

STATE OF MICHIGAN
IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY

Plaintiff/Counter-Defendant-Appellee,

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity a successor in interest to Michael J. Witucki, a deceased individual,

Defendants/Counter-Plaintiffs,

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.

Supreme Court
No. 152994

Court of Appeals
No. 322215

Wayne County Circuit Court
Case No. 12-002767-CK

**REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-
APPELLANT**

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III. INTRODUCTION

On December 1, 2015, the Court of Appeals held that the Fraud Exclusion¹ in the EMC Policies operates to bar coverage for the Funds' Consent Judgment against EMC insureds Helicon and Witucki. The Defendant-Appellant Funds filed their Application on January 11, 2016. Grounds for appeal include:

- The Fraud Exclusion cannot apply unless there has been a judicial determination that EMC's insureds (Helicon and Witucki) engaged in acts of fraud or dishonesty.² Under Michigan law, consent judgments have no such determinative effect. Application ("App.") at pp. 16-20.
- The Opinion adopted a definition of dishonesty so broad it encompasses **any** untrue statement, regardless of the intent with which it was made. Opinion at p. 4; App. at pp. 4, 9-16, 21-23. In so doing, the Opinion violated any number of controlling Michigan insurance policy construction precedents and eviscerated the provisions of the EMC Policies expressly extending coverage to misstatements, misleading statements and omissions. App. at pp. 9-16, 20-25. Moreover, there was not a single authority in the record—whether cited by the Funds, EMC or the Court of Appeals itself—that supported the Court of Appeals application of a fraud exclusion to negligence-based claims (such as those brought by the Funds under the CUSA). App. at pp. iii, 10-16.

The Funds further supported their Application by demonstrating that the published Opinion was not a harm affecting only the Funds. App. at pp. ii-v, 8-16. Thousands of Michigan professionals and board members rely on E&O and D&O policies with coverage grants and fraud

¹ Capitalized terms used, but not otherwise defined herein, will have the same meaning accorded to them in the Application for Leave to Appeal by Defendant-Appellant filed on January 11, 2016 (hereinafter, the "Application").

² The Fraud Exclusion precludes coverage for "[a]ny action brought against an 'insured' if **by judgment or adjudication** such action was **based on a determination** that acts of fraud or dishonesty were committed by the 'insured.'" Application at p. 6.

exclusions just like those in the EMC Policies. *Id.* If the Opinion is allowed to stand, the definition of “dishonest” conduct established by the Opinion would be binding upon all D&O and E&O policies. The Opinion would thus deprive thousands of Michigan insureds of coverage for negligent misstatements, misleading statements and omissions—coverage they purchased and they rely upon to protect themselves and their customers. *Id.*

In light of the argument and authority presented in the Funds’ Application, EMC’s Response is most notable for what it **does not say**. EMC’s Response lacks:

- **any** authority disputing the fact that the published Opinion will adversely affect thousands of Michigan insureds;
- **any** authority supporting the use of the Consent Judgment as the factual “determination” necessary to trigger the Fraud Exclusion;
- **any** authority supporting the application of a fraud exclusion to negligence-based claims;
- **any** attempt to explain how the Opinion is consistent with controlling insurance policy construction principles.

Rather than address the issues relevant to determining whether the Opinion should be allowed to stand as binding precedent, EMC spends the majority of its Response arguing that the Court should deny the Funds’ Application because the Opinion should ultimately be affirmed on grounds the Court of Appeals never addressed. Response at pp. 19-30. In other words, EMC wants the Court to allow a demonstrably incorrect **published** decision to stand—no matter how much collateral damage it will cause—because EMC likes the outcome.³ Arguments like that are exactly how bad law is created. Even if EMC were correct (and it’s not) the correct course of

³ EMC’s benefit if the Order is allowed to stand is not limited to this case. EMC would also have grounds to refuse to pay out on any future claim for negligent misrepresentation or omission (despite having taken premium payments to issue coverage for the same). App. at pp. ii-v, 8-16.

action would be to grant the Funds' Application, reverse the Opinion, then remand to the Court of Appeals so that they may address the other exclusions EMC relies upon.

As EMC has failed to even address, let alone refute, the grounds for appeal set forth in the Funds' Application, the Funds respectfully request that the Court peremptorily reverse the Opinion or, in the alternative, grant the Funds' Application for Leave to Appeal.

IV. ARGUMENT

A. **THE OPINION DEPRIVES THOUSANDS OF MICHIGAN INSUREDS OF COVERAGE FOR NEGLIGENT MISREPRESENTATIONS AND OMISSIONS.**

In their Application, the Funds showed how the Opinion's adoption of a broad definition of "dishonesty" to bar coverage for **any** untrue statement or omission of fact operates to eviscerate the express coverage for misstatements, misleading statements and omissions in the EMC Policies. App. at pp. ii-v, 8-16. The Funds further demonstrated how the published Opinion would adversely impact thousands of Michigan insureds because coverage grants and fraud exclusions like those in the EMC Policies appear in virtually every E&O and D&O policy that is issued. *Id.* Knowing this was a significant issue, the Funds provided the Court with a litany of cases to support their argument. *Id.*⁴

EMC takes a different approach. EMC does not refute—because it cannot—that virtually every E&O and D&O policy contains the same coverage grant and fraud exclusion appearing in the EMC Policies. It doesn't even contend that the same or similar coverage grant and fraud exclusion aren't in every E&O (aka, "Linebacker") Policy it issues.⁵ Instead, EMC makes the

⁴ As but one example, the Funds cited nearly 50 different authorities—spanning 35 jurisdictions and 5 different treatises—to support the fact that nearly every E&O and D&O policy contains coverage grants and fraud exclusions similar to those in the EMC Policies. App. at pp. 10-13, nn. 21-22. The Funds likewise provided multiple cases holding that fraud exclusions should not bar coverage for negligence-based claims.

⁵ EMC does claim that "the particular policy form at issue has not been used by EMC since 2008." But it doesn't provide the coverage grant for the policy form now in use. The Funds

unsupported assertion that the Opinion’s construction of the term “dishonesty” is “simply not determinative of the coverage afforded or excluded to the gamut of other possible insureds under other policies of insurance.” Response at p. viii. In other words, EMC is suggesting that Michigan trial courts will simply ignore the opinion when construing coverage grants and fraud/dishonesty exclusions similar to those at issue here. That, of course, is not possible. Michigan trial courts are **required** to follow the precedent established by the Court of Appeals. *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 353-54; 785 NW2d 45, 58-59 (2010) (“Although a trial court is not required to agree with appellate rules, orders, and caselaw . . . the court is required in good faith to follow those rules, orders, and caselaw.”).

In short, EMC’s protests are unsupported and contrary to law and do nothing to change the fact that thousands of Michigan insureds will lose coverage for negligence-based misrepresentation and omission claims unless the Court grants the Funds’ Application. App. at pp. ii-v, 8-16. The Funds respectfully request the Court accept jurisdiction and grant the Funds’ Application, or peremptorily reverse the Opinion, pursuant to MCR 7.305(B)(3).

B. EMC HAS FAILED TO PROVIDE SUPPORT FOR TREATING THE CONSENT JUDGMENT AS A “DETERMINATION” OF ANYTHING.

EMC adopts a similar approach with respect to the fact that the Consent Judgment lacks the necessary adjudicative traits to trigger the Fraud Exclusion. App. at pp. 16-20. The Fraud Exclusion in the EMC Policies cannot be triggered unless there is a “determination”—by

were, however, able to find an EMC “Linebacker” policy issued to the City of Hiawatha, Kansas for the 2013-2014 policy year (after EMC claims it changed its form). Relevant excerpts of the policy are attached hereto as Exhibit A, and the entire policy is available at <<https://www.cityofhiawatha.org/files/linebacker-public-officials-and-employemen-practice.pdf>> at_download/file> (accessed February 29, 2016). Predictably, the new policy form still extends coverage to “misstatement,” “misleading statement” and “omission.” Ex. A. The new policy likewise still excludes coverage if it has been established that the insured committed a “dishonest act.” *Id.* Thus, EMC’s new policy form only proves the Funds’ point—virtually every D&O and E&O policy that is issued contains coverage grants similar to those appearing in the EMC Policies at issue in this case.

judgment or adjudication—that Helicon and Witucki committed acts of fraud or dishonesty. *Id.*; see also App. at p. 6 (quoting text of Fraud Exclusion). That is a problem for EMC because this Court has quite clearly held that “the court **does not determine** ... the rights and obligations of the parties in a consent judgment.” *Acorn Inv Co v Michigan Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22, 30 (2014) (emphasis added) (citation omitted). Under controlling Michigan law, a consent judgment does not constitute an adjudication, or even a concession, of the facts or allegations at issue in the case. App. at pp. 16-20. That means there was no “determination” that Helicon and Witucki did or didn’t do anything. *Id.* And without that “determination” the Fraud Exclusion cannot apply. *Id.*

As it did with the broad impact of the Opinion, EMC simply ignores the law. Response at pp. 13-19. It makes no effort to argue that the Consent Judgment is, in fact, a determination of anything. *Id.* It cites no authority that would support treating the Consent Judgment as the determination of fact necessary to trigger the Fraud Exclusion. *Id.* Instead, EMC just pretends the issue doesn’t exist, making unsupported assertions that certain facts were “established,” “determined,” or “proved” in the Liability Action and claiming to know what specific conduct of Helicon and Witucki the Consent Judgment is based upon.⁶

⁶ See, e.g., Response at p. 3-4 (claiming that the Funds submitted considerable evidence which “established” Witucki and Helicon’s role); p. 13 (claiming the Consent Judgment was “a result” of Helicon and Witucki’s “self-dealing, dishonest and indisputably improper conduct”); p. 13 (claiming the lower courts properly applied the terms of the EMC Policies to the “undisputed tortious conduct of Helicon and Witucki – conduct which the Trusts themselves proved and upon which the judgment was specifically based”); p. 15 (claiming the Consent Judgment “necessarily determined” Helicon and Witucki committed acts of dishonesty); p. 15 (claiming that the facts “established by the Trusts . . . established” Helicon and Witucki sold and materially assisted in the sale of the Bonds); p. 17 (claiming “the record evidence established by the Trusts . . . established that Witucki and Helicon undertook great efforts and made numerous representations to the Trusts in order to secure their investments in the bonds”); p. 17 (claiming the “Trusts established that Helicon and Witucki knew” certain facts); p. 17 (claiming the “Trusts alleged and established” Helicon and Witucki were aware of certain facts); p. 17-18 (setting forth a

EMC's repeated attempts to imply (or simply state) that some sort of factual determination occurred are simply untrue. All of EMC's claims that facts were established/proved/determined in the Liability Action are based on four documents: 1) the Funds' First Amended Complaint; 2) the Funds' Brief in Opposition to Helicon's Motion for Summary Judgment; 3) the Order denying Helicon and Witucki's Motion for Summary Judgment; and, 4) the Consent Judgment. Response at pp. 1-7, 14-19. But these documents don't prove anything.

The Funds' First Amended Complaint and Brief in Opposition to Helicon's Motion for Summary Judgment are merely the Funds' statements of what they believe they can prove. They are nothing more than allegations until a fact finder determines that the Funds have met the necessary burden of proof. The same is true for the Order denying Helicon and Witucki's Motion for Summary Judgment. The Order demonstrates that the Funds had sufficient support for their claims to proceed to trial, not that they had met the necessary burden of proof. MCR 2.116(C)(10).⁷ That leaves only the Consent Judgment. But the Consent Judgment is not a factual determination either. App. at pp. 16-20.

The reality is that the parties settled and the Court documented the settlement in the form of the Consent Judgment. *Am Mut Liab Ins Co v Michigan Mut Liab Co*, 64 Mich App 315, 327; 235 NW2d 769, 776 (1975) ("A consent judgment reflects primarily the agreement of the parties. . . . The parties have not litigated the matters put in issue, they have settled. The trial judge has

litany of conduct and claiming it is "all conduct for which the judgment under the CUSA was imposed upon Helicon and Witucki); p. 19 (asserting "the record evidence clearly established" the Consent Judgment was based on acts of fraud or dishonesty).

⁷ EMC quotes exhaustively from the Order denying Helicon and Witucki's Motion for Summary Judgment in its Response, claiming that the "District Court concluded that the record evidence was sufficient to establish" Helicon and Witucki's role in the sale of the Bonds. Response at pp. 4-6. EMC's claim is inconsistent with the standard the Funds had to meet to overcome summary judgment. MCR 2.116(C)(10).

not determined the matters put in issue, he has merely put his stamp of approval on the parties' agreement disposing of those matters.”). There was no determination or adjudication of any fact. There is no way to tell, for example, if Helicon and Witucki’s liability is as a “seller” or for “materially assisting” in the sale of the Bonds. Conn Gen Stat Ann 36b-29.⁸ There is likewise no way to tell if Helicon and Witucki’s liability is based on an affirmative misrepresentation, an omission, or both (as both are actionable under the CUSA). *Id.* In short, despite EMC’s rhetoric, the Consent Judgment is not a **determination** of anything and therefore it is insufficient on its face to trigger the Fraud Exclusion. App. at pp. 16-20. As a result, the Funds respectfully request this Court peremptorily reverse the Opinion or accept jurisdiction to resolve the conflict between the Opinion and controlling Michigan law concerning consent judgments. MCR 7.305(B)(5)(b).

C. EMC MAKES NO EFFORT TO EXPLAIN HOW THE OPINION IS CONSISTENT WITH CONTROLLING MICHIGAN POLICY CONSTRUCTION PRINCIPLES.

Controlling Michigan law required the Court of Appeals to give effect to all words and phrases in the EMC Policies, avoid interpreting the EMC Policies in a manner that would create illusory coverage, strictly construe the Fraud Exclusion, and interpret all ambiguities in favor of coverage. App. at pp. 20-25. The Opinion violated each and every one of these policy construction principles. *Id.* EMC makes no effort to counter the Funds’ argument. Response at pp. 13-30. The Funds respectfully request this Court peremptorily reverse the Opinion or accept jurisdiction to resolve the conflict between the Opinion and controlling Michigan law concerning the construction of insurance policies. MCR 7.305(B)(5)(b).

⁸ A party may be liable under the CUSA as an offeror **or** seller of a security, **or** as a result of materially assisting the offeror or seller in a prohibited sale. Conn Gen Stat Ann 36b-29. They can likewise incur liability by offering or selling a security by means of untrue statements of fact **or** any omission to state material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading. *Id.*

D. EMC HAS FAILED TO PROVIDE ANY AUTHORITY SUPPORTING THE APPLICATION OF THE FRAUD EXCLUSION TO THE FUNDS' NEGLIGENCE-BASED CUSA CLAIMS.

While it would not resolve the issues above, the Opinion might be more understandable if it was based on some sort of authority—regardless of jurisdiction—that had applied a fraud exclusion to negligence-based claims. But that is not the case. While there are many authorities holding that fraud/dishonestly exclusions **do not apply to negligence-based claims**, the Funds are not aware of so much as a single case—aside from the Opinion—going the other way. App. at pp. iii, 13-14, 24. The Funds basically invited EMC to try to find a case that would support the Opinion. *Id.* EMC apparently couldn't find one. Response at pp. 14-19. As a result, the Opinion is not just contrary to controlling Michigan law (as discussed above and in the Application), it is also contrary to the weight of authority from other jurisdictions. App. at pp. iii, 13-14, 24. The Funds respectfully request this Court peremptorily reverse the Opinion or accept jurisdiction to resolve the conflict between the Opinion and the weight of authority. MCR 7.305(B)(5)(b).

E. THE MERE POSSIBILITY OF AFFIRMATION ON OTHER GROUNDS DOES NOT JUSTIFY ALLOWING A DEMONSTRABLY INCORRECT PUBLISHED OPINION TO STAND AS BINDING PRECEDENT.

Unable to present any authority supporting the Opinion, EMC spends the majority of its Response arguing that the Funds' Application should be denied because—according to EMC—coverage is also barred by other policy exclusions the Court of Appeals declined to address. Response at pp. 19-30. In other words, EMC is arguing this Court should allow the published Opinion to stand as **binding precedent**—to the detriment of thousands of Michigan insureds—because EMC believes other exclusions **might** apply. The Funds do not agree with EMC. But there is neither room, nor reason to address such other exclusions here.

The basic premise behind EMC's argument is that if the Court likes the conclusion reached by the Court of Appeals, but believes their reasoning is flawed, then the Court may

affirm on other grounds. Response at pp. 19-30. But that is not a choice the Court has at this stage. The Funds have merely sought leave to appeal. The Court can either grant the Funds' application—in the form of leave to appeal or peremptory reversal—or deny it. MCR 7.305(H).

If the Funds' Application is denied, the Court cannot rewrite the published Opinion—it will become a binding and precedential decision of the Court of Appeals exactly how it is written. MCR 7.305(H)(3) (decision of Court of Appeals becomes “final adjudication and may be enforced in accordance with its terms” if leave to appeal is denied). Trial courts would then be bound to follow the Opinion—and its faulty reasoning—resulting in exactly the kind of collateral damage to thousands of Michigan insureds the Funds have expressed concern over. *Pellegrino*, 486 Mich at 353-54; App. at pp. ii-v, 8-16.

If, on the other hand, the Funds' Application is granted, the Court would then be in a position to affirm on other grounds if it was inclined to do so. But even then, the preferred approach would be to reverse the Opinion—thereby rectifying all the issues set forth in the Funds' Application and this Reply—and remand to the Court of Appeals to address the policy exclusions it declined to rule on in the Opinion. See, e.g. *Lasher v Mueller Brass Co*, 392 Mich 488, 499; 221 NW2d 289, 293 (1974).

These jurisprudential issues are merely compounded by the circumstances present here. In their briefing before the Court of Appeals, the Funds devoted nearly 20 pages to argument on the three exclusions not addressed in the Opinion. Exhibit B to App. (Appellants' Opening Brief) at pp. 13-15, 19-26; Exhibit J to App. (Appellants' Reply Brief) at pp. 1-7, 9-10. This Reply has a 10-page limitation, making it impossible for the Funds to fully address all the defects in the other exclusions. MCR 7.305(E); MCR 7.212(G). Moreover, common sense would suggest that the Court of Appeals likely based their Opinion on the Fraud Exclusion because they felt it was

EMC's strongest argument. Yet even EMC was unable to provide any authority to support the Opinion. By spending the majority of its Response addressing exclusions the Court of Appeals declined to address, the implication is that EMC believes those exclusions are stronger than the Fraud Exclusion. Under the circumstances, EMC's belief seems ill-founded. That said, if the Court is inclined to give any credence to EMC's arguments concerning other exclusions not addressed in the Opinion, the Funds refer the Court to their appellate briefing on those exclusions. Exhibit B to Application (Appellants' Opening Brief) at pp. 13-15, 19-26; Exhibit J to Application (Appellants' Reply Brief) at pp. 1-7, 9-10.

V. CONCLUSION

EMC's Response fails to address, let alone refute, the grounds for Appeal set forth in the Funds' Application. As such, Defendant-Appellant Funds respectfully request this Court peremptorily reverse the Opinion or, in the alternative, grant the Funds' Application for Leave to Appeal.

Respectfully submitted,

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Dated: March 2, 2016

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EMPLOYERS MUTUAL CASUALTY COMPANY

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HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity a successor in interest to Michael J. Witucki, a deceased individual,

Defendants/Counter-Plaintiffs,

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I electronically filed the foregoing **REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT AND CERTIFICATE OF SERVICE** with the Clerk of the Court using the ECF system which will send notification of same to:

Supreme Court
No. 152994

Court of Appeals
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Wayne County Circuit Court
Case No. 12-002767-CK

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EXHIBIT A

To

Reply In Support Of Application For Leave To Appeal By Defendant-Appellant

EMPLOYERS MUTUAL CASUALTY COMPANY PRIOR POLICY: 8K4-60-38
LINEBACKER PUBLIC OFFICIALS AND
EMPLOYMENT PRACTICES LIABILITY
DECLARATIONS

POLICY PERIOD: FROM 04/01/13 TO 04/01/14

* POLICY NUMBER *
* 8 K 4 - 6 0 - 3 8 ---14 *

N A M E D I N S U R E D P R O D U C E R

CITY OF HIAWATHA
701 OREGON ST
HIAWATHA KS 66434-2204

AGENCY BILL AGENT:
AGENT PHONE:

INSURED IS: MUNICIPAL BUSINESS DESCRIPTION: MUNICIPALITY

* THIS IS A CLAIMS MADE POLICY *
* PLEASE READ CAREFULLY *

L I M I T S O F L I A B I L I T Y	
EACH LOSS	\$ 500,000
AGGREGATE FOR EACH POLICY TERM	\$ 1,000,000
INSURED'S DEDUCTIBLE EACH CLAIM (INCLUDING DEFENSE EXPENSE)	\$ 2,500

RETROACTIVE DATE AND EXCESS EXTENDED REPORTING PERIOD:
THIS INSURANCE DOES NOT APPLY TO WRONGFUL ACTS WHICH OCCUR
BEFORE THE RETROACTIVE DATE SHOWN BELOW.
RETROACTIVE DATE: 04/01/88
AVAILABLE SUPPLEMENTAL EXTENDED REPORTING PERIOD: (UNLIMITED)

TOTAL ADVANCE PREMIUM \$

COVERAGE IS PROVIDED FOR BOARD AND ALL EMPLOYEES

(THE ADVANCE PREMIUM IS A MINIMUM PREMIUM FOR THE POLICY TERM)
A \$100 MINIMUM POLICY PREMIUM APPLIES
IF POLICY IS CANCELLED AFTER THE EFFECTIVE DATE

CONTINUED

LINEBACKER PUBLIC OFFICIAL'S AND EMPLOYMENT PRACTICES LIABILITY COVERAGE FORM

COVERAGES A AND B PROVIDE CLAIMS – MADE COVERAGE
PLEASE READ THE ENTIRE FORM CAREFULLY

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties, and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who is an Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

SECTION I – COVERAGES

1. Insuring Agreement Coverage A – Public Officials Liability and Coverage B – Employment Practices Liability

a. Public Officials Liability

We will pay for "defense expense(s)" and/or those sums that the insured becomes legally obligated to pay as "damages" because of a "public official's wrongful act" rendered in discharging duties on behalf of the insured named in the Declarations.

b. Employment Practices Liability

We will pay for "defense expense(s)" and/or those sums that the insured becomes legally obligated to pay as "damages" because of an "employment wrongful act" rendered in discharging duties on behalf of the insured named in the Declarations.

2. Coverage Activation

a. "Damages" are paid excess of the deductible stated in the Declarations provided that:

- (1) The "wrongful act" on which the claim is based occurs on or after the "retroactive date" shown in the Declarations and not after the end of the policy period; and
- (2) The claim is first made against any past, present or future insured:
 - (a) During the policy period, or
 - (b) If extended reporting period applies, during that period.

b. A claim will be deemed to have been made at the earliest of the following times:

- (1) When a claim is received by any insured;
- (2) When a claim is received by us; or
- (3) When you become aware of a "wrongful act" which may give rise to a claim being made against you. You must give prompt written notice to us of such circumstances no later than:
 - (a) The end of the policy period; or
 - (b) If the Basic Extended Reporting Period applies, the end of the Basic Extended Reporting Period.

c. This insurance does not apply to any claim arising out of any "wrongful act" that occurs prior to the effective date of this policy or prior to the first policy issued by us that is an uninterrupted renewal that was either:

- (1) The subject of any demand, claim or other proceeding which was initiated against the insured; or
- (2) Based upon facts and circumstances which would cause a reasonable person to believe a claim would be made and which was known to any insured.

d. All "wrongful acts" contained within the same claim shall be deemed one "wrongful act" and such related "wrongful acts" shall be deemed to occur at the time of the first "wrongful act".

3. Defense and "Defense Expenses"

a. With regard to any claim we defend:

- (1) "Defense expenses" are subject to the deductible, and
- (2) We shall have the right and duty to select counsel.
- (3) Our duty to pay "defense expenses" begins only after we are notified of a claim. Any previous expenses incurred are not covered and will not apply with respect to your deductible obligations.
- (4) Our obligation to pay further "defense expenses" ends after the first judgment has been entered except for appeals of such judgment made by the claimant.

(5) We do not have a duty to defend the insured against any claim, for "damages" or relief or redress in any form, to which this insurance does not apply.

b. We will provide defense and pay "damages" of any claim seeking monetary damages that are covered by this policy. With regard to these claims:

- (1) We shall pay "defense expenses" incurred in the defense of a covered claim, in addition to the applicable limit of liability.
- (2) We are not obligated to defend any claim or to pay any "defense expense" after our limit of liability has been exhausted by payment of "damages".
- (3) We will pay plaintiff/claimant attorney's fees/expenses, if awarded in satisfaction of a claim, subject to the policy's limits of liability. This provision plus any "damages" will not exceed the Each Loss limit of liability shown in the Declarations. You will be responsible for the deductible.

c. We will provide defense of claims to which this insurance applies that we have a duty to defend which are:

- (1) Not seeking monetary damages or not seeking monetary damages other than plaintiff/claimant attorney fees/expenses;
- (2) Seeking only injunctive or other non-monetary relief or redress; or
- (3) Seeking monetary "damages" that are not covered by this policy.
 - (a) "Defense expenses" paid in defense of these claims are within the policy's limits of liability. Our obligation to pay "defense expenses" ends when the limit of liability shown in the Declarations has been exhausted by the payment of "defense expenses".
 - (b) We will pay plaintiff/claimant attorney's fees/expenses, if awarded in satisfaction of a claim, subject to the policy's limits of liability. This provision plus any "defense expense" will not exceed the Each Loss limit of liability shown in the Declarations. You will be responsible for the deductible.

4. Supplementary Payments

- a. We will pay in addition to our limit of liability with respect to any claim we defend:
 - (1) All expenses we incur.
 - (2) The cost of bonds required of an insured to release attachments because of the claim, but only to the extent the bond amounts are within the applicable limit of insurance. We are not required to apply for or furnish any bonds.

(3) All costs taxed against an insured in the claim except for plaintiff/claimant attorney's fees/expenses.

(4) Pre-judgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any pre-judgment interest based on that period of time after the offer.

(5) Interest on the covered amount of any judgment which accrues after a judgment is entered. Our duty to pay interest ends when we pay, offer to pay, or deposit in court that part of the judgment that is within the applicable limit of insurance.

(6) Reasonable expenses an insured incurs at our request, other than loss of earnings. Such expenses do not include salaries of officials or "employees" of the insured.

5. Exclusions – Coverage A and Coverage B

Each of the following exclusions is an absolute exclusion with no duty to defend or pay "damages" unless otherwise indicated. If both an absolute exclusion and an exclusion with a duty to defend apply, coverage for "defense expenses" is excluded and we have no duty to defend.

This insurance does not apply to:

a. Abuse or Molestation

- (1) The actual or threatened abuse or molestation by anyone of any person; or
- (2) The negligent:
 - (a) Hiring;
 - (b) Employment;
 - (c) Investigation;
 - (d) Supervision;
 - (e) Reporting to the proper authorities, or failure to report; or
 - (f) Retention

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by (1) above.

This exclusion does not apply to the extent coverage is provided under Section I 1.b. – Employment Practices Liability.

b. "Bodily Injury", "Property Damage", or "Personal and Advertising Injury"

- (1) "Bodily injury";
- (2) "Property damage";
- (3) "Personal and advertising injury", applicable to Coverage A only.

c. Bonds or Taxes

- (1) Debt financing, including but not limited to bonds, notes, debentures, guarantees of debt; or any facts or representations in the process of procuring bonds;

- (2) Taxes, including without limitation, the formulation of tax rates, assessments, the collection of taxes and/or the disbursement of tax refunds.

We will defend a claim under 5.c., but will have no obligation to pay "damages".

d. Contractual Liability

- (1) Amounts actually or allegedly due under the terms of a contract;
- (2) Failure, refusal, or inability of the insured to enter into, renew or perform any contract or agreement. Exclusion 5.d. (2) applies to Coverage A only; or
- (3) The procurement of goods and/or services, including, but not limited to construction, architect, or engineering, contracts or agreements.

We will defend a claim under Exclusion 5.d., but will have no obligation to pay "damages".

e. Knowingly Wrongful Acts, Illegal Acts, Self-Dealing or Illegal Profit

- (1) Any criminal, malicious, fraudulent, knowingly wrongful, or dishonest act or omission. This exclusion shall not apply until it has been established that the insured did commit such "wrongful act".
- (2) Any "wrongful act" based upon or attributable to an insured gaining any personal profit or advantage to which an insured is not legally entitled.
- (3) The return of any remuneration paid to an insured if such payment is held to be in violation of the law.

f. Electromagnetic Fields

- (1) Any cost or expense arising out of, resulting from, caused or contributed to by, electromagnetic fields, provided that such injury or damage results from or is contributed to by the hazardous properties of electromagnetic fields;
- (2) The costs of abatement or mitigation of:
 - (a) Electromagnetic fields; or
 - (b) Exposure to electromagnetic fields;
- (3) Any supervision, instructions, recommendations, warning or advice given or which should have been given in connection with paragraphs (1) and (2) above; or
- (4) Any obligation to share damages with or repay someone else who must pay damages in connection with paragraphs (1), (2) or (3) above.

g. Expected or Provided Facilities, Products or Services

Any expense for facilities, products or services normally provided or expected, by anyone, to be provided by the insured. We will defend a claim under Exclusion 5.g., but will have no obligation to pay "damages".

h. Failure to Obtain and Maintain Insurance

The failure to obtain or maintain any insurance, bond, or self-insurance fund, or the failure to advise or counsel with respect to procuring, obtaining or maintaining of any insurance coverage, bond or self-insurance fund.

i. Federal, State or Local Laws

Any actual or alleged violation of the Fair Labor Standards Act (FLSA), Worker Adjustment and Retraining Notification Act (WARN), Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), or the Occupational Safety and Health Act (OSHA).

This exclusion also applies to any rules or regulations promulgated under any of the foregoing and amendments thereto or any similar provisions of any federal, state or local law, and to that part of any "damages" awarded for the cost or replacement of any insurance benefits due or alleged to be due to any current or former "employee".

j. Fiduciary Liability

Any obligation or duty imposed by:

- (1) The Employee Retirement Income Security Act (ERISA) of 1974, including subsequent amendments or similar federal, state or local law or regulation; or
- (2) "Administration" of any "employee benefit program" or self-insurance fund; or
- (3) Investment activities, including any actual or alleged violation of any state or federal securities law; or
- (4) Activities in any other fiduciary capacity.

k. Law Enforcement Activities

Any law enforcement activities to protect the public or property including the operation of adult or juvenile correctional or detention facilities or programs. This exclusion applies to Coverage A only.

l. Land Use

The direct or indirect operation of the principles of eminent domain, including but not limited to: adverse possession; taking of property; and condemnation or inverse condemnation proceedings.

However, we will defend a claim against the insured for exercising its zoning or permitting duties in a land use regulatory capacity, but we will not have any obligation to pay "damages".

m. Lead

- (1) Any cost or expense to abate, mitigate, remove or dispose of lead, lead compounds, or materials containing lead;
- (2) The actual, alleged or threatened expense arising out of, resulting from, caused by or contributed to by the toxic or pathological properties of lead, lead compounds or lead contained in any materials;

- (1) Twelve months starting when the Basic Extended Reporting Period, set forth in Paragraph 3. above ends; or
- (2) Sixty months starting when the Basic Extended Reporting Period, set forth in Paragraph 3. above ends.

(a) You must give us a written request for the endorsement within 60 days after the end of the policy period. The Supplemental Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

- i) The exposures insured;
 - ii) Previous types and amounts of insurance;
 - iii) Limits of Insurance available under this Coverage Part for future payment of damages; and
 - iv) Other related factors.
- (b) The additional premium will be:
- i) Ninety percent (90%) of the annual premium for this Coverage Part when the twelve month option is chosen; or
 - ii) Two hundred percent (200%) of the annual premium for this Coverage Part when the sixty month option is chosen.

This endorsement shall set forth the terms, not inconsistent with this Section, applicable to the Supplemental Extended Reporting Period.

(c) If the Supplemental Extended Reporting Period is in effect, we will provide the Supplemental Aggregate Limit of Insurance, as indicated in the Supplemental Extended Reporting Period Endorsement, but only for claims first received and recorded during the Supplemental Extended Reporting Period. For those claims first received during the Supplemental Extended Reporting Period, coverage is excess over any other valid and collectible insurance available under policies in force after the Supplemental Extended Reporting Period starts.

SECTION VI – DEFINITIONS

1. **“Administration”** means:
 - a. Giving counsel to “employees” with respect to “employee benefit programs”;
 - b. Interpreting “employee benefit programs”;
 - c. Handling of records in connection with “employee benefit programs”; and
 - d. Effecting enrollment of “employees” under “employee benefit programs”.
2. **“Advertisement”** means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are broadcast or published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
3. **“Bodily injury”** means “bodily injury”, sickness or disease sustained by a person, including death resulting from any of these at any time. “Bodily injury” does not include mental anguish that results from an “employment wrongful act”.
4. **“Damages”** means those amounts that the insured becomes legally obligated to pay for claims arising out of a “wrongful act” to which this insurance applies. “Damages” does not include:
 - a. Fines or penalties imposed by law;
 - b. Salaries of your “employees” and office expenses incurred by you; or
 - c. Judgments, or awards arising out of matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.
5. **“Defense expenses”** are sums payable to others for investigation, litigation, negotiation, or settlement of any claim which we deem expedient. “Defense expenses” do not include our own internal company claim adjustment expenses, or any plaintiff/claimant attorney’s fee/expenses.
6. **“Employee”** means an individual whose labor or service is engaged by and directed by the insured or a member of the “organization.” This includes part-time, seasonal and temporary employees as well as any individual employed in a supervisory or managerial position. But “employee” does not include an independent contractor or any “employees” of any independent contractor, “leased worker”, or “temporary worker”.

7. **"Employee benefit programs"** means:
- Group life insurance, group accident or health insurance, investment plans or savings plans, profit sharing plans, pension plans and stock subscription plans, provided that no one other than an "employee" of the insured may subscribe to such insurance or plans; and
 - Unemployment insurance, social security benefits, worker's compensation and disability benefits.
8. **"Leased worker"** means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
9. **"Organization"** means the entity named in the Declarations as the Named Insured.
10. **"Personal and advertising injury"** means injury, other than "bodily injury", arising out of one or more of the following offenses:
- False arrest, detention or imprisonment;
 - Malicious prosecution;
 - Wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - The use of another's advertising idea in your "advertisement"; or
 - Infringing upon another's copyright, trade dress or slogan in your "advertisement".
11. **"Professional services"** means anyone employed or serving in any of the following professions while performing their duties as such:
- The practice of medicine, including, but not limited to, physician, surgeon, osteopath, chiropractor, anesthesiologist, dentist, psychiatrist, psychologist, nurse, or pharmacist; and
 - The practice of law, including but not limited to, the judiciary.
- "Professional services" shall not include a response to an official call to duty for emergency services by an "organization's" fire, ambulance or rescue facility.
12. **"Property damage"** means:
- Physical injury to tangible property, including all resulting loss of use of that property; and

- Loss of use of tangible property that is not physically injured.
13. **"Retroactive date"** means the date specified in the Declarations. Those "wrongful acts" that occur prior to the "retroactive date" are not covered by this policy.
14. **"Temporary worker"** means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
15. **"Volunteer"** means any person whose services are uncompensated and whose activities are directed and supervised by, and for the benefit of the "organization".
16. **"Wrongful act"** includes any of the following:
- "Employment wrongful act"** means any of the following actual or alleged practices directed against any of your "employees", "leased workers", "temporary workers", former "employees", or any applicant for employment with you and for which remedy is sought under any federal, state or local statutory or common civil employment law:
 - Wrongful refusal to employ an applicant for employment;
 - Wrongful failure to promote an "employee", wrongful deprivation of career opportunity; or wrongful failure to grant tenure;
 - Wrongful: demotion, retaliation, evaluation, supervision, reassignment, or discipline;
 - Wrongful termination of employment, including retaliatory or constructive discharge;
 - Employment related misrepresentation;
 - Sexual harassment or workplace harassment;
 - Any employment related coercion discrimination, or humiliation, as a consequence of race, color, creed, national origin, marital status, medical condition, gender, age, physical and or mental impairments, pregnancy, sexual orientation or preference or other status that is protected pursuant to any applicable federal, state, or local employment ordinance or statute; or
 - Employment-related libel, slander, defamation, or invasion of privacy.
 - "Public official's wrongful act"** shall mean any of the following:
 - Actual or alleged errors;
 - Misstatement or misleading statement;
 - Act, omission, neglect, or breach of duty by an insured in the discharge of "organizational" duties. "Public Officials Wrongful Act(s)" does not include an "employment wrongful act".