

Endless Liability: Determining Aggregate Limits for Environmental Property Damage in Pre-1986 Liability Policies

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One of the biggest obstacles to settling environmental claims is the fact that pre-1986 insurance policies generally do not contain aggregate limits for many types of coverage, including environmental property damage liabilities. Policyholders are understandably reluctant to surrender policies that may provide unlimited coverage because they may find themselves responsible for unknown future liabilities attributable to these policies. On the other hand, insurance companies are equally eager to close their books on this coverage, for the very reason that it relieves them of their exposure to these same unknown future liabilities. The resulting tension delays settlements and, in some cases, may prevent settlements entirely.

THE HISTORY OF AGGREGATE LIMITS IN LIABILITY POLICIES

Property insurance is easy to value because it relates to specific, tangible property. Liability insurance is different, however, because liabilities flow from future events and cannot be known or quantified when the policy is sold. As the insurance industry developed its liability insurance product over the past hundred years, it has

wrestled with the issue of whether (and under what circumstances) these policies should be subject to maximum limits.

The First Liability Policies

The first liability policy in the United States was issued in 1886 to The Gender and Paeschke Manufacturing Company of Milwaukee by a London-based insurance company that had recently opened an office in Boston.¹ Early liability policies covered a policyholder's liability for the injury or death of its own employees and were known simply as "Employers Liability" policies.²

Before the nineteenth century ended, new policies were created covering "the legal liability of the Assured arising from bodily injuries resulting from negligence," with standard limits of \$1,500 per person and \$5,000 per accident.³ An insurance company's liability for bodily injury appears to have been fixed at a maximum limit, or aggregate, for the policy period.⁴ These policies were generally known as "Public Liability" policies, although third-party liability coverage was also available under "General or Landlords' Liability" and "Vehicle Indemnity" policies.⁵ Coverage for third-party property damage was apparently available only as an endorsement in connection with "Teams Liability" policies, which covered liabilities arising from horses, horse teams or horse-drawn vehicles.

Early Twentieth Century Liability Policies

As the market for liability coverage continued to expand during the early years of the twentieth century, the wording of the policies evolved as well.⁶ By about 1912, liability policies almost uniformly provided coverage for:

Loss and/or Expense Arising or Resulting from Claims upon the Assured for Damages on account of bodily injuries and/or death accidentally suffered, or alleged to have been suffered, by any person or persons while within or upon the premises described in said Warranties (or the premises adjacent thereto) and/or by reason of the business as described and conducted at the locations named therein . . .

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In addition to coverage standardization, two other major changes had occurred in liability insurance products by 1912. First was the removal of aggregate limits and the increase of standard limits for public liability policies to \$5,000 per person and \$10,000 per accident.⁸ As one contemporary authority noted:

A liability policy limits the indemnity to be paid by the insurance company; the so-called "standard limits" being \$5,000 in respect of damages arising from injury to one person and \$10,000 in respect of damages arising from injuries to several persons in any one accident [However,] the limits stated in the policy may be brought into play a number of times during the term of a policy. That is to say, the policy is an open one covering all accidents happening while it is in force.⁹

The second change was the fragmentation of the public liability policy into categories related to the policyholder's specific business. For instance:

- *General Liability, otherwise known as Owners', Landlords' and Tenants' (OL&T) Public Liability Policies:* covering non-manufacturing business owners and tenants for third-party bodily injury or death sustained while within or adjacent to the policyholder's premises. (Coverage for injury or death of the policyholder's employees was offered under the Employers' liability form.) OL&T policies could have any one of six premium bases but were typically calculated on the number of square feet of the premises insured.¹⁰

- *Manufacturers' Public Liability Policies*: covering owners of manufacturing facilities or warehouses for non-employee third-party bodily injury or death sustained by reason of the operation of the policyholder's trade or business. Premiums for these policies were calculated based on the policyholder's payroll.¹¹
- *Contractors' Public Liability Policies*: offering the same coverage for contractors, mining, quarrying, construction, power and telephone companies, and other employers who conduct their operations at various locations and not at one premises. Premiums for Contractors' Public Liability Policies were calculated based on the policyholder's payroll.¹²

Once the first public liability policy was created, additional policy types were created tailored to each particular hazard to be insured. (The exception to this trend was the Manufacturers' and Contractors' Liability Policy, created when the Manufacturers' Public Liability Policy and the Contractors' Public Liability Policy were combined into one policy form.) For instance, elevator liability policies, products liability policies, automobile liability policies, and protective liability policies were developed in short order.¹³ By 1920, there were at least 15 separate forms or "schedule policies" available, each of which offered coverage for some form of public liability.¹⁴ Because each policy was exclusive of all the others, each was rated differently, according to rates made from the experience of that coverage alone, without taking into account the hazards insured under other policies.¹⁵

Despite this proliferation of policy types, liability policies generally covered only third-party bodily injury or death and did not apply to third-party property damage. The

exception to this rule was coverage for property damage arising from the operation of horses and horse-drawn vehicles, which was available as a rider to Teams Public Liability policies. As the use of horseless vehicles became more widespread, similar property damage coverage was also made available as a rider to Automobile Public Liability policies. The standard limit for property damage liability under these policies was \$1,000 per accident.¹⁶

Comprehensive General Liability (CGL) Policies

During the next 20 years, purchasing primary liability insurance became increasingly complex, as still more policy forms were created to cover newly recognized hazards or liabilities. Policies continued to be written on a piecemeal basis, with each new policy designed to exclude the coverage contemplated by other liability policies already in common use.¹⁷

In 1939, the National Bureau of Casualty Underwriters, the only casualty insurance bureau operating on a national basis, and the Mutual Casualty Insurance Rating Bureau, which operated in states having rate regulatory powers, began developing a comprehensive liability insurance product.¹⁸ These organizations had two goals. First, they wanted to draft a policy form that covered all primary liability exposures arising from all locations and business activities of a policyholder, unless an exposure was specifically excluded.¹⁹ Second, they wanted to create a policy form that met the statutory requirements of every state, so that it could be used anywhere in the country.²⁰ They succeeded with both goals, and the first standard-form comprehensive general liability policy was released for use in 1941.²¹ Well-received from the outset by

agents and policyholders alike, CGL policies soon became the cornerstone of corporate third-party liability programs,²² from which today's CGL policy has evolved.

Coverage Under the New CGL Policies

Not surprisingly, because the new CGL policies offered liability coverage equivalent to the coverage available under all the old schedule policies combined (plus new coverage for unforeseen risks), the CGL policies were sold with basically the same terms and limits as the schedule policies. The standard bodily injury limits remained \$5,000 per person and \$10,000 per accident. Property damage coverage was also available, although sources conflict as to whether it was merely available as an endorsement or whether it was part of the standard policy form, but often excluded.²³

In light of the fact that these new CGL policies provided separate and distinct limits for each line of coverage, coverage lines were rated separately using the same premium bases that had been developed under the old schedule policies. As one insurance expert noted:

The limits of a Comprehensive General Liability policy apply to all the hazards of the policy Limits are scheduled in the same manner as under the separate Divisions of the Schedule Policy, with an aggregate limit on those coverages to which this third limit applies under the separate policies; e.g., on Products Liability; and under Coverage B (Property Damage Liability) on Operations, Contractual and Protective Liability; and on Premises-Operations, which would come under a Manufacturers' and Contractors' policy, if a Schedule policy were being used.²⁴

The declarations page of a 1941 standard-form CGL policy sets forth bodily injury coverage on a per person and per accident basis, but only has an aggregate limit for products-related bodily injury. Property damage coverage is set forth on a per accident

basis, with separate aggregate limits for operations,²⁵ protective, products, and contractual liabilities.

CGL Policy Premiums

Premiums for the CGL policies were calculated on the same basis as the individual hazards were rated under schedule policies, plus an additional charge of one percent of the aggregate premium for the “comprehensive” coverage.²⁶ There were apparently two reasons for this additional charge. First, the broader coverage offered under the CGL policy warranted a surcharge in addition to the premium that would have been charged for the schedule policies.²⁷ Second, this additional premium was necessary to meet the unknown (and consequently unrated) risks that were seen as inevitable under these new policies, even where neither the policyholder nor the insurance company was dishonest or neglectful.²⁸ Minimum policy premiums for standard policy limits were established at \$100 for bodily injury liability and \$50 for property damage liability per year in an effort to restrict the sale of these policies to policyholders paying a large premium.²⁹ These minimum premium requirements were lifted almost immediately.³⁰

The premium for each of the hazards insured was calculated separately. For instance, the premium for coverage arising from Manufacturers’ and Contractors’ liabilities (operations) is determined by remuneration (payroll), the Products Liability coverage is based on sales, and the Miscellaneous (signage) coverage is on a “per sign” basis. Premiums for protective and contractual liabilities, “if any,” are not calculated separately but included in the overall policy premium.

AGGREGATE LIMITS FOR ENVIRONMENTAL PROPERTY DAMAGE UNDER CGL POLICIES

Most environmental pollution in the United States results from historical business activities and waste disposal practices that were ordinary, routine and legal when they took place. Today's environmental property damage claims would therefore fall under the premises-operations coverage of a CGL policy, which responds to liabilities resulting from activities that are necessary and incidental to a policyholder's normal business operations.³¹ Although the 1941 standard-form CGL policy has undergone major revisions every decade since its release, the Limits of Liability section has remained substantially unchanged, particularly as it relates to "premises and operations" (premises-operations) coverage.³²

The First CGL Policy Form

Most CGL policies contain separate and distinct limits for different types of coverage. This is especially true for the earliest CGL policies.

Relevant Policy Language for Environmental Property Damage Coverage

The first standard-form ISO CGL policy, released in 1941, contains aggregate limits for property damage liability under the following circumstances:

Limits of Liability

* * *

(Coverage B). The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use

thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

Without an understanding of the historical background of liability policies, this provision may be difficult to interpret. Nonetheless, a careful reading shows that it ties the aggregate operations limit to those premises and operations hazards rated on a remuneration (payroll) basis. The net effect of this provision is to limit the application of the policy's aggregate limit for operations property damage to only those premises or operations that are rated on a remuneration basis.

The Limits of Liability section further provides:

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by operations rated upon a cost premium basis.

Like the paragraph that precedes it, this provision ties one of the policy's property damage aggregate limits to the specific hazard insured. In this case, the aggregate protective limit of liability set forth on the policy's declarations page applies only to hazards resulting from work performed by independent contractors that is rated on a cost of work basis. Therefore, any property damage liabilities flowing from work performed by independent contractors that is not rated on a cost of work basis is not governed by the policy's aggregate protective limit.

The Limits of Liability section also provides:

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

Again, this paragraph makes the existence of an aggregate contractual limit of liability contingent upon the independent contractor's hazard is rated on a per contract basis.

Finally, the Limits of Liability section states:

These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

This paragraph gives the insured additional aggregate limits for each project performed for the policyholder away from its premises. Project is not a defined term in the policy.³³

Contemporary Analysis

Aggregate limits were the exception rather than the rule during the first forty years liability policies were sold, particularly for the property damage hazard. Insurance professionals understood that the lack of aggregate limits in liability policies could expose an insurance company to unlimited risks. As one commentator noted, when discussing Public Liability policies in 1912, "[t]he limits stated in the policy may be brought into play a number of times during the term of the policy. That is to say, the policy is an open one covering all accidents happening while it is in force."³⁴

In reviewing early twentieth century writings of other insurance authorities analyzing liability policies, what stands out is the absence of *any* reference to aggregate limits in these policies. The following discussion of policy limits is typical, in that it fails to mention any provision for aggregate limits for any type of liability coverage:

The standard limit for a public liability policy is \$5,000 for injuries to any one person and \$10,000 for any one accident involving injuries to more than one person, subject to the \$5,000 limit for each person. There is a limit of \$1,000

placed upon the liability of the company for property damage for any claim or claims arising out of a single accident.³⁵

According to contemporary experts, the standard-form CGL policy released in 1941 did not deviate from the coverages offered by the individual schedule policies, but merely consolidated the various liability coverages already available into one policy (plus extending coverage to respond to unknown risks). There is no evidence that aggregate limits were introduced with the CGL policy form. In fact, the opposite is true.

Members of the insurance industry were aware early on that liability policies often did not have aggregate limits, and of the potential liability they faced under these policies. As one contemporary authority observed in 1912:

[T]he limits stated in the policy may be brought into play a number of times during the term of a policy. That is to say, the policy is an open one covering all accidents happening while it is in force.³⁶

The insurance industry also knew how to write liability policies with aggregate limits, and they knew how to do so in simple, concise language.³⁷ The fact that the drafters of the original CGL policies did not do so can only be explained by two scenarios.

The first possible explanation is that this Limits of Liability language is merely excess verbiage carried forward from the earlier schedule policies and – in spite of the fact that it makes up the bulk of a CGL policy's Limits of Liability section – is irrelevant in determining the policy's aggregate limits. Under this theory, the fact that this provision continued essentially intact over forty-plus years of CGL policies does not change its status as a vestigial remnant of earlier policy forms. This explanation, however, is scarcely credible considering the history of liability policies in this country and the talent, effort and expertise behind the development of the CGL policy form.

A more persuasive explanation is that this language means just what it says: CGL policies contain aggregate limits for property damage liabilities only in certain limited circumstances. In other words, the original CGL policy form was carefully crafted to carve out specific property damage hazards that would be subject to aggregate limits and those hazards were defined by their rating basis. Other property damage risks that fell outside these enumerated hazards would not be subject to aggregate limits and would be rated accordingly. Risks such as property damage under the premises-operations hazard rated on a remuneration basis would be subject to aggregate limits.³⁸ Property damage under the premises-operations hazard rated on a premium basis other than remuneration would not be subject to aggregate limits. This is the only explanation that is consistent with the historical evidence surrounding the creation of the CGL policy. This explanation is also consistent with the understanding of insurance authorities during the time the first CGL policies were issued – that coverage under these policies was not necessarily subject to aggregate limits. As one commentator noted in 1947:

Strictly speaking, therefore, one liability policy could obligate the insurance company to make payments of a fantastic amount of money, if by some quirk of fate a vast number of accidents were to occur while the property was in force.³⁹

1966 and 1973 CGL Policy Forms

Although major changes were made to the CGL policy form in 1943 and 1955, these revisions did not affect the Limits of Liability section as it related to premises-operations property damage coverage.⁴⁰ Further substantive revisions to the CGL policy form were also made in 1966 and 1973, with the most notable change being the

movement away from limits stated on a per person/per accident basis in earlier CGL policies to limits stated on a per occurrence/aggregate where applicable basis.

Relevant Policy Language for Environmental Property Damage Coverage

The 1966 and 1973 revisions left the language of the property damage portion of the Limits of Liability section essentially unchanged, however. The 1973 policy form provides:

* * *

Coverage B – The total limit of the company for all damages because of property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the schedule applicable to “each occurrence.”

The total liability of the company for all damages because of all property damage to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of property damage liability stated in the schedule as “aggregate”:

- (1) all property damage arising out of premises or operations *rated on a remuneration basis* or contractor’s equipment rated on a receipts basis, including property damage for which liability is assumed under any incidental contract relating to such premises or operations, but excluding property damage in subparagraph (2) below;

* * *

Such aggregate limit shall apply separately to the property damage described in subparagraphs (1), (2) and (3) above, and under subparagraphs (1) and (2), separately with respect to each project away from premises owned by or rented to the named insured.

(Emphasis supplied.)

Under subparagraph (1) of this revised CGL form, the existence of an aggregate limit for property damage resulting from the premises-operations hazard is once again contingent upon whether the hazard is rated on a remuneration basis.

Contemporary Analysis

Commentators analyzing the limits of liability in the 1966 and 1973 standard-form CGL policies focused somewhat more heavily on the limited circumstances in which these policies contained aggregate limits. For instance, technical industry documentation on rules and interpretation of the 1973 CGL policy form stated:

PREMISES AND OPERATIONS LIABILITY

Premises and operations liability insurance provides protection against claims of bodily or property damage which results from occurrences on the insured premises or involving operations of the insured conducted away from the premises

Limit of Liability:

Rule 1: The manual rates and minimum premiums and operations liability provide a basic limit of \$25,000 under bodily injury coverage for all damages suffered by one or more persons as a result of any one occurrence. For property damage coverage, a basic limit of \$5,000 is required for all damages because of property damage suffered by one or more persons or organizations as the result of any one occurrence, *subject to a basic aggregate limit of \$25,000 for all property damage arising out of premises and operations rated on a payroll basis or contractor's equipment rented on a receipts basis.*

*The aggregate limit applies separately to each year of the policy and to each project involving operations being performed away from premises owned by or rented to the named insured.*⁴¹

(Emphasis supplied.)

The conclusion that the existence of an aggregate limit for premises-operations property damage hinges on the rating basis for the premises-operations hazard is further supported by another authority, who stated:

Until recently, bodily injury liability in most instances provided for separate insurance limits applying to each person, and to a single accident, but did not restrict the number of accidents for which payments may be made during the policy period.

* * *

Important revisions in general liability policies in 1973 and resulted in the elimination of the per-person limit. *Only a per-occurrence limit now applies, plus an aggregate limit for the policy period for products-completed-operations liability insurance.* The minimum occurrence limit is \$25,000. *Strictly speaking, therefore, one liability policy could obligate the insurance company to make payments of a fantastic amount of money if, by some quirk of fate, a vast number of accidents were to occur while the policy was in force.*

* * *

The property-damage minimum limit is applicable to all property damage resulting from a single accident. The minimum accident limit is \$5,000 For certain types of liability insurance (for example, premises-operations liability rated on a remuneration or receipts basis, independent contractors' liability, and products-completed-operations liability), there is in addition an aggregate limit.⁴²

Further, unlike property damage claims, bodily injury claims resulting from premises-operations liabilities were not subject to aggregate limits under any circumstances. As noted in a 1981 industry manual on liability policy rules, classifications and interpretation

[The Limits of Liability Section] details the [insurance] company's limit of liability under each section of the policy in different situations. Essentially, there will be a bodily injury

and property damage limit on the declarations page of the policy, as well as a products/completed operations limit if this coverage is applicable. These specific limits will govern the company's limit of liability on the policy, regardless of the number of insureds in the policy or the number of claims against the insured.

The aggregate limit of liability for property damage is slightly different than for bodily injury. All bodily injury included in the products/completed operations hazard is subject to an aggregate. *There is no aggregate applicable to bodily injury claims arising from premises or operations.*⁴³

The lack of aggregate limits for some coverages continued to be a source of concern, even while these policies were in effect.

It is important to note that if there is no aggregate listed in the declarations page for any of these coverages, there is no limit on what the company can be called upon to pay in any one year. For example, if bodily injury has an occurrence limit of \$500,000 but no aggregate, the insurance company will pay a maximum of \$500,000 for any one products/completed operations loss, but can be called on to pay an infinite number of such claims.⁴⁴

Post-1986 Analysis of Earlier CGL Forms

In 1986, the Comprehensive General Liability policy was re-named the Commercial General Liability Policy (but still referred to as a CGL policy). Appropriately enough, this new name marked a sea change in the coverage available under the policies, which changed from occurrence-based to claims-made⁴⁵ and included numerous new exclusions.

Introduction of General Aggregate in CGL Policies Emphasizes Lack of Aggregates in Earlier Policies

One of the most dramatic changes to CGL policies in 1986 was the creation of a general aggregate limit applicable to all nonproducts coverages, which replaced the

previous separate or split policy limits available for each type of coverage offered by earlier CGL policies. This revision represented the insurance industry's response to latent injuries and property damage from long-tail claims, and the absence of aggregate limits in previous CGL policies, in particular, the lack of a premises-operations property damage aggregate limit. As one contemporary noted:

Provisions Dealing with "Limits" Are Source of Controversy

In both of the new Commercial General Liability forms, Section III deals with *limits* of insurance. It differs from the limits of liability section of the Comprehensive General Liability policy. By far the most significant difference is the inclusion of a *general aggregate* limit applicable to the total amount payable under Coverages A, B and C. (Payments by the insurer for products or completed operations claims are *not* included within this new *general aggregate* limit. As under the older CGL policy, there is a separate aggregate limit applicable to product and completed operations claims.)

* * *

The Comprehensive General Liability Policy – and both of the new [Commercial General Liability] forms – have an *occurrence* limit, spelling out the maximum the insurer will pay as damages from any one occurrence. Under the older policy, that limit is available to cover an infinite number of *separate* occurrences. Under the new forms, that is no longer true. The general aggregate limit will shut off coverage at some point.

The older CGL policy does place an aggregate limit on *property damage* claims resulting from a number of specified hazards – *e.g.*, premises or operations rated on a remuneration basis. The new *general aggregate* limit, however, applies across the board . . . to all property damage losses, and to bodily injury, personal injury, advertising injury and medical payments losses as well.⁴⁶

Other insurance professionals were equally aware that premises-operations property damage coverage was often not subject to aggregate limits before 1986. For instance, one insurance expert recently noted

Up until the mid-1980s, general liability policy coverage for liability arising out of business and operations often was not subject to an aggregate limit. In theory, an insurer could be required to pay up to the per occurrence policy limit many times because of events during a single policy period, with no true cap on the extent of the insurer's cumulative liabilities under the policy.⁴⁷

In 1990, another industry source, *Fire Casualty & Surety Bulletins*, made similar observations when discussing the differences between the new 1986 CGL policy and the previous version

The general aggregate limit of insurance [in the new 1986 CGL form] puts a cap on the amount the insurer will pay in a policy year for all damages and medical expenses other than damage within the products-completed operations hazard; damages within that hazard are subject to their own aggregate limit. In the 1973 CGL policy, one aggregate limit applies to bodily injury within the products and completed operations hazards, and another aggregate limit applies to property damage resulting from (1) risks rated on remuneration basis or contractors equipment rated on a receipts basis; (2) operations performed for the named insured by independent contractors; (3) the products and completed operations hazards. There is, however, no overall aggregate limits as in the current CGL forms. So, exhaustion of insurance limits because of prior claims during the policy period is now a possibility for claims that in the 1973 form would have been subject to a per occurrence limit only.⁴⁸

*Lack of Aggregates for Premises-Operations Hazard in
Pre-1986 CGL Policies Known Outside Insurance Industry*

The lack of aggregate limits in pre-1986 CGL policies, and the potential exposure resulting from the absence of aggregate limits, was well known both inside and outside the insurance industry. In a report submitted to Congress in 1986, the General Accounting Office noted

Another “stacking” problem that could occur, the insurance industry fears, concerns the earlier occurrence-based form’s lack of an aggregate policy limit on certain types of coverage (*i.e.*, for premises and operations). Court judgments could make their liability “astronomical,” insurers believe, depending on how courts interpret the term “occurrence.”

* * *

While the previous CGL occurrence-based form included limits per individual occurrence for CGL risks, it applied aggregate policy limits of liability only to risks involving bodily injury and property damage arising from products and completed operations. It did not place aggregate limits on the other types of risks (*i.e.*, those falling with the premises/operations category).

Under the previous form, for example, Company A may have had an occurrence-based policy with a per-occurrence limit of \$250,000 for all claims other than those for products and completed operations, but no limit on the number of occurrences. Conceivably, the insurer might have had to pay several claims, each up to the \$250,000 per-occurrence limit, because there was no aggregate dollar limit.⁴⁹

JUDICIAL INTERPRETATION OF THE EXISTENCE
OF AGGREGATE LIMITS FOR PREMISES-OPERATIONS
PROPERTY DAMAGE

As discussed in the previous section, contemporary authorities writing during the pre-1986 period consistently acknowledged that standard-form CGL policies only contained aggregate limits for premises-operations property damage when that hazard was rated on a remuneration basis. Perhaps as a result of the near unanimity of historical authorities, the issue of whether the existence of an aggregate limit for premises-operations property damage is governed by the hazard's rating basis has rarely been addressed by the courts.

Despite some spirited and creative arguments to the contrary, courts that have addressed this issue have found that this provision restricts aggregate limits for premises-operations property damage to those instances where the premium of the policy at issue is actually rated on a remuneration basis.

National Industri Transformers Co. v. Atlantic Mutual Ins. Co.

For instance, in *National Industri Transformers Co. v. Atlantic Mutual Insurance Co.*,⁵⁰ a federal court found that the Limits of Liability section of the policy provided the mechanism for computing and applying the undefined per occurrence and aggregate terms set forth on the policy's declaration page.⁵¹ In the event of more than one occurrence, the aggregate limits for individual categories of loss would be determined under the language of the Limits of Liability section.⁵² The court found that, because the premium for the National Industri policy was rated on a remuneration basis, policy terms relating to "property damage arising out of . . . operations rated on a remuneration basis" resulted in the application of a separate aggregate limit available for the policyholder's premises-operations losses.⁵³

Intel Corp. v. Hartford Accident and Indemnity Co.

Other courts, analyzing the same policy provision, have reached the same conclusion. In *Intel Corp. v. Hartford Accident and Indemnity Co.*,⁵⁴ the policyholder argued that its standard-form CGL policies did not have aggregate limits for premises-operations property damage because the premiums were calculated on a sales basis and not on a remuneration basis.⁵⁵ In its analysis, the court stated that, although payroll was reviewed in determining the premiums under these policies, “the final step was to convert the factors looked at in connection with various risks to a sales rate in order to come up with the premium.”⁵⁶ The court further explained

The fact that payroll may have been a factor does not mean that the premises-operations risk can be considered to be rated on a remuneration basis when: (1) the policies’ endorsements say the premium of the policies is determined by a composite (percentage of sales) rate; (2) no separate method for rating the premises-operations risk is set forth in the policies; (3) the parties agreed that the premiums in the policies would be determined on a composite rate basis, and (4) Hartford’s underwriter testified that the premium was determined by considering various exposures and converting the various factors into a sales rate.⁵⁷

In addition, there was nothing in the policies to suggest that the composite rate was based on anything but sales.⁵⁸ As a result, the court held that Hartford’s policies did not contain aggregate limits for premises-operations property damage.⁵⁹

Occidental Chemical Co. v. Hartford Accident & Indemnity Co.

A similar result was reached in *Occidental Chemical Co. v. Hartford Accident & Indemnity Co.*,⁶⁰ which also addressed the standard-form CGL language providing for premises-operations aggregates when that liability was rated on a remuneration basis.

⁶¹ In *Occidental Chemical*, the policy premium page and the uncontradicted testimony

of the insurance company's underwriters stated that policy premiums were based on remuneration and not on sales.⁶² The court found that this fact was dispositive as to the existence of an aggregate limit for premises-operations property damage and, therefore, the policy at issue had an aggregate limit for these liabilities.⁶³

Dana Corp. v. Hartford Accident & Indemnity Co.

The existence of aggregate limits for premises-operations property damage under standard-form CGL language was also addressed by the trial court in *Dana Corp. v. Hartford Accident & Indemnity Co.*⁶⁴ The primary policies at issue in *Dana Corp.* contained standard-form language, which provided

Subject to the above provision respecting "each occurrence" the total liability of the company for all damages because of all property damage to which this coverage applies and described in any of the numbered sub-paragraphs below shall not exceed the limit of property damage liability stated in the schedule as "aggregate:"

- (1) all property damage arising out of premises or operations rated on a remuneration basis or contractor's equipment rated on a receipts basis, including property damage for which liability is assumed under any incidental contract relating to such premises or operations, but excluding property damage in sub-paragraph (2) below⁶⁵

As discussed in a subsequent ruling addressing the practical effects of its earlier decision, the trial court court found that under this language the primary policy did not contain aggregate limits for environmental property damage unless it was rated on a remuneration basis.⁶⁶ Because the policy premium was based on the policyholder's sales and not its payroll, the court held the policy had no aggregate limits for environmental property damage under the premises-operations hazard.⁶⁷

Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau

In *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*,⁶⁸ the issue before the court was not whether standard-form policy language governed the existence of aggregate limits for premises or operations losses, but on what basis the policy premium was computed (e.g., remuneration, receipts, sales). The language of the policies at issue in *Detrex* called for aggregate limits for “all property damage arising out of premises or operations rated on a remuneration basis or contractor’s equipment rated on a receipts basis.”⁶⁹ The policyholder, Detrex, contended that its policies were rated on a sales basis and not on a remuneration basis and, thus, had no aggregate limits for premises or operations liabilities under this language.⁷⁰

In further support of this interpretation of the remuneration basis policy language, the insurance company defendant in *Detrex* did not dispute that this language in the Limits of Liability section controlled the existence of premises-operations aggregate limits but, instead, took issue with the basis on which the premiums were rated.⁷¹

The court accepted the parties’ contention that the existence of a premises-operations aggregate limit was controlled by the rating basis of the policy at issue, but found that a genuine issue of material fact existed as to how the relevant policy hazards were rated, and refused to grant summary judgment.⁷²

Chemical Leaman Tank Lines Inc. v. Aetna Casualty & Surety Co.

Insurance companies – particularly insurance companies that have sold umbrella policies – also acknowledge that whether a standard-form CGL policy has a premises-operations aggregate limit depends on the policy’s rating basis. In its brief filed in *Chemical Leaman Tank Lines Inc. v. Aetna Casualty & Surety Co.*,⁷³ cross-appellant

London Market Insurers argued that the primary policies, sold by Aetna, did not have aggregate limits for property damage from operations risks. As London Market acknowledged, in order to have aggregate liability limits for premises-operations property damage, the standard-form Aetna policies required that the “premises or operations [be] rated on a remuneration basis.”⁷⁴ Because none of the Aetna policies were remuneration rated, London Market argued, none of the Aetna policies had premises-operations aggregate limits.

CONCLUSION

Policyholders and their counsel tend to think of all standard-form ISO CGL policies in terms of modern policies, which have an overall policy aggregate for non-products liabilities. Nothing could be further from the truth. Although current commentators often fail to acknowledge the fact, insurance authorities analyzing these policies at the time they were developed and sold freely recognized that the policies might be called upon to respond to an infinite number of accidents or occurrences.

Due to their lack of aggregate limits for many hazards, pre-1986 standard-form CGL policies can be immensely valuable. Understanding how aggregate limits are determined in these policies is critical for policyholders and their counsel, particularly in the context of environmental property damage claims. Policyholders who do not have a thorough understanding of the coverage provided by their policies and the limits of liability applicable to that coverage risk, settling environmental coverage actions for a fraction of the value of the triggered policies, and forfeiting an untold amount of coverage in the process.

¹ See *THE BUSINESS OF INSURANCE* VOL. II 191 (Howard P. Dunham ed. 1912) (hereafter “DUNHAM”); James A. Robertson, *How Umbrella Policies Started, Part 1: Early Liability Coverage* ¶11 (Mar. 2000), <<http://www.irmi.com/expert/articles/robertson001.asp>> (hereafter “*Umbrella Policies Part 1*”). This policy was written by Employers Liability Assurance Corporation. *Umbrella Policies Part 1* ¶11.

² *DUNHAM* VOL. II at 191.

³ *Id.* at 213. The Gender and Paeschke policy had limits of \$1,500 per person and \$3,750 per accident. *Umbrella Policies Part 1* at ¶17.

⁴ *DUNHAM* VOL. II at 213. The reason that the very first liability policies had aggregate limits may have been due to the fact that they were written on “English Public Liability Policy” forms. See *DUNHAM* VOL. III at 381. Policies written on “General Liability Policy” forms did not have aggregate limits. See *id.* at 384-388.

⁵ *DUNHAM* VOL. II at 191.

⁶ See *id.* at 213.

⁷ See *id.*; *DUNHAM* VOL. III at 384. Sixteen different insurance companies were writing liability policies by 1912: Aetna, American Fidelity, American Mutual Liability, Casualty Company of America, Employers’ Liability, Fidelity & Casualty, Frankfort of Germany, General Accident, London Guarantee & Accident, Maryland Casualty, New Amsterdam, Ocean Accident & Guarantee, Philadelphia Casualty, Standard of Detroit, Travelers, and United States Casualty. *DUNHAM* VOL. II at 205. Even as late as 1920, however, the vast majority of general liability policies were written in only a few larger cities. MARTIN P. CORNELIUS, *THIRD PARTY INSURANCE* 163 (1920) (hereafter “CORNELIUS”).

⁸ *DUNHAM* VOL. II at 215-216.

⁹ *Id.*

¹⁰ See *CORNELIUS* at 71, 76-77. In addition to area (square footage), the five other rating bases used for OL&T coverage were: admissions, frontage, receipts, teams and units (“each,” “per person,” etc.) ROBERT I. MEHR AND EMERSON CAMMACK, *PRINCIPLES OF INSURANCE* 349 (1952).

¹¹ See *CORNELIUS* at 71, 77-78.

¹² See *id.* at 68; *DUNHAM* VOL. II at 225-226.

¹³ See *COMPREHENSIVE LIABILITY INSURANCE: LECTURES AND A CASE STUDY 12* (Mark R. Greene ed., 1957) (hereafter “*Greene*”). Protective liability policies cover the liability of the policyholder arising out of operations performed for it by independent contractors, and arising out of omissions or supervisory acts of the policyholder in connection with such operations. ROBERT RIEGEL & JEROME S. MILLER, *INSURANCE PRINCIPLES AND PRACTICES* 607 (3d ed. 1947) (hereafter “*RIEGEL (1947)*”).

¹⁴ See *CORNELIUS* at 160. These policies offered mutually exclusive coverage in an attempt to lower premium costs. The thinking appears to have been that the costs of these types of insurance should not be averaged in the premiums of all policyholders because not all policyholders had the hazards covered by the policies. For instance, the cost of elevator liability insurance should not be averaged into the premiums for premises coverage because relatively few policyholders had elevators at the time. E. W. SAWYER, *COMPREHENSIVE LIABILITY INSURANCE* 13-14 (1943) (hereafter “*SAWYER*”).

¹⁵ *Id.* at 14-15.

¹⁶ *CORNELIUS* at 175.

¹⁷ *Greene* at 12.

¹⁸ *SAWYER* at 20-21. The Insurance Services Office, commonly known as “ISO,” is the successor entity to the National Bureau of Casualty Underwriters (“NBCU”) and the Mutual Casualty Insurance Rating Bureau. ISO was formed in 1971 through a consolidation of national insurance rating or service organizations. Standard-form insurance policies promulgated by ISO or its predecessors are commonly referred to in the insurance industry as “ISO forms.”

¹⁹ James A. Robertson, *How Umbrella Policies Started, Part 2: The First Umbrella Forms* ¶8 (Apr. 2000), <<http://www.irmi.com/expert/articles/robertson002.asp>> (hereafter “*Umbrella Policies Part 2*”). Insurance expert E.W. Sawyer, who is frequently cited in this article, was the attorney for the NBCU and a leading proponent of a blanket liability form of coverage. *Id.* at ¶9.

²⁰ *Greene* at 12-13.

²¹ See *Umbrella Policies Part 2* ¶10. In 1986, these policies were re-named “Commercial General Liability” policies. Both policies will be referred to as “CGL” policies in this article.

²² *Greene* at 13.

²³ Compare ROBERT RIEGEL & JEROME S. MILLER, *INSURANCE PRINCIPLES AND PRACTICES* 685 (4th ed. 1959) (property damage coverage available as an endorsement) with PHILIP GORDIS, *PROPERTY AND CASUALTY INSURANCE* 374 (1953) (hereafter “*GORDIS*”) (property damage coverage part of standard policy form).

²⁴ *Id.* at 376. Evidently many of these early policies did not have aggregate limits even for products liability losses, but instead established the maximum products loss by referring to a *batch limit*, which placed a limit on the insurance company’s liability for all losses arising out of one production unit. S.S. HUEBNER, *ET AL.*, *PROPERTY AND LIABILITY INSURANCE* 388 (1968). Batch clauses were used in liability policies written before 1966. James S. Trieschmann, *Umbrella Policy Analysis* 215, 29 *CPCU ANNALS* 213, 215 (1976).

²⁵ Unfortunately, *operations* or *premises-operations* coverage is easily confused with completed operations coverage. Premises-operations coverage responds to liabilities arising from a policyholder’s business operations. In contrast, completed operations coverage is more akin to products liability coverage in that it responds to liabilities arising from work done or services rendered by the policyholder. One commentator explained the difference this way

The premises-operations portion of the policy is intended to cover accidents that occur while insured operations are going on. For example, suppose the manager [of a hardware store] undertakes to install linoleum in a customer’s kitchen. Suppose further that, while installing the linoleum, he negligently damages the home or injures a third person and a claim is made against the hardware store. The hardware store liability insurance applies as a part of the operations hazard included as incidental to use of the premises as a hardware store [*i.e.*, premises-operations coverage]. On the other hand, the premises-operations hazard is designed to *exclude* such incidents as the one involved in a well-known case where an electrical contractor was hired to connect motors to fans in poultry incubators as a part of a general change in electrical current used in the area. Many months later the fans were turned on when the incubators were put in use. Because they had been improperly installed, a large number of eggs failed to hatch. This error was not covered [under the premises-operations coverage] because it came under the completed operations exclusion, which provides that there will be no coverage arising out of the hazard of operations if the accident occurs after the operations have been completed or abandoned and the accident occurs away from the insured’s premises.

JOHN D. LONG & DAVIS W. GREGG, *PROPERTY AND LIABILITY INSURANCE HANDBOOK* 474 (1965). Because the completed operations hazard is more closely related to the products hazard than it is to premises-operations, later versions of the CGL policy often group products with completed operations for purposes of calculating policy limits.

²⁶ SAWYER at 23.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 22. This restriction was put in place because of the costs incurred by the insurance company to survey and audit the policyholder’s operations prior to issuing a CGL policy. *Id.*

³⁰ See *id.* at 22-23.

31 See 7A J. APPLEMAN, *INSURANCE LAW AND PRACTICES*, § 4493.03 at 76 (W. Berdal ed. 1979).

32 Major changes were made to CGL policies in 1943, 1955, 1966, 1973 and 1986. *Umbrella Policies Part 2* at ¶13.

33 The meaning of project in this context has apparently not been analyzed by the courts.

34 See *DUNHAM VOL. II* at 216.

35 S.B. ACKERMAN, *INSURANCE: A PRACTICAL GUIDE FOR VARIOUS FORMS OF COVERAGE* 243 (1928). Accord ROBERT RIEGEL & H.L. LOMAN, *INSURANCE PRINCIPLES AND PRACTICES* 159 (1921) (“The liability of the company was limited to \$5,000 for an injury to one person in one accident, and \$10,000 for injuries to more than one person in one accident, subject to the \$5,000 per person limitation.”). Even products liability coverage was not subject to an aggregate limit in these early policies, but instead contained “per person” limits that were capped at a “batch” limit applicable to all injuries arising from any one lot produced. *Id.* at 250-251. Accord ALBERT H. MOWBRAY & RALPH H. BLANCHARD, *INSURANCE: ITS THEORY AND PRACTICE IN THE UNITED STATES* 180 (5th Ed. 1961) (“Some contracts provide for a single limit for each occurrence applying to total damages for bodily-injury and property-damage liability; others have a single limit per claim. Limits are also placed on medical payments; and for certain kinds of insurance, an aggregate limit on all the damages payable during the term of the contract.”)

36 *DUNHAM VOL. II* at 215-216.

37 As early as 1912, liability policies written on the so-called English form had overall annual aggregate limits. See *DUNHAM VOL. III* at 381. These policies provided: “the Company’s liability shall be limited to ____ pounds in respect of any one accident occurrence (which term shall include a series of injuries and/or damages arising to different persons or properties from one original cause), and to ____ pounds in any one year.” *Id.*

38 *GORDIS* at 376.

39 *RIEGEL* (1947) at 594.

40 See *Umbrella Policies Part 2* at ¶14.

41 *GENERAL LIABILITY MANUAL: RULES, CLASSIFICATIONS & INTERPRETATIONS Vol. I II. B.2* (International Risk Management Institute, Inc. 1981) (emphasis supplied).

42 ROBERT RIEGEL, *ET AL.*, *INSURANCE PRINCIPLES AND PRACTICES* 435 (6th ed. 1976) (emphasis supplied).

43 *GENERAL LIABILITY MANUAL: RULES, CLASSIFICATIONS & INTERPRETATIONS Vol. II II.C.15* (International Risk Management Institute, Inc. 1981) (emphasis supplied).

44 *Id.*

45 Although standard-form CGL policies have been written on a claims-made basis since 1986, “occurrence-based” coverage is still available for an additional premium.

46 JOHN LINER ORGANIZATION, *YOUR GUIDE TO THE NEW I.S.O. COMMERCIAL LINES POLICIES* 11-12 (1987) (emphasis in original).

47 ERIC A. WIENING & DONALD S. MALECKI, *INSURANCE CONTRACT ANALYSIS* 113-114 (1st ed. 1992) (emphasis supplied).

48 *Fire Casualty & Surety Bulletin* AD1-2 (Mar. 1990).

49 UNITED STATES GENERAL ACCOUNTING OFFICE, *BRIEFING REPORT TO CONGRESSIONAL REQUESTERS, LIABILITY INSURANCE – CHANGES IN POLICIES SET LIMITS ON RISKS TO INSURERS* 8, 17 (Nov. 1986).

50 1996 U.S. Dist. LEXIS 20047 (S.D.N.Y. July 24, 1996).

51 *Id.* at *31.

52 *Id.*

53 *Id.* at *34.

54 No. C-87-20434 (N.D. Cal. Aug. 31, 1993).

55 *Id.* at 24.

56 *Id.* at 25.

57 *Id.*

58 *Id.* at 24.

59 *Id.* at 25.

60 No. 41009/80 (N.Y. Sup. Ct. Dec. 4, 1996).

61 *Id.* at 4.

62 *Id.* at 4-5.

63 *Id.* at 5.

64 No. 49D01-9301-CP-0026, *slip op.* (Ind. Super. Ct., Marion Cty. Mar. 24, 1999), as discussed in *Dana Corp. v. Hartford Accident & Indemnity Co.*, No. 49D01-9301-CP-0026, *slip op.* at 2, 16 (Ind. Super. Ct., Marion Cty. May 7, 1999), *reprinted in* Mealey's Litigation Report Insurance (May 25, 1999).

65 See Brief of Appellee Allstate Insurance Co., *Dana Corp. v. Allstate Ins. Co.* at 6, filed Feb. 4, 2000, No. 49D01-9301-CP-0026 (Ind. Sup. Ct., Marion Cty.). A copy of this brief is on file with the author.

66 *Dana Corp. v. Hartford Accident & Indemnity Co.*, No. 49D01-9301-CP-0026, *slip op.* at 16 (Ind. Super. Ct., Marion Cty. May 7, 1999), *reprinted in* Mealey's Litigation Report Insurance (May 25, 1999).

67 *Id.* The trial court's decision is currently on appeal to the Indiana Court of Appeals.

68 746 F. Supp. 1310 (N.D. Ohio 1990) (*Detrex*).

69 See Plaintiff Detrex Corporation's Opening Brief Addressing Certain Legal Issues at 60, dated Sept. 8, 1989, *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*, No. C85-2278Y (N.D. Ohio). A copy of this brief is on file with the author.

70 *Detrex* at 1326.

71 *Id.* See also Wausau's Memorandum in Response to Plaintiff Detrex Corporation's "Opening Brief Addressing Certain Legal Issues" and in Support of Wausau's Alternative Motions for Summary Judgement and Reconsideration at 66, dated Oct. 1989, *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*, No. C85-2278Y (N.D. Ohio) ("Detrex correctly recognizes that Wausau's maximum total liability . . . for all damages because of all property damage arising out of premises or operations rated on a remuneration basis may not exceed the limit of property damage stated as 'aggregate' in the Detrex/Wausau policies"). A copy of this brief is on file with the author.

72 *Detrex* at 1326.

73 Nos. 97-5735 and 97-5736 (3rd Cir. dated April 22, 1998). A copy of this brief is on file with the author.

74 *Id.*