or stockholder employee of the named insured.

If the policy includes all employed lawyers as named insureds at inception, any additional lawyers employed during the policy period shall be deemed named insured.

Changes shall be reported to company no later than the next anniversary date of the policy. In the event of death, incapacity or bankruptcy, the legal representative of the named insured shall be an additional insured under the policy.

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Sole proprietors, partners of a partnership, stockholders or members of professional corporations or professional associations.

Any lawyer who is an employee of the named insured.

Any lawyer who was previously a named insured (other than sole proprietor), who terminated his relationship with the firm but only for services rendered subsequent to the retroactive date and prior to termination.

Professional Liability

B. What is Covered?

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Covers claims arising out of acts or omissions of the insured and any other person for whom the insured is legally responsible for professional services rendered, or which should have been rendered in the insured's capacity as a lawyer.

When the insured acts as a fiduciary, such services shall be deemed professional legal services but only to the extent that the insured would have been legally responsible in the usual attorney-client relationship as attorney for a fiduciary, except for any loss sustained by the insured as the beneficiary or distributee of any trust or estate.

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Covers acts, errors, or omissions of the insured and any other person for whom the insured is legally responsible, in professional services rendered or which should have been rendered in the insured's capacity as a lawyer or notary public.

Includes personal injury (libel, slander, etc.)

When the insured acts as a fiduciary, such services shall be deemed professional legal services except for any loss sustained by the insured as the beneficiary or distributee of any trust or estate. Services performed by the insured in a lawyer-client capacity, even though such services could be performed wholly or in part by non-lawyers, shall be deemed to be professional services.

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Covers acts or omissions of the insured and any other person for whom the insured is legally responsible for professional services rendered or which should have been rendered subsequent to the retroactive date (which is the date the insured's coverage first incepts) in the insured's capacity as a lawyer.

When the insured acts as a fiduciary, such services shall be deemed professional legal services, but only to the extent the insured would have been legally responsible in the usual lawyer-client relationship as attorney for fiduciary.

C. Defense, Settlement and Supplementary Payments.

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The company shall defend.

Written consent of the insured before settlement. If the insured refuses to settle as recommended by the company and elects to contest the claim, company's liability shall not exceed the amount for which the company would have been liable at that time.

Company shall not be obligated to pay any claim, claims expense, or continue defense after limits of liability have been exhausted.

Claims expense included within limits of liability, and if limits are exhausted the company shall have the right to withdraw, tendering control of defense to the insured.

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Written consent of the insured before settlement. If the insured refuses to settle as recommended by the company and elects to contest the claim, company's liability shall not exceed the amount for which the company would have been liable at that time.

Company shall not be obligated to pay any claim, claims expense, or continue defense after limits of liability have been exhausted.

Subject to insured's obligation to pay his deductible which is applicable to claims expenses in addition to the limit of liability. If payment in excess of the limits of liability comes necessary, company's liability for such claims expense shall be such proportion as the limit of liability bears to the total amount paid to dispose of the claims.

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The company shall defend.

Written consent of the insured before settlement. If the insured refuses to settle as recommended by the company and elects to contest the claim, company's liability shall not exceed the amount for which the company would have been liable at that time.

Company shall not be obligated to pay any claims expense, or continue defense after limits of liability have been exhausted.

Claims expense included within limits of liability, and if limits are exhausted, the company shall have the right to withdraw, tendering control of defense to the insured.

D. Claims Made Features, and Prior Acts Coverage.

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Applies to acts or omissions if claim is first made during the policy period or extended reporting period. Claim is first made if:

a) during the policy period or extended reporting period insured knows or becomes aware of a possible claim and gives written notice to the company;

b) if payable claim is made, any additional claims brought subsequently to that policy year resulting from the same or related acts shall be considered part of the claim first made during the policy year.

A claim is considered first made when company first receives notice.

Prior acts included if the insured did not know nor could have foreseen a possible claim before effective date of policy.

If other valid and collectible insurance exists, this policy shall apply as excess with claims expense included in the limits of liability.

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Applies to claim first made against the insured during the policy period arising from professional services:

a) during the policy period, or

b) prior to the effective date provided insured had no knowledge as of the date of signing application and there are no other policies which would respond.

If other policies exist, no prior acts coverage even if the available limits of such other insurance is insufficient to pay claims expense or loss incurred.

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Applies to professional services if claim is first made during the policy period or a reporting period. Claim is first made if:

a) during the policy period or a reporting period (if purchased) the insured knows or becomes aware of a possible claim and gives written notice to the company;

b) if payable claim is made, any additional claims brought subsequent to the policy period resulting from the same or related acts shall be considered a part of the claim first made during the policy period.

A claim is considered first made when company first receives notice.

No coverage prior to retroactive date (i.e. inception of policy).

E. Policy Period.

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The period of time between the inception date and the effective date of termination, expiration or cancellation of coverage, specifically excluding any extended reporting period.

The period from the inception date to policy expiration date or earlier termination date, if any.

The period commencing on the retroactive date and ending on the effective date of termination, expiration or cancellation of coverage, specifically excluding any reporting period purchased.

F. Extended Reporting Endorsement (Tail Coverage)

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In cases of cancellation by either the insured or the company, the insured may purchase an endorsement providing an extended reporting period for claims which arose during the policy period but which are reported in the extended reporting period. The insured shall pay a premium equal to 225% of the last annual premium within 30 days of termination of policy. Premium may be paid in installment.

Extended reporting period is unlimited.

If the company shall cancel or refuse to renew the policy, the insured may purchase an extended reporting period of two years after the effective date of cancellation or non-renewal. The premium shall be 100% of the last annual premium. The insured must indicate in writing no later than 10 days after the cancellation or non-renewal that he wishes to purchase such option, otherwise the insured cannot at a later date exercise the right. The quotation of a different premium and deductible for renewal does not constitute a cancellation or non-renewal.

In the event of cancellation or non-renewal, the insured shall have the right to purchase additional reporting periods upon payment of an additional premium to be computed in accordance with the company's rules, rates and premium effective upon the date of the endorsement. The limits of liability shall be applicable to each reporting period. Insured must exercise the right by written notice no later than 30 days after termination.

Three extended reporting periods - first two for one year, the third continues for an unlimited period.

G. Territory

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Worldwide providing claim is made or suit is brought within the United States or Canada.

Worldwide except Communist Block countries.

United States and Canada.

H. Limits of Liability.

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Claims expenses are incurred within the limits of liability. All claims expenses shall first be subtracted from the limits of liability with the remainder being the amount available to pay money damages.

The limit is applicable to all claims and expenses arising out of the same or related professional services without regard to the number of claims. If additional claims are subsequently made arising out of the same professional services as a claim already made, all such claims shall be considered first made within the policy year or extended reporting period in which the first claim was made and all such claims shall be subject to the same limit of liability.

The inclusion in the policy of more than one insured shall not increase the limits of the company's liability.

The aggregate limit is the total limit of the company's liability for all claims and claims expense arising out of each policy year or during the extended reporting period.

The deductible amount, if any, shall be subtracted from the total amount of money damages and claims expenses, and the company is liable only for the difference.

If company has paid any amounts in settlement or for claims expense in excess of the limit of liability or within the amount of the deductible, the insured shall be liable to repay the company.

The limit of liability shall not exceed the amount stated in the policy. Two or more claims arising out of a single act shall be treated as a single claim.

The inclusion of more than one insured shall not increase the company's limit of liability.

The deductible amount is applicable to each claim and includes loss payments and claims expense, whether or not loss payment is made. Deductible is mandatory, and the insured shall pay within ten days of a written demand from the company the applicable amount of deductible due whether for loss payment or claims expense. The company determines the reasonableness of claims expense and such determination is conclusive on the insured.

The aggregate limit is the total limit of the company's liability for all claims arising out of each policy year.

Claims expenses included within limits of liability. All claims expense shall first be subtracted from the limit of liability with the remainder being the amount available to pay money damages.

The limit is applicable to all claims and expenses arising out of the same or related professional services without regard to the number of claims are subsequently made arising out of the same professional services as a claim already made, all such claims shall be considered first made within the policy year or reporting period in which the earliest claim was first made.

The aggregate limit is the total limit of the company's liability for all claims and expense arising out of each policy year or reporting period.

The inclusion of more than one insured shall not increase the limits of the company's liability.

The deductible, if any, shall be subtracted from the total amount of money damages and the company is liable only for the difference.

If the company has paid any amounts in settlement or for claims expense in excess of the limit of liability or within the amount of the deductible, the insured shall be liable to repay the company.

Professional Liability

I. Claims Expense.

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Fees charged by attorneys(s) designated by the company. All other fees, costs, and expenses resulting from the investigation, adjustment, defense and appeal of claim if incurred by the company or by the insured with written consent of the company. Does not include salary charges of regular employees or officials of the company.

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Fees charged by any lawyers designated by the company. All other fees, costs and expenses resulting from investigation, adjustment, defense and appeal of a claim if incurred by the company or by the insured with the written consent of the company. Reasonable expenses incurred by the insured at the company's request, including actual loss of wages or salary (but not loss of other income) not to exceed \$25 per day, because of attendance at hearing or trials. Does not include salary charges of regular employees or officials of the company.

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Fees charged by attorney(s) designated by the company. All other fees, costs, and expenses resulting from investigation, adjustment, defense and appeal of claim incurred by the company or by the insured with the written consent of the company. Does not include salary charges of regular employees or officials of the company or fees and expense of independent adjusters.

J. Exclusions.

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1. Criminal or malicious acts.
2. Deliberate, dishonest or fraudulent acts.
3. Employer's claim against salaried employee.
4. Bodily injury or property damage.
5. Insured's activities as officer, director of any employee trust, charitable organization, corporation, company or business other than that of the named insured.
6. Punitive or exemplary damages.
7. Claim arising out of any other business enterprise owned, controlled or managed by the insured, including property.
8. Prior acts if the insured knew or could have reasonably foreseen a possible claim before effective date of policy.
9. Standard Nuclear Energy Liability Exclusion.

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1. Dishonest, fraudulent, criminal or malicious acts.
2. Claim arising out of any other business enterprise owned, controlled or managed by the insured, including property, or because insured is an officer, director, etc. of any firm not named in the policy.
3. Insured's activities as an officer, director, partner, trustee, or employee of a business enterprise, charitable organization, employee fund or trust, public official or an employee of a governmental body, subdivision or agency.
4. Bodily injury or property damage.
5. Claims arising from notarizing document without physical presence of signor.
6. Prior acts for which other insurance exists whether or not available limits of such other insurance is sufficient to pay claims expense or loss incurred.
7. Loss arising out of a violation or alleged violation of the Securities Act of 1933 as amended or a lawful regulation issued pursuant to any of the foregoing statutes, unless endorsed hereon.
8. Standard Nuclear Energy Liability Exclusion.
9. Punitive or exemplary damages.

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1. Dishonest, fraudulent, criminal or malicious acts.
2. Claims arising out of any business enterprise owned, controlled or managed by the insured, including property.
3. Bodily injury or property damage.
4. Loss arising from:
 - a) any security or activities or transactions under the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisors Act of 1940 or the Public Utility Holding Company Act of 1935.
 - b) any purchase, sale or offering of any security to or from the public covered by any state Blue Sky or Securities Law.
 - c) any rules or regulations issued pursuant to any of the above without regard to the legal theory on which claim is based.
5. Arises from activities in dual capacity as a lawyer and an officer, director, partner, of any other entity other than that of the named insured.
6. If claim must be submitted to arbitration, pursuant to an agreement made by the insured without the written consent of the company unless the insured agreed to submit the subject matter of any claim to binding arbitration before the professional services out of which the claim arose were rendered or should have been rendered.
7. Arises out of any proceeding brought by any governmental unit or any court or bar association regulating or attempting to regulate the conduct of attorneys.
8. Punitive or exemplary damages.
9. No prior acts coverage.
10. Standard Nuclear Energy Liability Exclusion.

K. Waiver of Exclusion and Breach of Conditions.

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Coverage is provided for the "innocent partner." If a dishonest, fraudulent malicious or criminal act is committed without the personal knowledge or personal acquiescence of other named insureds or personal passivity after acquiring such knowledge.

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Coverage is provided for the "innocent partner." If a dishonest, fraudulent, malicious or criminal act is committed without the personal knowledge or personal acquiescence of other named insureds or personal passivity after acquiring such knowledge.

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No such provision.

K. Waiver of Exclusion and Breach of Conditions. *continued*

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Coverage is also provided to the "innocent partner" relating to the giving of notice to the company with respect to which any other insured is in default.

After receiving knowledge, the insured will comply with such condition promptly.

Coverage is also provided to the "innocent partner" relating to the giving of notice to the company with respect to which any other insured is in default.

After receiving knowledge, the insured will comply with such condition promptly.

L. Other Insurance.

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If the insured has other applicable insurance, the company shall respond pro rata. With respect to prior acts coverage, the insurance will only apply as excess over any other valid and collectible insurance and shall then apply only in the amount by which the applicable limits of this policy exceeds the sum of applicable limits of all other insurance. If this policy is treated as excess, any claims expense allocated shall be included in the limit of liability.

Policy is in excess of both the amount of the applicable deductible and additionally the amount of any other valid and collectible insurance, except that there is no coverage for prior acts for which other insurance exists whether or not the available limits of liability of such other insurance is sufficient to pay any claims expense or loss incurred.

If the insured has other applicable insurance, the company shall respond pro rata.

M. Arbitration.

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The company is entitled to exercise all insured's rights in the choice of arbitrators and in the conduct of any arbitration proceeding.

The company shall defend those claims insured by the policy in the event such claims can by agreement with the claimant be contested by arbitration in accordance with the rules then obtaining by the American Arbitration Association provided that said agreement does not result in the abandonment or waiver of any defenses available to the insured.

The company is entitled to exercise all insureds' rights in the choice of arbitrators and in the conduct of any arbitration proceeding.

N. Notice of Claim or Suit.

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As soon as the insured becomes aware of any act or omission which would reasonably be expected to be the basis of a claim or suit covered by the policy, written notice shall be given to the company as soon as practicable together with the fullest information obtainable.

If claim is made or suit is brought, all documents shall immediately be forwarded to the company.

If during the policy period or the extended reporting period, the company receives written notice of any act or omission which could be expected to give rise to a claim, any claim which subsequently arises shall be considered to be a claim reported during the policy year when written notice was received.

As soon as practicable the insured shall give notice to Shand, Morahan & Company, Inc. of any claim made against them or of the receipt of notice from any person of an intention to hold the insured responsible. The insured upon request shall give the company such information as the company may reasonably require.

If claim is made or suit is brought all documents shall immediately be forwarded to the company. If during the policy period or the two-year extended reporting period if applicable, the insured becomes aware of any circumstances which may subsequently give rise to a claim, and the insured gives written notice during the policy period, any claim that may subsequently be made arising out of such act shall be deemed for the purposes of this insurance to have been made during the policy period.

As soon as the insured becomes aware of an event which may subsequently give rise to a claim, written notice containing the fullest information obtainable shall be given to the company as soon as practicable.

If a claim is made the insured shall immediately notify the company of the nature and extent of each and every threat, or advise of any intention to hold any insured liable and all documents shall be immediately forwarded to the company including any of the foregoing which are in writing.

O. Assistance and Cooperation of the Insured.

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The insured shall cooperate with the company and upon request, assist in making settlements, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization other than any employee

The insured shall cooperate with the company and upon request shall attend hearings and trials and shall assist in effecting settlements securing and giving evidence obtaining the attendance of witness and in the conduct of suits. The insured

The insured shall cooperate with the company and upon request, assist in making settlements, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the

continued

O. Assistance and Cooperation of the Insured. *continued*

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of any insured who may be liable to the insured.
The insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense.

shall not be required to contest any legal proceedings unless a lawyer (to be mutually agreed upon by the insured and the company) shall advise that such proceedings shall be contested. The insured shall not, except at his own cost, make any payment, admit any liability, settle any claims, assume any obligation or incur any expense without the written consent of the company.

insured.
The insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense.

P. Subrogation.

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The company shall be subrogated to all the insured's rights of recovery against any person or organization other than an employee of an insured.
The insured shall assist however necessary to secure such rights and do nothing after the loss to prejudice them.

The company shall be subrogated to all the insured's rights of recovery against any person or organization.
The insured shall assist however necessary to secure such rights and do nothing after the loss to prejudice them.
The company shall not exercise any such rights against any named insured unless the claim is brought about or contributed to by the dishonest, fraudulent, criminal or malicious acts or omissions of such an insured.

The company shall be subrogated to all the insured's rights of recovery against any person or organization.
The insured shall assist however necessary to secure such rights and do nothing after loss to prejudice them.

Q. Assignment.

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The interest hereunder of any insured is not assignable. If the insured shall die or be adjudged incompetent this policy shall cover the insured's legal representative.

Assignment is not binding until endorsed onto the policy. The policy will cover the insured's legal representatives should the insured die or be deemed incompetent.

Assignment is not binding unless endorsed onto the policy. If the named insured dies, the policy shall apply to his legal representative.

R. Cancellation.

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The insured may cancel by surrendering the policy or by giving written notice stating when cancellation should be effective. Return premium shall be computed short rate.
The company must give 30 days written notice of cancellation. Return premium shall be computed pro rata.

The insured may cancel by surrendering the policy or by giving written notice stating when cancellation should be effective. Return premium shall be computed short rate.
The company must give 30 day written notice of cancellation. Return premium shall be computed pro rata.

The insured may cancel by surrendering the policy or by giving written notice stating when cancellation should be effective. Return premium shall be computed short rate.
The company must give 10 days written notice of cancellation. Return premium shall be computed pro rata.

S. Conformance to State Statutes.

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No such provision.

If policy is in conflict with statutes of the state where contract is issued, policy will conform to state statutes.

If policy is in conflict with statutes of the state where contract is issued, policy will conform to state statutes.

T. Warranties

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Insured warrants the statements in the application which becomes part of the contract.

Insured warrants the statements in the application which becomes part of the contract.

Insured warrants the "Declarations" in the policy which are based on his agreements and representations.