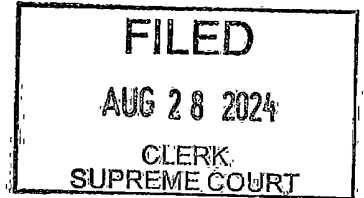


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COMMONWEALTH OF KENTUCKY
SUPREME COURT,
CASE No. 2023-SC-0497



Commonwealth of Kentucky
Court of Appeals Case Nos. 2022-CA-0384-MR and 2022-CA-0415-MR
On Appeal from Campbell Circuit Court
Honorable Julie Reinhardt Ward, Judge
Action No. 20-CI-00489

JEREL COLEMON,
Administrator and Personal Representative
for the Estate of William Virgil

APPELLANT

v.

WESTPORT INSURANCE COMPANY,
As successor to Coregis Insurance Company

APPELLEE

REPLY BRIEF OF APPELLANT, THE ESTATE OF WILLIAM VIRGIL

Respectfully submitted,

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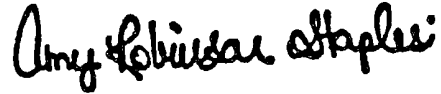
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Appellant, The Estate of William Virgil was served via Federal Express, overnight courier, this 26th day of August, 2024, upon the following: Office of the Clerk, Kentucky Supreme Court, 700 Capital Avenue, Room 235, Frankfort, KY 40601; Office of the Clerk, Kentucky Court of Appeals, 669 Chamberlin Ave., Suite B, Frankfort, KY 40601; and via U.S. mail, postage prepaid, on: Adam H. Fleischer & Kevin F. Harris, BatesCarey LLP, 191 N. Wacker, Ste. 2400, Chicago, IL 60606; William B. Orberon and Ryan D. Nafziger, Phillips Parker Orberon & Arnett, PLC, 716 W. Main St., Ste. 300, Louisville, KY 40202; Jason C. Kuhlman, the Law Office of Jason C. Kuhlman, PLLC, P.O. Box 17216, Fort Mitchell, KY 41017, Jeffrey C. Mando, Adams Law, PLLC, 40 West Pike St., Covington, KY 41011; Timothy Sturgill, Kentucky Association of Counties, 400 Englewood Drive, Frankfort, KY 40601; Andrew-John R. Bokeno, Wilson Elser Moskowitz Edelman & Dicker, 100 Mallard Creek Rd., Suite 250, Louisville, KY 40207; Robert A. Button, Turner, Keal & Button, PLLC, 10624 Meeting Street, Suite 101, Prospect, KY 40059; Kristie Walker, Assistant Jefferson County Attorney, First Trust Centre, 200 S. Fifth Street, Suite 300N, Louisville, KY 40202.



Amy Robinson Staples

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Appellant replies to Westport's 8/9/2024 Response Brief ("R.Br.") as follows:

ARGUMENT

I. There is no "dispositive difference" between the St. Paul Policies (eff. 2007-2011) and the Westport Policies (eff. 1997-2000).

In her Opening Brief ("Br."), Appellant shows that insurance policies must be construed according to their plain and ordinary terms and—as such—the Sixth Circuit in *Newport I* correctly concluded that Virgil's Federal Lawsuit alleged injury which "happened" during LEL policies effective from 2007 to 2011 (the "St. Paul Policies"). Br. at pp. 21-22.¹ In its Response Brief ("R.Br."), Westport concedes that *Newport I* was correctly decided. R.Br. at pp 1-2 (the St. Paul Policies were "applied exactly as written"). Instead, Westport argues that the St. Paul Policies are "dispositively different" principally because the Westport Policies use the word "**occurs**"² whereas the St. Paul Policies uses the word "**happens**."³ More granularly, Westport argues that the (undefined) word "occurs" really means "to commence" in that it only "refer[s] to the date the 'personal injury' offense caused the injury to come into existence." R.Br. at 6-7. But this argument is specious for many reasons.

First, there is no difference (much less a "dispositive difference") between the word "**happens**" and the word "**occurs**." In fact, the dictionary definition of the term "to

¹ Citing *St. Paul Guardian Ins. Co. v. City of Newport, KY* ("*Newport I*"), 804 F. App'x 379, 382-83 (6th Cir. 2020).

² The Westport insuring agreements provide as follows: "This insurance applies to 'bodily injury,' 'property damage,' or 'personal injury' only if: ... (2) The 'bodily injury,' 'property damage' or 'personal injury' **occurs** during the policy period."

³ The St. Paul insuring agreements provide as follows: "We'll pay amounts any protected person is legally required to pay as damages for covered injury or damage that:...**happens** while this agreement is in effect...." *Newport I*, 804 Fed. Appx. at 381.

occur” means “to *happen*,”⁴ and the foremost synonym for “to occur” is “to happen” (and vice versa).⁵ Moreover, the Policies are elsewhere clear that “occurs” (or “occurrence”) refers to continuous or repeated injuries or events, not merely their commencement. *See, e.g.*, 1999-2000 Policy, Br. Appx G,⁶ at p. 26, ¶ J (excluding “[o]bvious continuous or repeated seepage or leakage of water or steam ... which *occurs* over a period of 14 days or more....”); 1997-1998 Policy, Br. Appx E, at p. 14, ¶ 9 (“occurrence” encompasses “continuous or repeated exposure to substantially the same general harmful conditions”). Indeed, the Westport Policies utilize “to commence” (not “to occur”) for instances where coverage is limited to when injury or damage “first comes into existence.” *See, e.g.*, 1999-2000 Policy, Br. Appx G, at p. 27, ¶ K.1 (“We will pay for loss or damage...which *commences* during the Policy Period...”).

Further, Westport’s entire argument glosses over the fact that “personal injury” is defined as “injury...*arising out of*” an offense—which means that resulting “injury” is distinct than the offense itself. *See Newport I*, 804 F. App’x at 383 (“[B]y the plain terms of the LEL Provision, covered personal injuries include any injuries *caused* by the wrongful act—malicious prosecution. Malicious prosecution cannot, therefore, *be* the injury.”). And under Kentucky insurance law, the phrase “*arising out of*” (as used in the Westport Policies) is even more expansive than “*caused by*” (as used in the St. Paul Policies). *Hugenberg v. W. Am. Ins. Co./Ohio Cas. Grp.*, 249 S.W.3d 174, 186 (Ky. App.

⁴ OCCUR, WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/occur> (last visited August 21, 2024).

⁵ OCCUR and HAPPEN, WEBSTER THESAURUS at www.merriam-webster.com/thesaurus (last visited August 21, 2023).

⁶ “Br. Appx __” refers to the Appendix affixed to the Opening Brief.

2006) (the terms “arising out of” “are broad, general and comprehensive terms meaning ‘originating from,’ or ‘having its origin in,’ ‘growing out of’ or ‘flowing from’....”).

Here, there is no dispute that injuries sustained by Virgil during the Westport policy periods is “causally connected” to his malicious prosecution.

II. Kentucky caselaw distinguishing “legal injury” from “damage, hurt, loss, or harm sustained” does not alter fundamental rules of contract construction.

While purporting to disclaim the application of any “majority rule” on the one hand, Westport boldly asserts on the other that there is an immutable rule under Kentucky law that “personal injury” coverage only covers the “legal injury” associated with an enumerated tort such that the “‘personal injury’ that triggers coverage is that which came into existence at the time of the offense committed against the claimant.” R.Br. 7-10. In reality, there is not a *single* Kentucky case supporting such a blanket rule. Indeed, it appears the lone Kentucky case addressing the term “personal injury” in an insurance context is *Sonitrol of Lexington, Inc. v. Gen. Star Indem. Co.*, No. 2008-CA-000724-MR, 2010 WL 743785, at *3 (Ky. Ct. App. Mar. 5, 2010) (unpublished), where the Court of Appeals found that “personal injury” referred to “mental injury, anguish or shock which arises out of” an offense, not the commission of the offense itself.⁷

Because no Kentucky case supports its position, Westport mixes together a hodgepodge of inapposite, non-insurance cases addressing, *e.g.*, when the statute of limitations (“SOL”) accrues for sexual molestation, abuse of process, and discrimination/retaliation⁸; a case discussing whether a “temporary flare-up of

⁷ Pursuant to RAP 41(A)(4), this Opinion is not binding authority.

⁸ See generally R.Br. at pp. 6-10, citing: *Roman Cath. Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998) (addressing when sexual abuse claim accrues); *DeMoisey v. Ostermiller*, No. 2014-CA-001827-MR, 2016 WL 2609321 (Ky. App.

symptoms” constituted “injury” under a worker’s compensation statute specifically defining “injury” as a “work-related traumatic event”⁹; a 93-year-old case discussing whether destruction of a hotel was an “injury to real property” within the meaning of section 62 of the Civil Code of Practice¹⁰; and a 97-year-old case identifying a list of numerous post-conviction injuries that are compensable in malicious prosecution cases.¹¹

But these non-insurance cases have no impact on how Kentucky courts construe private contracts. Nor do any of these cases alter the reality that the undefined phrase “injury...other than bodily injury”—under both an “ordinary meaning” construction and a close textual reading—clearly refers to nonbodily injuries resulting from an offense (not just the “legal injury” or the offense itself). *See* Br. at pp.14-17. Stated differently, the (unremarkable) fact that Kentucky caselaw differentiates “legal injury” associated with a particular tort from “resulting harm, suffering, or damages” has no bearing on whether said resulting harm constitutes “injury...other than bodily injury” under fundamental principles of contract interpretation. It is precisely this reason that every modern decision (including *Newport I*) has held that wrongful imprisonment and emotional and dignitary harms *do* constitute “personal injuries.” *See* Br. at pp.19-23.

III. Westport’s “national insurance cases” are stale and based on an alleged “majority rule” which Westport itself concedes no longer exists.

In her Opening Brief, Appellant shows the alleged “majority rule” articulated by

May 6, 2016) (addressing when abuse of process claim accrues); *Walker v. Commonwealth*, 503 S.W.3d 165 (Ky. App. 2016) (“An action for discrimination or retaliation accrues on the date the act of discrimination or retaliation occurs.”).

⁹ R.Br. at pp.7, citing *Robertson v. United Parcel Serv.*, 64 S.W.3d 284 (Ky. 2001).

¹⁰ R.Br. at pp.7-10, citing *Combs v. Hargis Bank & Tr. Co.*, 27 S.W.2d 955 (Ky. 1930).

¹¹ R.Br. at pp.7-10, citing *H.S. Leyman Co. v. Short*, 283 S.W. 96 (Ky. 1926).

the COA—that “commencement of a malicious prosecution is the event that triggers insurance coverage”—has been squarely rejected by every modern decision across the country over the past decade. Br. at pp. 17-23. In Response, Westport concedes there is no applicable “majority rule.” R.Br. at pp. 3-5. As Westport explains, the so-called “majority rule” is a misnomer as it was formulated to address an issue not in dispute in this case—specifically, whether the tort of malicious prosecution occurs at the time of (1) the commencement of the prosecution or (2) at the time of favorable termination. *Id.*

This concession dooms Westport as its cited “national insurance cases”¹² involve application—or rather *misapplication*—of the so-called “majority rule.” For example, *Werner* involved whether the “operative event triggering Royal's liability is the termination of the securities fraud action in Cohen's favor” (*Werner*, 784 F. Supp. at 691)—which is a “totally different dispute” according to Westport. R.Br. at p.4. And in *Genesis*, the wholesale denial of coverage by the *Genesis* Court—based on the alleged “*majority view* that ‘the tort of malicious prosecution occurs for insurance coverage purposes ... when the underlying criminal charges are filed’” (*Genesis*, 677 F.3d at 814)—was a misapplication of the “majority rule” in the first instance (a point Westport now concedes). Similarly, Westport’s favorite case (*Harrisburg*)—a nearly two-decades old unpublished district case from the Middle District of Pennsylvania—was based on a combination of “the *majority rule* that the tort of malicious prosecution occurs when the underlying criminal charges are filed against a defendant” (*Harrisburg* at *9) and

¹² See R.Br. at pp. 10-14, citing: *Coregis Ins. Co. v. City of Harrisburg* (“*Harrisburg*”), No. 1:03-CV-920, 2006 WL 860710 (M.D. Pa. Mar. 30, 2006); *Genesis Ins. Co. v. City of Council Bluffs* (“*Genesis*”), 677 F.3d 806 (8th Cir. 2012); and *Royal Indem. Co. v. Werner* (“*Werner*”), 784 F. Supp. 690 (E.D. Mo.), *aff'd*, 979 F.2d 1299 (8th Cir. 1992)

Pennsylvania’s judicially-created “first manifestation” rule that has never been adopted in Kentucky. Ultimately, every decision in the past decade has ruled that LEL personal injury coverage is triggered by wrongful imprisonment and resultant emotional and dignitary harms “arising out of” the offense of malicious prosecution,¹³ and Westport’s cited cases are as stale as its argument that “‘personal injury’ only ‘occurs’ at the time when the enumerated offense is committed against the claimant.”

Finally, the Appleman’s Chapter (drafted more than a decade ago) is also outdated.¹⁴ Nevertheless, the Chapter as it exists now does not help Westport. First, the language examined in § 33.03 [ii] *specifically defines “personal injury” as the offense itself*—e.g., “‘personal injury’ means (b) malicious prosecution.” See Appx 1 (red

¹³ See, e.g., *Newport I*, 804 F. App’x at 385 (“wrongful imprisonment and the resultant physical and dignitary harms that accompany such confinement” are “*injuries*...covered by the policy language as that language would be used and understood by the common person”); *Ferguson v. St. Paul Fire & Marine Ins. Co.*, 597 S.W.3d 249, 259 (Mo. Ct. App. 2019) (“[A]t a minimum, Ferguson sustained the loss of liberty, loss of time, and deprivation of society each day of his incarceration and the district court divided the damages related to the year in which they were sustained. Therefore, we conclude that Ferguson met his burden to demonstrate the Insurers have a duty to indemnify Columbia for Ferguson’s *personal injuries*”); April 28, 2021 Amended Order in *City of Elkhart v. National Cas. Co., et al.* (“*Elkhart II*”), Case No. 20D02-1711-PL-000259 (Indiana Superior Ct. 2020) at pp. 34-35, Br. Appx I (“The Court agrees with Elkhart that [underlying claimant] Cooper’s allegations have triggered the St. Paul policies because Cooper alleges he suffered bodily *and personal injury* that happened during the St. Paul policy periods. ... He also seeks damages *for personal injury* due to false imprisonment and violation of his civil rights, and this injury continued to take place from before the St. Paul policies commenced to their expiration.”); July 28, 2021 Mem. and Order in *Idaho Counties Risk Management Program Underwriters v. City of Idaho Falls, et al.*, Case No. CV10-20-6658 (Idaho Dist. Ct. 2020) at p. 6, Br. Appx J (“Thus, under Section C, the policy provides coverage to the City for all damages it is obligated to pay *for such personal injuries arising during the Policy Period, regardless of when the personal injuries first occurred.*”) (emphases added).

¹⁴ Because Westport’s version of the Chapter misses the last page, Appellant attaches a more complete version hereto as Appx 1. An updated version of this Chapter is currently expected for publication in Appleman’s winter issue.

highlighting). This language is materially different than Westport's which define "personal injury" as "injury, other than 'bodily injury,' arising out of [an offense]." This means, unlike the studied language in Appleman's, the offenses listed in the Westport Policies cannot "be the injury." *Newport I*, 804 F. App'x at 383. Moreover, Westport simply ignores the author's ultimate conclusion multiple years of personal injury coverage may be implicated by a given claim. See Appx 1 (green highlighting).


IV. KALF's *Amicus Brief* is based on false premises.

The Kentucky Association of Counties All Lines Fund ("KALF") has filed an *amicus brief* alleging that if the Court rules in Appellant's favor, then (1) malicious prosecution claims "would trigger every insurance contract" issued by KALF between conviction and exoneration, "implicate the limits of each such contract," and threaten KALF's "financial stability" and (2) KALF would have no ability to "gauge and control" its risk. But both of these are false premises as evidenced by KALF's coverage contracts themselves (which are triggered by the "commitment of a tort during the Coverage Period."). See, e.g., KALF exemplar coverage contract, attached as Appx. 2, p. 4. As such, any ruling on Westport's coverage obligations has zero impact on KALF's "financial stability." Moreover, KALF's own coverage contracts demonstrate how easy it is for a carrier to "gauge and control" risk through underwriting, including through the use of exclusions. See, e.g., *Kentucky Ass'n of Ctys. All Lines Fund Tr. v. McClendon*, 157 S.W.3d 626 (Ky. 2005) (upholding KALF's decision not to defend or indemnify magistrate judges based on intentional act exclusion in coverage contracts).

CONCLUSION

For the foregoing reasons, and those set forth in the Opening Brief, Appellant respectfully request the Court REVERSE the trial court's March 8, 2022 Order.

Respectfully submitted,



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APPENDIX

APPENDIX INDEX

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1	<i>Appleman's</i> , § 33.03 [1][a][i] and [ii]
2	Kentucky Association of Counties All Lines Fund exemplar coverage contract

APPX 1

Appleman's, § 33.03 [1][a][i] and [ii]

4 New Appleman on Insurance Law Library Edition § 33.03

New Appleman on Insurance Law Library Edition > NEWAPL Volume 4—Specific Types of Liability Insurance > Chapter 33 LAW ENFORCEMENT LIABILITY INSURANCE

Author

William G. Beck, Ian Hale, Sarah E. Millin and Jennifer M. McAdam*

§ 33.03 LEL Policies Are Different From CGL Policies, Intended to Insure Against the Specific Risks Faced by Law Enforcement Officers

[1] Coverage Provisions in LEL Policies Can Be Unique

(a) The Majority of LEL Policies Contain One of Two Types of Insuring Agreement

(i) True Act-Based Insuring Agreement Merely Requires an Act During the Policy Period to Invoke Coverage

The insuring agreement of a Law Enforcement Liability (LEL) policy will generally require either the causal act or the resultant injury to happen during the policy period to invoke coverage, but not both. Moreover, most true act-and injury-based insuring agreements in LEL policies do not directly tether the act or injury to an “occurrence” or “accident,” as typical CGL policies do. As a practical matter, this means that coverage under most LEL policies may be easier to invoke than coverage under a CGL policy, especially CGL policies that purport to require both the “occurrence” or “accident” and an injury during the policy period.

Many LEL policies contain what can be termed an act-based insuring agreement. Under a policy with an act-based insuring agreement, the material requirement to invoke coverage is the allegation or existence of one of the policy's defined or enumerated “acts” during the policy period.¹ When the

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The authors thank Jordan Bergsten and Amanda Sisney for their contributions to this chapter, and would also like to thank the attorneys at Neufeld Scheck & Brustin LLP for their many contributions to the authors' understanding of this developing area of insurance law.

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¹ Consider *USIA—Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988 (S.D. Iowa 2010), *aff'd*, *Genesis Ins. Co. v. City of Council Bluffs* 677 F.3d 806 (8th Cir. 2012) (alleged misconduct—fabricating evidence and coaching or coercing witnesses into giving perjured testimony—took place well before beginning of policy period and instances of purported wrongful conduct cited by insureds at best only raised vague, “metaphysical doubt” as to material facts; even assuming existence of act of

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~~resultant injury happened or is deemed to have happened—during or after the policy period—has no bearing on coverage analysis under true act-based insuring agreements.~~

A typical example of an act-based insuring agreement will read:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any “wrongful act” that results in personal injury to which this policy applies. ...

This insurance applies only to “wrongful acts” that occur ... *during the policy period* ... ²

“Wrongful Act” means any actual or alleged event, act, error or omission, neglect or breach of duty, misstatement, or misleading statement.

Thus, under act-based insuring agreements, the only coverage condition with a temporal limitation is the “act” element, and the primary focus of any coverage inquiry is the existence of one of the defined or enumerated acts during the policy period.

LEL policies that contain act-based insuring agreements give rise to somewhat different scope of coverage and related coverage considerations than CGL policies, or even LEL policies with injury-based insuring agreements.

For example, the defined or enumerated acts covered are generally very broad, such as “any event, act or omission. ...” This means there is generally less concern over whether the act complained of will fall within the coverage provisions set forth in the insuring agreement, though it is of course still important to know the specific acts listed as covered in a policy.

~~More salient, however, is the related fact that policies insuring against the act that caused an injury are recognized as providing broader coverage than policies insuring against an “occurrence” or “accident” giving rise to an injury.³ In situations where multiple or serial acts lead to an injury, and the multiple or serial acts occur within the period of two successive insurance policies, some courts interpreting occurrence or accident-based insuring agreements (in CGL policies) have held that the occurrence or accident is not deemed to occur until the claimant is injured, thereby limiting coverage to a single policy.⁴ Policies that insure against the act, by contrast, should not face such interpretive limitations.~~

affirmative tortious conduct during policy period, that conduct could not constitute “wrongful act” unless it resulted in injury and underlying claimants did not specifically allege they were injured by any wrongful conduct during policy period).

See also US/MS—Travelers Indem Co v Forrest Cty., No. 2:14-CV-22-KS-MTP, 2017 U.S. Dist. LEXIS 217767 (S.D. Miss. Mar. 30, 2017) (in a civil rights case dealing with liability insurance, the lower court had previously held that a failure to come forward during the applicable policy period and rectify civil rights violations that occurred before the policy period, did not trigger coverage under an occurrence policy because plaintiffs did not allege specific actions or omissions during the policy period; thus the insurer had no duty to defend. Here, the plaintiffs alleged injuries caused by the sheriff defendants in the performance of law enforcement duties, during the LEL policy period. The plaintiffs alleged false imprisonment and wrongful acts surrounding the criminal investigation, prosecutions, and parole. Here, the court felt the plaintiffs stated a claim that was reasonable within the policy coverage, and thus triggered the insurer’s duty to defend).

Compare St. Paul Fire & Marine Ins. Co v City of Waukegan, 2017 IL App (2d) 160381, 82 N.E.3d 823 (discussing Travelers Indem. Co.: “this holding is at odds with Illinois law and is therefore not instructive or relevant. Mere incarceration is not a triggering event under Illinois law.” St. Paul held that insurance coverage is triggered at the commencement of malicious prosecution).

² Cf. MO—Ferguson v. St. Paul Fire & Marine Ins. Co., No. WD 82090, 2019 Mo. App. LEXIS 1944, reh’g denied (Jan. 23, 2020) (LEL policy provided coverage for injuries sustained during the policy period even though the wrongful acts may have occurred before policy commencement, a covered injury ... “happens while this agreement is in effect”).

³ MA—Hernandez v Scottsdale Ins. Co., 26 Mass. L. Rep. 15 (Mass. Super. Ct. 2009) (finding that “Only specific policy language will trigger coverage based on the wrongful acts of the insured”).

⁴ See, e.g.:

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(ii) True Injury-Based Insuring Agreements Merely Requires an Injury During the Policy Period to Invoke Coverage

Many LEL policies contain what can be termed an injury-based Insuring Agreement. Under an injury-based insuring agreement, the material requirement to invoke coverage is the allegation of existence of one of the policy's defined or enumerated "injuries" during the policy period. Whether or not the causal act or acts that gave rise to the injury occurred during the policy period is irrelevant to the coverage analysis undertaken with a true injury-based insuring agreement.

The operative language of injury-based insuring agreements in LEL policies may appear to come in two entirely different varieties. However, while these two ostensibly different varieties of insuring agreements employ different terms and structures, closer analysis reveals that there is little to no practical difference in their application.

In the first variety, the insuring agreement's material requirement to invoke coverage is phrased directly in terms of the existence of an "injury" or "personal injury" during the policy period. A typical example of such an insuring agreement reads:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act, error, omission, neglect or breach of duty that results in "personal injury" to which this policy applies. ...

This policy applies only to "personal injury" ... that occurs during the policy period.

"Personal Injury" means any or all of the following:

- (a) false arrest;
- (b) malicious prosecution;
- (c) false imprisonment;
- (d) deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or the State;
- (e) humiliation or mental distress; ...

Under an LEL policy that contains this variety of insuring agreement, it is clear that the only material requirement to invoke coverage is the happening of an enumerated "injury" during the policy period.⁶ Again, when the causal act, error, omission, neglect or breach of duty or other enumerated "act" happened is wholly irrelevant in determining whether the policy is invoked.

In the second variety, the insuring agreement's material requirement to invoke coverage is actually phrased in terms of the happening of an "offense" during the policy period.⁷ A typical example of such an insuring agreement reads:

US—*Baylor Heating & Air Conditioning, Inc. v. Federated Mut. Ins. Co.*, 987 F.2d 415, 418 (7th Cir 1993) (applying Indiana law);

ID—*Millers Mutual Fire Ins. Co. v. Ed Bailey, Inc.*, 647 P.2d 1249, 1251 (Idaho 1982);

IL—*Great American Ins. Co. v. Tinley Park Recreation Comm'n.*, 259 N.E.2d 867 (Ill. App. Ct. 1970).

⁶ US/MS—*Travelers Indem. Co. v. Forrest Cty.*, No. 2:14-CV-22-KS-MTP, 2017 U.S. Dist. LEXIS 217767 (S.D. Miss. Mar. 30, 2017);

LA—*Doucet v. Darwin Select Ins. Co.*, 2017 La. LEXIS 271 (Feb. 3, 2017).

⁶ This second variety of Insuring Agreement employs the same structure that many modern CGL policies employ for Coverage B—Personal Injury coverage. See ISO Commercial General Liability Coverage Form CG 00 01 12 07, Section I—Coverages, Insurance Services Office, Inc., 2006.

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4 New Appleman on Insurance Law Library Edition § 33.03

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act, error, omission, or breach of duty that results in "personal injury" to which this policy applies. ...

This insurance applies to "personal injury" *only if caused by an offense committed ... during the policy period.* ...

"Personal Injury" means any injury arising out of one or more of the following offenses:

- (a) false arrest;
- (b) malicious prosecution;
- (c) false imprisonment;
- (d) deprivation of any rights, privileges or immunities secured by the Constitution and Laws of the United States of America or the State;
- (e) humiliation or mental distress; ...

this second variety of injury-based insuring agreements defines "offense" in the exact way the first variety defines "injury," and while the second variety may seem to contain a separate "injury" requirement in addition to the "offense" requirement, there is no separate definition of this "injury," nor is there a requirement that this "injury" happen during the policy period. Stated another way, the "offense" can, in most circumstances, simply be viewed as the "injury" for all practical purposes under this second variety of insuring agreement.

Thus, there is no analytical difference between the two varieties of injury-based insuring agreements, and both merely require the happening of one of the enumerated injuries during the policy period to invoke coverage, regardless of when the causal act happened.

✘ Expert Insight:

The injuries or offenses enumerated within LEL policies will vary. As with policies containing act-based Insuring Agreements, it is important to be aware of the particular injuries or offenses listed within the particular policy being analyzed, as these will determine the scope of coverage afforded by the policy and, ultimately, whether the allegations, facts and claims asserted fall within that scope of coverage.

Most LEL policies with true act-based Insuring Agreements cover, *separately*, false arrest, malicious prosecution, and false imprisonment, and the majority cover, *separately*, violations of civil rights and humiliation and mental distress. Notably, the first three of these "injuries" arise sequentially in innocence cases: first the individual is arrested, then prosecuted, then imprisoned. (This, viewed in

⁷ See US/MS—Travelers Indem. Co. v. Forrest Cty., No. 2:14-CV-22-KS-MTP, 2016 U.S. Dist. LEXIS 93046 (S.D. Miss. July 18, 2016) (for an umbrella policy, court found language unambiguous that covered "bodily injury that occurs during the policy period and is caused by an occurrence ... defined as an accident." Since the bodily injuries were not alleged to have happened by accident, the injuries were not covered under the policy).

cf. subsequent holding Travelers Indem. Co. v. Forrest Cty., No. 2:14-CV-22-KS-MTP, 2017 U.S. Dist. LEXIS 217767 *20-22 (S.D. Miss. Mar. 30, 2017) (LEL Policy at issue covered personal injury only where "such offense is committed during the policy period" which insurer claimed meant that the alleged wrongful act must occur during the policy period—rather than the actual injury. Further, in the personal injury definition there was a requirement that the injury be committed during the coverage period. Court interpreted ambiguity against the insurer, found stated claim fell within policy coverage and insurer had a duty to defend);

see Nationwide Mut. Ins. Co. v. Lake Caroline, Inc., 515 F.3d 414 (5th Cir. 2008) (applying rules of Mississippi contract construction, notably that ambiguity is interpreted against the insurer)

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conjunction with the fact that LEL policies are written to insure law enforcement against the very risk represented by an innocence case, suggests that policies covering multiple years may be implicated.

[b] Some Outlier LEL Policies Contain Different Insuring Agreements That May Have Other Requirements to Invoke Coverage

While the majority of LEL policies appear to have either an injury-based or an act-based insuring agreement, there are some outlier LEL policies that contain different—and sometimes substantially different—insuring agreements. There is a wide range of nonstandard coverage language that can appear in such policies, and a commonsense, literal reading is recommended when analyzing such language in an attempt to determine the scope of coverage provided.

The two most common outlier insuring agreements contain (1) language that requires both an act and injury during the policy period to invoke coverage, or (2) language similar to that used in the occurrence-based insuring agreements found in some CGL policies.

Expert Insight:

LEL policies that contain an insuring agreement that requires both an act and an injury during the policy period to invoke coverage are much more restrictive. These policies will also necessitate much more analysis, both in determining the scope of coverage afforded, and in determining whether the specific claims being asserted fall within that coverage.

LEL policies that employ language similar to that used in the occurrence-based insuring agreements in some CGL policies may purport to require that the act or injury arise out of an “accident,” while at the same time purporting to cover intentional torts such as false arrest, malicious prosecution, and false imprisonment.⁸ In the CGL context, “courts are split as to whether the requirement for an occurrence, that the injury be expected or intended by the insured, is inconsistent with the nature of personal injury/advertising injury coverage, thereby making the occurrence requirement unenforceable.”⁹

A small minority of courts have tried to harmonize the personal injury provisions with the definition of “occurrence” by focusing on definition of “accident” as “an unexpected injury-causing event.”¹⁰ These courts rationalize that “coverage is afforded under the policy for the personal injuries defined when either the external cause or the resulting injury was unexpected or accidental.”¹¹ However, “when the intent to harm is present, the exclusion applies.”¹²

Most courts have adopted the more reasoned viewpoint, holding that where personal injury coverage does require an occurrence, “[t]he offenses listed in the definitions of personal injury/advertising injury cannot be reconciled with the requirement that there be an accident.”¹³ Indeed, courts agree that “the ‘accident’ component of the definition of ‘occurrence’ is [directly] contrary to the intentional component of ... the offenses which the policy recognizes as those triggering ‘personal injury.’”¹⁴ Courts adopting this viewpoint

⁸ See, e.g., *Missouri Prop. & Cas. Ins. Guaranty Ass'n v. Petrolite Corp.*, 918 S.W.2d 869, 873 (Mo. Ct. App. 1996) (interpreting CGL policy requiring “personal injury,” defined to include a number of intentional torts, to arise out of an “occurrence,” which was defined as an “accident”).

⁹ WINDT, INSURANCE CLAIMS AND DISPUTES 3D, § 11:28.

¹⁰ See, e.g., *AZ—State Farm Fire and Cas. Co. v. Doe By and Through Doe*, 797 P.2d 718 (Ariz. Ct. App. 1990).

¹¹ See, e.g., *AZ—State Farm Fire and Cas.*, 797 P.2d at 719.

¹² See, e.g., *AZ—State Farm Fire and Cas.*, 797 P.2d at 719.

¹³ WINDT, INSURANCE CLAIMS AND DISPUTES 3D, § 11:28.

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APPX 2

Kentucky Association of Counties All Lines Fund exemplar coverage contract

KENTUCKY ASSOCIATION OF COUNTIES
ALL LINES FUND

COVERAGE AGREEMENT NO. _ _

COVERAGE PERIOD: 12:01 a.m. July 1, 1991
TO 12:00 a.m. June 30, 1992
Retroactive Date: July 1, 1988

Whereas many of the counties of Kentucky and their subagencies have found it advantageous to join together to share their insurance risks through a group self-insurance mechanism, and

Whereas it is recognized that a major purpose of such group self-insurance is to share as many risks as possible without unnecessary exclusion or limitation, and

Whereas it is desirable to share such risks under a written agreement that is not only as broad as possible, but as easy to read and as uncluttered as possible, and

Whereas it is admitted that the creation of such a written agreement means that ambiguities may exist regarding certain claims that may be made against the group self-insurance fund which the members of the fund intend to have interpreted in favor of the member against whom such claim is made or who may have suffered a loss,

Now therefore:

In consideration of the agreement to be, or remain, a member of the KALF, signing or having signed, the Participation Agreement, and submitting to KALF the necessary contributions, premiums, and subject to all the terms of the Participation Agreement, this Coverage Agreement and any other terms and conditions of membership, KALF agrees with County Fiscal Court including those subagencies listed on Exhibit A of this Coverage Agreement, as a member of KALF and with each other member of KALF as follows:

I. DEFINITIONS

As used herein certain terms shall be defined as follows

- A. Automobile means a land motor vehicle, trailer or semi-trailer designed for travel on public roads (including any machinery or apparatus attached thereto), but does not include mobile equipment.
- B. Claim means a demand for money naming the member or other person(s) protected under Article II of this Coverage Agreement and alleging the commission of a tort or violation of a fiduciary duty by or on behalf of the member or such other person(s) for which the member or such other person(s) is legally liable.
- C. Consequential loss means a Business Interruption or Extra Expense loss as provided for in Article VI, Section J, herein.
- D. Employee means:
 - 1. a bona fide employee having a personnel file maintained by the member, assigned a defined and regular work schedule, required to conform to the member's policies and procedures, and having Federal and State taxes withheld.
 - 2. an individual performing the function of an employee on a voluntary basis at the request of or with the permission of the member; and
 - 3. any executive officer, administrator, supervisor or member of a governing body of the member, whether appointed or elected;
 - 4. any member of the governing body of any public agency whose appointment or election to that position was made by the chief executive officer or the governing body of the member; while acting within the scope of his or her duties as such.
- E. Intentional tort means a tort which was committed with knowledge that committing the act was wrong or expected to produce a wrongful act or knowingly failing to correct a wrongful act after discovery.
- F. Loss means a financial loss which the member has suffered due to damage to or destruction of real or personal property for which KALF is responsible under Article II, Section E, herein but not a consequential loss for which KALF is responsible under Article II, Section F, herein.

- G. Member means any Kentucky County, any named political subdivision or any "independent subagency" of a Kentucky County which has applied to become a part of KALF has properly executed a Self Insurance Program Agreement and has been approved for membership by KALF. Any subagency of the County with a governing Board other than the members of the Fiscal Court which is appointed in its entirety by the Fiscal Court or which receives a significant portion of its budget from the Fiscal Court shall be deemed to be an additional member under this Coverage Agreement and shall be entitled to all the coverages afforded to the County by this Agreement upon written request. Any other subagency of a County Fiscal Court shall be considered to be an "independent subagency" and may only become a member of KALF in the same manner as a County.
- H. Occurrence means a event, including continuous or repeated exposure to conditions, which results in an injury or damage to property neither expected nor intended from the standpoint of the member.
- I. Replacement cost means the cost of repairing or replacing the damaged or destroyed property with new materials or property of like quality at the time the damage or destruction of the property occurred.
- J. Tort means a civil wrong other than a breach of contract or warranty for which money damages are sought from the wrongdoer or its principal.

II. COVERAGES

- A. KALF will pay on behalf of the member all sums which the member shall become legally obligated to pay as damages because of the commitment of a tort during the Coverages Period shown on Page 1 of this Coverage Agreement by the member or its employee or agent, except as excluded hereinafter, and up to the limits of liability stated herein.

The protection provided the member under this Coverage A shall be extended to apply to any employee of the member so long as the employee was acting within the scope of his or her duties as such at the time of the commitment of the alleged tort.

This obligation shall include paying on behalf of the member any liability which the member may have assumed under a contract, whether written or oral, with a third party for the consequences of a tort or alleged tort committed by such third part of its employee or agent except for the assumption of liability for a claim due to professional malpractice, including medical malpractice.

Such contract must have been entered into before the event or occurrence from which the liability assumed by the member arose.

In the event the member was insured under Claims Made coverage before July 1, 1988, the coverage afforded by this section shall also apply to any claim resulting from an alleged tort occurring during the period commencing with the Retroactive Date shown on Page 1 of this Coverage Agreement and July 1, 1988 to the same extent that coverage would apply under this Coverage Agreement if such alleged tort had occurred during the Coverage Period shown on Page 1 of this Coverage Agreement.

- B. KALF shall pay, subject to the limitations herein, to those persons injured while operating or using an Automobile the benefits that would be provided all such persons by a commercial automobile insurance policy issued to the member under Insurance Service Office forms for Uninsured of Underinsured Motorists Coverage and Personal Injury Protection (No Fault) coverages. KALF may take as a credit against any payment the amount the party received or is eligible to receive as workers' compensation benefits arising out to the occurrence. KALF may take as a credit payments made by another uninsured or underinsured motorists carrier
- C. KALF shall pay on behalf of any employee for claims brought against such individuals for torts committed by such persons or for alleged violations of such person's fiduciary duties in their public official capacity during the Coverage Period shown on Page 1 of this Coverage Agreement except as restricted hereinafter.

KALF has no duty to defend any suit brought for the collection of money owed or claimed to be owed by the member, provide representation for any appeal to a court of higher jurisdiction of an administrative action of the member, defend any action to enforce a contract or defend any action challenging the constitutionality of any ordinance. KALF has not duty to defend or pay on behalf of a member any fine assessed by a state or federal agency for violation of a statute or regulation.

In the event the member was insured under Claims Made Coverage before July 1, 1988, the coverage afforded by this section shall also apply to any claim resulting from an alleged tort or violation of such person's fiduciary duties occurring during the period commencing with the Retroactive Date shown on Page 1 of this Coverage Agreement and July 1, 1988 to the same extent that coverage would apply under this Coverage Agreement if such alleged tort or violation of fiduciary duties had occurred during the Coverage Period shown on Page 1 of this Coverage Agreement.

- D. KALF shall have the right and duty to investigate any claim and to defend any suit seeking damages for such claim against a member, or any other person to whom KALF has assumed a duty under Sections A and C of this Article, even if any of the allegations of the suit are groundless, false or fraudulent, and shall make such investigation and settlement of any claim or suit as it deems expedient. In the event the claim includes allegations of an intentional tort, KALF shall still have the duty to defend such claim or suit but shall not be liable for that portion of any judgment due to the claim having been found to be the result of an intentional tort. KALF has no obligation to pay any punitive damages assessed on account of an employee's intentional acts or act expected to cause injury or damage.
- E. KALF shall reimburse each member the replacement cost loss from any occurrence to real and personal property owned by the member or leased, rented or borrowed by the member, if the member is obligated to insure such property, or it legally liable for damage to such property, against all risks of physical loss, except such property and except such losses as are specifically excluded by this Coverage Agreement, and to the extent and under the terms and conditions stated hereinafter.
- F. KALF will reimburse each member the consequential loss resulting from damage to or destruction of real or personal property, except excluded property listed under Article V, Section C, from any occurrence, except those causes of loss listed under Article V, Section A, and subject to the terms and conditions stated in Article VI, Section J.

III. LIMITS OF LIABILITY

Regardless of the number of persons, members or employees who may be protected by KALF for claims against them under the terms of this Coverage Agreement or the number of members, persons or organizations who sustain loss or the number of claims or losses presented to KALF under this Coverage Agreement is limited as follows:

- A. A maximum amount of \$1,000,000 for any one tort (including alleged violations of public officials' fiduciary duties) or for all torts for which claims are made under Article II, Sections A and C resulting from occurrences during the Coverage Period shown on Page 1 of this Coverage Agreement against the member, its employees and other persons protected by this Coverage Agreement.

- B. The maximum amounts payable for Uninsured and Underinsured Motorists coverage to any one person shall be \$60,000 and the maximum amount payable under Personal Injury Protection (No-Fault) due to injury to any one person shall be \$10,000.
- C. A maximum amount of \$5,000,000 for loss or damage to real and personal property caused by any one occurrence except as follows:
1. the limit of liability may be increased if done by special endorsement to this Coverage Agreement;
 2. the limit shall be \$500,000 when the loss is to fine arts, glass or valuable papers;
 3. the limit shall be \$250,000 when the loss is to property of others in the care, custody or control of the member or for which the member may be legally liable for any other reason;
 4. the limit shall be \$500,000 during any one coverage year when the loss is due to flood or earthquake (this limit shall not apply to damage caused by fire resulting from an earthquake);
 5. the limit shall be \$25,000 when the loss is due to crime, which means employee dishonesty, loss of money and securities, loss due to depositor forgery and due to counterfeit money or paper. The coverage afforded for a loss due to employee dishonesty shall be extended to include loss due to lack of faithful performance by any employee. Such coverage for employee dishonesty and lack of faithful performance shall include the Commonwealth of Kentucky as an obligee to the extent required by Kentucky law.
- D. A maximum amount of \$500,000 for consequential loss as provided under Article II, Section F.

IV. DEDUCTIBLES

From each and every loss or consequential loss paid by KALF under Article II, Sections E and F shall be subject to a deductible as outlined on an endorsement or other written memorandum. See Endorsement 1.

V. COVERAGE EXCLUSIONS

- A. Under the coverage provided under Article II, Section A, C & D, coverage does not apply:
1. To a claim arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the member;

2. To a claim resulting from an intentional tort or an act intended to cause injury or damages; - See Endorsement 2
 3. To a claim resulting from, caused by or due to war, whether or not declared, civil war, insurrection, rebellion, or revolution or to any act or condition incident to any of the foregoing;
 4. To a claim arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water;
 5. To a claim due to any obligation for which the member or any carrier as his insurer may be held liable under any Worker's Compensation, Unemployment Compensation, Disability Benefits or Employees Benefits Law, or any similar law;
 6. To a claim due to a delay in or lack of performance by or on behalf of the member of any contract or agreement; including but not limited to claims for breach or non-renewal of written or oral employment contracts.
 7. To a claim resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof; or (2) the member is, or, had this agreement not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
- B. Under the coverage provided under Article II, Section C, coverage does not apply if the person(s) against whom the claim is made was not acting in good faith and within the scope of his or her official functions and duties when the alleged tort or violation of fiduciary duty was caused by the willful or wanton misconduct of such person(s) or was an intentional tort.
- C. Under the coverage provided under Article II, Section E and F, coverage does not apply if the damaged or destroyed property consists of:
1. Aircraft including motors, equipment and accessories;
 2. Plans, blueprints, mechanical drawings, designs or

specifications except for the value of the materials therein;

3. Trees, shrubs, grass, growing crops and live animals;
4. Any other property specifically insured elsewhere.
5. Road or road beds

D. Under the coverage provided under Article II, Sections E and F, coverage does not apply if the cause of the loss consists of:

1. Wear and tear, gradual deterioration, inherent vice, latent defect, freezing or extremes of temperature, mechanical or electrical breakdown or failure unless fire or explosion ensues, and then only for the loss caused by such ensuing fire or explosion.
2. Unexplained loss, mysterious disappearance, or shortage disclosed by taking inventory, except when such loss occurs while the property is entrusted to carriers for hire;
3. Loss caused by repairing, adjusting, servicing or maintenance operations unless fire or explosion ensues and then only for the loss caused by such ensuing fire or explosion;
4. Loss occasioned by the neglect of the member to use all reasonable means to save and preserve the property at and after any disaster insured against or when the property is endangered by fire in neighboring premises, or when the insured has notice of any impending disaster;
5. Loss caused by or resulting from hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces, or by military, naval or air forces, or by an agent of such government, power, authority or forces; or
6. Loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the peril(s) insured against in this Coverage Agreement; however, subject to the foregoing and all provisions of this Coverage

Agreement, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this Coverage Agreement.

7. Loss caused by the removal of asbestos.

VI. ADDITIONAL TERMS AND CONDITIONS

The following additional terms and conditions shall apply to this Coverage Agreement.

- A. All members' contributions, premiums shall be computed in accordance with KALF's rules and rates applicable to the coverages afforded herein and shall be promptly paid by each member in accordance with the payment schedule determined by KALF.
- B. KALF shall, from time to time, require the member to complete certain applications or questionnaires in order for KALF to properly arrive at the member's contributions or premiums. The member shall use its best efforts to complete such applications or questionnaires accurately, completely and efficiently. Failure in good faith to do so shall not diminish or void the protection provided by this Coverage Agreement, but any discovery of such error may result in an additional premium or contribution being due KALF by the member, which the member agrees to pay promptly upon being billed, regardless of whether such discovery of the error occurred after the expiration of the Coverage Period of this Coverage Agreement.
- C. KALF or its delegated agent shall be permitted, but not obligated, to inspect the member's property and operations at any time. Neither KALF's right to make inspections nor the making thereof, nor any report thereon, shall constitute an undertaking, on behalf of or for the benefit of the member or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation. The permitted inspections may include an examination and audit of the member's books and records at any time during the coverage year and within three years after the final termination of the member's membership in KALF.
- D. If a claim is brought against the member the member shall:
 1. As soon as practicable after the claim or suit is brought, give written notice thereof to KALF. Such written notice shall provide reasonably obtainable information with respect to the time,

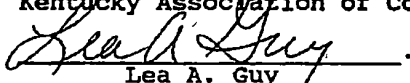
- place and underlying circumstance of the claim or suit;
2. Immediately forward to KALF every demand, notice, summons or other process received by the member or its representative;
 3. Neither admit any liability, make any payment, assume any obligation, nor incur any expense related to such claim or suit, except with the prior written consent of KALF;
 4. Fully cooperate with KALF in the investigation and defense of the claim, and in enforcing any right of contribution or indemnity against any person or organization which may be liable to the member, because of injury or damage with respect to which the protection is afforded under this Coverage Agreement;
 5. Neither voluntarily make any payment, assume any obligation nor incur any expense, other than for first aid to others at the time of the accident, except at its own cost.
- E. No action shall lie against KALF unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Coverage Agreement, nor until the amount of the member's obligation to pay shall have been determined either by final judgment against the member after actual trial or by written agreement of the member, the claimant and KALF. Any person or organization, or the legal representative thereof, which has secured such judgment or written agreement shall thereafter be entitled to recover under this Coverage Agreement to the extent of the coverage provided. No person or organization shall have any right under this Coverage Agreement to join KALF as a party to any action against the member to determine the member's liability, nor shall KALF be impleaded by the member or its legal representative.
- F. In the event of any payment under this Coverage Agreement, KALF shall be subrogated to all the member's rights of recovery against any person or organization, and the member shall do whatever is necessary to secure such rights and shall do nothing after a claim or loss to prejudice such rights.
- G. If both the coverage provided by KALF and commercial insurance apply to a claim or a loss on the same basis, unless there is a written agreement between KALF and the insurer to the contrary, the protection afforded by this Coverage Agreement shall be excess of said commercial insurance.

- II. Either KALF, or the member, may terminate the member's participation as a member of KALF by providing the other with at least 60 days prior written notice of such termination. Following such termination, the duties and obligations of one Agreement and in the Participation Agreement. If KALF terminates the member's membership, any unearned contributions, premiums shall be computed on a pro rata basis and paid to the member. If the member terminates its membership and the unearned amounts shall be computed under the normal "short rate" table used by commercial insurers. In the event that membership is terminated by KALF because of the member's non-payment of contributions, premiums or assessments, the prior written notice of such termination need not exceed 10 days.
- I. In the event of a loss, KALF shall not be liable beyond the replacement cost value of the property at the time the loss occurs. Such loss shall include reimbursement of loss due to cost of debris removal, increased cost of construction and demolition cost, if any. Any loss involving an automobile shall be adjusted and paid on an actual cash value basis, i.e., depreciation shall be deducted from the replacement cost value.
- J. The special coverage for consequential loss provided by Article II, Section F is further described as follows:
 - 1. Business Interruption coverage applies to the consequential loss resulting directly from the necessary interruption of the member's operations and the consequent reduction in Gross Earnings, caused by damage to, or destruction of, real or personal property. Extra Expense coverage applies to the necessary extra expenses incurred by the member in order to continue as nearly as practicable the normal operation and normal Gross Earnings of the member's operations following damage to or destruction of real or personal property.
 - 2. In the event of such damage or destruction, KALF shall pay the actual loss sustained by the member resulting directly from such interruption of operations and such necessary extra expenses incurred by the member for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as was damaged or destroyed commencing with the date of such damage or destruction and not limited by the date of termination of the coverage period under this Coverage Agreement.
 - 3. In arriving at the amount of a Business

Interruption loss, due consideration shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the member with the same quality of service which existed immediately the date of damage or destruction and due consideration shall be given to the experience of the operations before the date of damage or destruction and the probable experience thereafter had no loss occurred. Business Interruption coverage also covers such expenses as are necessarily incurred for the purpose of reducing the loss.

THIS COVERAGE HAS BEEN PLACED WITH A LIABILITY SELF-INSURANCE GROUP WHICH HAS RECEIVED A CERTIFICATE OF FILING FROM THE COMMONWEALTH OF KENTUCKY. CLAIMS AGAINST GROUP MEMBERS ARE NOT COVERED BY THE KENTUCKY INSURANCE GUARANTY ASSOCIATION.

This Coverage Agreement has been executed this 25th day of June 19 91 in the City of Frankfort, Kentucky on behalf of the Kentucky Association of Counties All Lines Fund by


Lea A. Guy

APPENDIX A

Unless altered or amended by separate endorsement, the aggregate policy limits for a general liability claim shall not exceed \$2,000,000.00. The aggregate policy limits for a public officials claim is \$1,000,000.00 in the aggregate and the policy limits for Law Enforcement \$2,000,000.00 in the aggregate.

Except in situations and under circumstances where additional self-insurance coverage is requested by the county, in order to allow a county or political subdivision to PROPERLY budget for its liability and expenses, the county will receive only one premium charge or assessment per year. Additionally, the coverage memorandum incorporated by reference the self-insurance agreement executed by each county upon the entry into the program and attached hereto.

ENDORSEMENT 1

Deductibles

General Liability	\$1,000.00
Law Enforcement	1,000.00
Public Officials	1,000.00
Automobile Liability	-0-
Comp/Collision	250.00
Property	1,000.00
Inland Marine	1,000.00
Boiler	1,000.00
Bonds	As Per Application

ENDORSEMENT 2

Limits of Liability

General Liability	\$2,000,000.00
Law Enforcement	2,000,000.00
Public Officials	1,000,000.00
Automobile Liability	1,000,000.00
Comp/Collision	-0-
Property	12,567,862.00
Inland Marine	As Per Schedule
Boiler	1,000,000.00
Bonds	As Per Application

ENDORSEMENT 3

This is an Occurrence Policy