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**ANNOTATED COMMERCIAL
GENERAL LIABILITY POLICY**

by Mark G. Lichy and Marcus B. Snowden

Release No. 30, December 2018

What's New in this Update:

- The second release of the 2018 *Annotated Commercial General Liability Policy* update focuses upon Chapters 24A through 37 of the text. Authors note that this release features not simply an update of coverage jurisprudence assessing the critical policy wording but three new chapters. Updates of the Personal Injury as well as the Advertising Liability coverage grant language are included with this release. Also considered are the Professional Services and War Risks exclusions. Judicial consideration of the Limits and General Conditions policy terms is also included in this update. Importantly, new chapter 24B considers jurisprudence interpreting the Abuse exclusion.

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As readers will note, we have set out the exclusion language adopted by the IBC in its advisory Form 2100. This said, authors caution that the market place often employs manuscript “abuse exclusion” wording customized for a particular risk. Readers are reminded to review the precise abuse exclusion language employed in the policy under consideration. We have also added chapters considering judicial assessment of the Asbestos exclusion as well as the so-called Mould or Fungus clause.

- New Chapter 24B contains a review not only of the IBC abuse exclusion language but judicial interpretation of the clause or analogous policy wording. Where relevant, reference is also made to abuse exclusion language contained in habitational insurance contracts. Authors note that the IBC introduced the Abuse exclusion in 2005 to address the increased volume of claims initiated against commercial or institutional entities such as religious organizations or educational service providers. Prior to the introduction of this clause, insurers typically relied upon a non-fortuity argument or the intentional act exclusion to seek to negate defence or indemnity obligations. Authors, among other things, note that this exclusion is broadly drafted to take away coverage from employers who employ a so-called perpetrator. The exclusion focuses upon claims grounded in wrongful hiring, supervision or retention. Readers are invited to consider the jurisprudence referenced but again are reminded that the precise language of the policy exclusion contained within the policy under consideration is required.
- The update of Chapter 25 which considers the Personal Injury Insuring Agreement focuses upon the so-called malicious prosecution offence. Readers will be aware that coverage is provided for the offence of malicious prosecution. One of the coverage debates emerging in respect of this specific offence is which CGL policy is triggered when an institution or commercial entity is sued for this alleged tort. Certain policyholders and insurers argue that it is the policy in place when the criminal prosecution is dismissed that must respond to the civil suit alleging malicious prosecution. The gravamen of this submission is that the elements of the tort do not crystalize until the criminal charge is dismissed. Still other insurers and insureds argue that the CGL policy in place when the charges are first laid must respond. It is the act of placing charges or initiating prosecution that is the critical element of the tort, from this perspective. Readers will not be surprised to learn there is a diversity of views expressed within US appellate courts. The majority of courts hold that the policy in place when the charge is laid must respond. Please review the

update, again mindful that in the Canadian context, the wording at issue will drive the result.

- Authors note that Chapter 26A contains a detailed update of recent U.S. jurisprudence considering various issues which arise in litigation where policyholder seeks coverage under the Advertising Injury Insuring Agreement. The update considers a number of issues which arise in circumstances where policyholder alleges that the underlying claim involves oral or written publication within an advertisement. Certain exclusions within this coverage grant are also considered by the U.S. courts. Readers may want to review in particular the *Burlington Insurance Company v. Minadora Holdings LLC*, 690 Fed.Appx. 918 (9th Cir., 2017)) case.
- The Asbestos exclusion has long been the subject of consideration by U.S. courts. Perhaps because of the limited number of underlying asbestos cases within Canada, the exclusion has faced less scrutiny within this country. Authors speculate that the application of worker's compensation laws to Canadian asbestos cases may have resulted in the comparative dearth of Canadian coverage cases interpreting this clause. This stated, there have in the past few years emerged some litigation within Canada respecting application of this exclusion to underlying asbestos claims. Please note authors have not set out the considerable volume of U.S. jurisprudence interpreting this or analogous exclusionary language. Rather, in new Chapter 31A, we have referenced articles which summarize the U.S. assessment of this clause. Reference is made to the leading Ontario case of *Goodyear Canada Inc. v. American International Cos.*, 2013 ONCA 395 (Ont. C.A.), which considers in some depth the asbestos exclusion and American doctrines inclusive of the so called Stonewall Principle. Reference is also made to the Quebec Superior Court decision in *Institution Royale v. Construction Expert RC Inc.*, 2011 CarswellQue 8424 (C.S. Que.), which upheld application of the asbestos exclusion.
- Authors have also added new Chapter 32A considering the common exclusion typically referenced as the "Mould Exclusion". The history of this clause with reference to both scientific studies of this contaminant and an article reviewing judicial consideration of this exclusion are included. Authors undertake at least brief review of the Canadian jurisprudence considering this clause.
- Again authors wish to thank the Snowden Law Professional Corporation team for their invaluable contribution to this update. Also we again thank the Thomson Reuters team for their skilled assistance and patience in bringing this second installment of the 2018 Release to press.

