

VERMONT DEPARTMENT OF FINANCIAL REGULATION

DIVISION OF INSURANCE

Insurance Bulletin No. 189

“NON-CUMULATION” POLICY PROVISIONS

The Vermont Insurance Division has recently seen an increase in the use of “non-cumulation” policy provisions and endorsements in liability policy filings. The purpose of this Bulletin is to remind insurers of the Division’s position that such clauses or endorsements in occurrence-based liability policies are not permissible under Vermont law and, therefore, will not be approved.

Non-cumulation provisions or endorsements attempt to limit an insurer’s liability when multiple policies issued by the same company or its affiliates apply to an injury that causes continuous damage over successive policy periods. A typical non-cumulation clause provides that if a single claim or several “related” claims (for example, a pollution loss) has been filed against the insured for damages occurring over a number of policy years, the insurer’s maximum limit of liability under all policies issued to the insured will not exceed the highest limit applicable under any one policy form. For example, an insured who has purchased commercial liability policies with a one million dollar annual limit from the same company for a period of five years and who experiences a five million dollar pollution loss beginning in year one and continuing through year five would be limited to a recovery of one million dollars and would be prohibited from aggregating the annual policy limits to cover the entire loss, even though the loss occurred continuously throughout the five-year period.

Non-cumulation provisions in an occurrence-based commercial liability policy are problematic for two reasons. First, although non-cumulation language significantly reduces the amount of coverage available for a catastrophic event like a pollution loss, insurers have been unable, despite repeated requests from the Insurance Division, to demonstrate an actuarial basis for the pricing of policies with non-cumulation clauses or to show that the reduction in coverage is appropriately reflected in the policy’s cost. Section 4685(d) of Title 8 V.S.A. provides that rates are unfairly discriminatory if “price differentials fail to reflect equitably the difference in expected losses and expenses.” It is the Division’s position that policy provisions which lack actuarial justification and which limit coverage without a corresponding reduction in premium are unfairly discriminatory.



Second, non-cumulation provisions are inconsistent with the nature of the coverage granted in an occurrence policy. An occurrence policy provides indemnification for liability incurred as a result of accidents or injuries that take place during the term of the contract, which is typically one year. As noted by the Vermont Supreme Court in *Towns v. Northern Security Ins. Co.*, 184 Vt. 322, 345-346 (2008), when successive commercial liability policies are on the risk during a “continuous trigger” event that occurs over several policy periods, it is the expectation of the parties that each policy will be responsible for its proportionate, pro-rata share of the loss. As discussed above, a non-cumulation provision has the effect of making only one annual policy limit applicable to a continuous trigger loss, even if the loss occurred continuously over several successive policy periods. Section 3542(2) of Title 8 prohibits policy language that is inconsistent or misleading with respect to the general grant of coverage contained in the insurance contract. In addition to the lack of actuarial justification noted above, non-cumulation clauses are inconsistent with the coverage expectations of policyholders who purchase occurrence based commercial liability policies and are misleading to consumers who lack the technical knowledge to understand that policy limits can be aggregated if they move their liability coverage to a new, non-affiliated insurer each year.

The Vermont Insurance Division recognizes that it would be unfair to require an insurer to pay for losses that were known to the policyholder at the time a new or renewal policy is written. For this reason, the Department will continue to approve “known loss” exclusions that bar coverage of losses that are known before policy’s inception or renewal date.

This bulletin applies to the commercial liability lines listed on Attachment A. The bulletin applies to policies issued or renewed on or after the date of its issuance.

Inquiries concerning this bulletin should be directed to Kevin Gaffney, Director of Rates & Forms.


Susan L. Donegan, Commissioner

4/22/16
Date

Attachment A

- 17.0000 Other Liability Combinations (Occurrence/Claims Made)
- 17.0001 Commercial General Liability
- 17.0004 Contractual Liability
- 17.0006 Directors & Officers Liability
- 17.0008 Employee Benefit Liability
- 17.0009 Employers Liability
- 17.0010 Employment Practices Liability
- 17.0011 Environmental Pollution Liability
- 17.0012 Fire Legal Liability
- 17.0013 Kidnap & Ransom Liability
- 17.0016 Nuclear Energy Liability
- 17.0019 Professional Errors & Omissions Liability
- 17.0020 Commercial Umbrella & Excess
- 17.0022 Other
- 17.0024 Internet Liability
- 17.1000 Other Liability Combinations (Other Liability)
- 17.1001 Commercial General Liability
- 17.1002 Completed Operations
- 17.1004 Contractual Liability
- 17.1005 Day Care Centers
- 17.1006 Directors & Officers Liability
- 17.1007 Elevators & Escalators Liability
- 17.1008 Employee Benefit Liability
- 17.1009 Employers Liability
- 17.1010 Employment Practices Liability
- 17.1011 Environmental Pollution Liability
- 17.1012 Fire Legal Liability
- 17.1013 Kidnap & Ransom Liability
- 17.1014 Liquor Liability
- 17.1015 Municipal Liability
- 17.1016 Nuclear Energy Liability
- 17.1018 Premises & Operations
- 17.1019 Professional Errors & Omissions Liability
- 17.1020 Commercial Umbrella & Excess
- 17.1022 Other
- 17.1024 Internet Liability
- 17.2000 Other Liability Combinations (Claims Made Only)
- 17.2001 Commercial General Liability
- 17.2002 Completed Operations
- 17.2004 Contractual Liability
- 17.2006 Directors & Officers Liability
- 17.2008 Employee Benefit Liability
- 17.2009 Employers Liability
- 17.2011 Environmental Pollution Liability

- 17.2012 Fire Legal Liability
- 17.2013 Kidnap & Ransom Liability
- 17.2014 Liquor Liability
- 17.2015 Municipal Liability
- 17.2016 Nuclear Energy Liability
- 17.2018 Premises & Operations
- 17.2019 Professional Errors & Omissions Liability
- 17.2020 Commercial Umbrella & Excess
- 17.2022 Other
- 17.2024 Internet Liability
- 18.0000 Product Liability-Occurrence/Claims Made
- 18.0001 Product Liability-Occurrence Only
- 18.0002 Product Liability-Claims Made Only