

# Manufacturers' Errors and Omissions Liability Endorsement (3179)



**This endorsement changes the policy. Please read it carefully.**

**This endorsement provides claims made coverage. "Claims" must first be made against an insured during the policy period and must be reported to us during the policy period or during the period described in Section VI – Automatic Extended Reporting Period. Where legally permissible, the payment of "defence costs" reduces the limits of insurance. The deductible applies to "defence costs" and "damages".**

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

Throughout this endorsement the words "you" and "your" refer to the Named Insured shown in the Declarations.

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**.

Words and phrases that appear in quotation marks have special meaning. Refer to **Section VII – Definitions**.

In this endorsement, words in the singular include the plural and vice versa, and words in one gender include all genders.

The Declarations and this endorsement to the Commercial General Liability policy provide Manufacturers' Errors and Omissions Liability Coverage. Where any provision of this endorsement conflicts with a similar provision in the Commercial General Liability policy, the provisions of this endorsement take precedence.

## **Section I – Insuring Agreement – Coverage**

1. In consideration of the payment of the premium by the insured, and in reliance upon the representations made by the insured, we will pay those sums that the insured becomes legally obligated to pay as "damages" because of a "claim" for "loss of use", first made against any insured and reported to us during the policy period, to which this insurance applies. We will have the right and duty to defend the insured against any "claim" seeking "damages" because of "loss of use" to which this insurance applies. We may, at our discretion, investigate and settle any "claim" that may result. However, we will have no duty to defend the insured against any "claim" to which this insurance does not apply. Further:
  - a. The amount we will pay for the sum of "damages" and "defence costs" is limited as described in **Section III – Limits of Insurance, Deductible and Reduction of Limits**; and
  - b. Our duty to defend any "claim" or to pay any "damages" or any "defence costs" for such "claim" ends when the applicable Limit of Insurance shown in the Declarations has been exhausted.When our right and duty to defend any "claim" ends, we will withdraw and tender the defence to you as provided in **Section V – Conditions, Paragraph 15. Transfer of Duties When a Limit of Insurance is Exhausted**.
2. This insurance applies only if:
  - a. The "loss of use" takes place in the "coverage territory";
  - b. The "loss of use" did not commence before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and
  - c. A "claim" is first made against any insured during the policy period and reported during the policy period or during the Automatic Extended Reporting Period described in **Section VI – Automatic Extended Reporting Period** and reported to us pursuant to **Section V – Conditions, Item 6. Insured's Duties in the Event of a Claim** of this endorsement.
3. A "claim" will be deemed to have been first made at the earlier of the following times:
  - a. When notice of such "claim" is first received by any insured; or
  - b. When a "claim" against an insured is made directly to us in writing.

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4. The inclusion of more than one insured in any "claim", or the making of "claims" by more than one person or entity will not increase the Limits of Insurance shown in the Declarations. All "claims" arising out of the same "loss of use" and all "interrelated loss of use" will be deemed one "claim", and all such "claims" will be deemed to be first made when the earliest of such "claims" is first made during the policy period and reported during the policy period or during the Automatic Extended Reporting Period described in **Section VI – Automatic Extended Reporting Period** and reported to us pursuant to **Section V – Conditions**, Item 6. **Insured's Duties in the Event of a Claim** of this endorsement.

## Section II – Who is an Insured

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner;
  - b. A partnership, limited liability partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business;
  - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers;
  - d. An organization other than a partnership, limited liability partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your shareholders are also insureds, but only with respect to their liability as shareholders; or
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees;
2. Your "subsidiaries" are also insureds;
3. Your "employees" are also insureds while acting within the scope of their duties for you and only with respect to the conduct of your business, as described in the Business Description of the Declarations;
4. Any person or organization having proper temporary custody of your property if you die, but only until your legal representative has been appointed; or
5. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this endorsement.

No person or organization is an insured with respect to the conduct of any current or past partnership, limited liability partnership, joint venture, limited liability company or corporation that is not shown as a Named Insured in the Declarations.

## Section III – Limits of Insurance, Deductible and Reduction of Limits

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. "Claims" made; or
  - c. Persons or organizations making "claims".

### 2. Aggregate Limit of Insurance

Subject to applicable law, our liability for the combined total of all "damages" and "defence costs" for all "claims" covered by this endorsement will not exceed the amount shown in the Declarations as Aggregate Limit.

The Limits of Insurance of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

### 3. Each Claim Limit of Insurance

Subject to Paragraph 2. **Aggregate Limit of Insurance** above, the most we will pay for "damages" and "defence costs" arising out of any one "claim" covered by this endorsement, subject to the Each Claim Deductible, if any, is the amount shown in the Declarations as Each Claim Limit.

#### **4. Deductible**

Subject to applicable law, our obligations to pay "damages" and "defence costs" arising out of a single "claim", applies only in excess of the amount shown in the Declarations as Deductible. With respect to each "claim" to which this insurance applies, we will not be liable for more than the difference between the applicable Limit of Insurance shown in the Declarations and the Deductible, subject to the following provisions:

- a. The terms of this endorsement, including those with respect to our right and duty to defend any "claim" and your duties in the event of a "claim", apply irrespective of the application of the Deductible.
- b. We may pay any part or all of the Deductible as "damages" and/or "defence costs" to effect settlement of any "claim" and, upon notification of the action taken, you will promptly reimburse us for such part of the Deductible as has been paid by us.

#### **5. Reduction of Limits**

- a. Subject to applicable law, "defence costs" are part of and not in addition to the Limits of Insurance shown in the Declarations, and the payment of "defence costs" reduces such Limits of Insurance shown in the Declarations.
- b. The Each Claim Limit and the Aggregate Limit, shown in the Declarations, will be reduced by the sum of:
  - (1) The amounts we pay as "damages"; and
  - (2) The amounts we pay as "defence costs".

### **Section IV – Exclusions**

This insurance does not apply to any "claim" for "damages", loss, cost, expense or "loss of use":

#### **1. Any Insured Against Any Other Insured**

Brought by or on behalf of any insured against any other insured.

#### **2. Asbestos**

Related to or arising from any actual or alleged liability for any legal remedy of any kind whatsoever (including but not limited to "damages", interest, mandatory or other injunctive relief, statutory orders or penalties, legal or other costs, or expenses of any kind) in respect of actual or threatened loss, damage, cost or expense directly or indirectly caused by, resulting from, in consequence of or in any way involving, asbestos or any material containing asbestos in whatever form or quantity.

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "damages", loss, cost, expense or "loss of use".

#### **3. Bodily Injury, Property Damage or Personal and Advertising Injury**

For "bodily injury", "property damage" or "personal and advertising injury".

#### **4. Cost Guarantee or Estimate**

Based upon or arising out of your failure to meet the terms of any cost guarantee or cost estimate.

#### **5. Criminal Acts; Misrepresentations**

Based upon or arising out of:

- a. Dishonest, fraudulent, criminal, or malicious act or omission;
- b. Unauthorized representations; or
- c. Intentional misrepresentations.

However, notwithstanding the foregoing, the insured will be afforded a defence of a "claim", subject to the terms and conditions of this endorsement, until the allegations are subsequently proven by a final adjudication. The insured will reimburse us for all "defence costs" in the event the final adjudication determines that the insured acted dishonestly, fraudulently, criminally or with wrongful purpose of intent to misrepresent, or the insured maliciously committed unauthorized representation.

#### **6. Delay**

Based upon or arising out of a delay in the performance of any contract or agreement.

This exclusion does not apply if such delay is the result of "loss of use" resulting from the failure of "your manufactured product" to perform the function or serve the purpose intended after installation.

## **7. Employee Benefits/Retirement Programs**

Based upon or arising out of an insured's actual or alleged violation of any employee benefit program or as a fiduciary in connection with any employee retirement or pension plan, including but not limited to any alleged violation of the United States of America Employee Retirement Income Security Act of 1974 and its amendments, or any similar state, provincial or local law, or any regulation or order issued in connection therewith.

## **8. Enhancement, Maintenance and Prevention**

Based upon or arising out of the failure to prevent any "damages", loss, cost, expense or "loss of use" incurred by any person or organization.

This exclusion does not apply to "damages", loss, cost, expense or "loss of use" sustained by others arising out of:

- a. "Your manufactured product";
- b. Property containing or incorporating "your manufactured product"; or
- c. Property on which "your work" was performed.

## **9. Expected or Intended Loss of Use**

Caused by an intentional act or omission committed by any insured which the insured knows will reduce the quality of performance of "your manufactured product" or "your work" below the level expected or required by buyers or users of the product. This includes, but is not limited to "loss of use" that results from the decision of any insured to cease providing consultation, advice, repair services, maintenance services, replacement parts, or other similar support for "your manufactured product" or "your work".

## **10. Fungi or Spores**

- a. Incurred by others, arising directly or indirectly from the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, presence of, spread of, reproduction, discharge or other growth of any "fungi" or "spores", however caused, including any cost or expense incurred to prevent, respond to, test for, monitor, abate, mitigate, remove, clean up, contain, remediate, treat, detoxify, neutralize, assess or otherwise deal with or dispose of "fungi" or "spores";
- b. For any supervision, instruction, recommendation, warning, or advice given or which should have been given in connection with Item a. above; or
- c. For any obligation to pay "damages", share "damages" with or repay someone else who must pay "damages" because of such injury or damage referred to in Items a. or b. above.

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "damages", loss, cost, expense or "loss of use".

This exclusion does not apply to any "fungi" or "spore" that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption.

## **11. Incomplete Work**

Arising out of "your work", which has not been completed.

"Your work" will be deemed to be completed at the earliest of the following times:

- a. When all the work called for in your contract has been completed;
- b. When all of the work to be done at a particular job site has been completed, only that particular job site will be deemed completed, if your contract calls for work at more than one job site; or
- c. When that part of the work to be done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair, or replacement, but which is otherwise complete, will be treated as completed.

## **12. Information Distribution**

Arising out of any actual or alleged violation of:

- a. The United States of America CAN-SPAM Act of 2003 or any law amendatory thereof;
- b. The United States of America Telephone Consumer Protection Act (TCPA) of 1991 or any law amendatory thereof; or
- c. Any other ordinance, regulation or statute of any jurisdiction relating to communicating, distribution, publication, sending or transmitting of content, information or material.

### **13. Intellectual Property**

Based upon, or arising out of any actual or alleged piracy, infringement of a patent, copyright, trademark, service mark, trade dress, trade name, trade secret or other intellectual property rights.

### **14. Nuclear Energy Liability**

- a. Imposed by or arising from any nuclear liability act, law, statute, or regulation, or any law amendatory thereof;
- b. With respect to which an insured under this endorsement is also insured under a contract of nuclear energy liability insurance (whether the insured is unnamed in such contract and whether or not it is legally enforceable by the insured) issued by the Nuclear Insurance Association of Canada or any other insurer or group or pool of insurers or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- c. Resulting directly or indirectly from the "nuclear energy hazard" arising from:
  - (1) The ownership, maintenance, operation or use of a "nuclear facility" by or on behalf of an insured;
  - (2) The furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility"; or
  - (3) The possession, consumption, use, handling, disposal or transportation of "fissionable substances", or of other "radioactive material" (except radioactive isotopes, away from a nuclear facility, which have reached the final stage of fabrication so as to be useable for any scientific, medical, agricultural, commercial or industrial purpose) used, distributed, handled or sold by an insured.

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "damages", loss, cost, expense or "loss of use".

### **15. Personal Profit**

Based upon or arising out of the actual or alleged gaining of profit or advantage to which the insured was not legally entitled.

### **16. Pollution**

- a. Based upon, arising out of or which would not have occurred, in whole or in part, but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time; and
- b. Arising out of any:
  - (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (2) "Claim" by or on behalf of a governmental authority because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "damages", loss, cost, expense or "loss of use".

### **17. Prior Coverage**

Based upon, arising out of or attributable to any "loss of use" which has been the subject of any notice given under any policy or endorsement of which this endorsement is a successor, renewal or replacement or any policy expiring prior to the inception date of this endorsement.

### **18. Prior Notice**

Which has been reported, or for which, in any circumstance, notice has been given, under any prior insurance policy or endorsement providing essentially the same type of coverage.

### **19. Professional Services**

Based upon or arising out of the rendering or failing to render "professional services" to or for others by or on behalf of an insured.

### **20. Taxes, Fines or Penalties**

Based upon or arising out of taxes, fines or penalties imposed by law or by any contract.

## **21. Technology Services**

Based upon or arising out of "technology services" provided by the insured, including but not limited to "claims" for the transmission of computer viruses, corruption of databases, computer system incompatibility, misappropriation, alteration or deletion of data or harm to the integrity of a computer system.

## **22. Terrorism**

Based upon or arising directly or indirectly, in whole or in part, out of "terrorism" or out of any activity or decision of a government agency or other entity to prevent, respond to or terminate "terrorism".

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "claim", "damages", loss, cost, expense or "loss of use".

## **23. Trade Practice**

Based upon or arising out of any actual or alleged violation of:

- a. Consumer fraud, consumer protection, consumer privacy, unfair trade, restraint of trade or deceptive business practice or unfair competition laws; or
- b. Securities or antitrust law.

## **24. War Risks**

Arising directly or indirectly, in whole or in part, out of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military power.

This exclusion applies regardless of any other contributing or aggravating cause or event that contributes concurrently or in any sequence to the "damages", loss, cost, expense or "loss of use".

## **25. Wear and Tear**

Based upon or arising out of gradual deterioration or wear and tear of "your manufactured product" or "your work".

## **26. Workers' Compensation and Similar Laws**

Based upon or arising out of any obligation of the insured under a workers' compensation, disability benefits or unemployment or employment compensation law or any similar law.

## **Section V – Conditions**

### **1. Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this endorsement.

### **2. Canadian Currency Clause**

All limits of insurance, premiums and other amounts as expressed in this endorsement are in Canadian currency.

### **3. Changes**

This endorsement contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this endorsement with our consent. This endorsement's terms can be amended or waived only by endorsement issued by us and made a part of this endorsement.

### **4. Changes in Exposure**

#### **a. Acquisition or Creation of Another Organization**

If during the policy period you:

- (1) Acquire securities or voting rights in another organization or create another organization, which as a result of such acquisition or creation becomes a "subsidiary"; or
- (2) Acquire any organization by merger into, amalgamation or consolidation with you,

then, unless other valid, collectible insurance is in place, such acquired organization will not be covered under this endorsement with respect to "loss of use" taking place prior to such acquisition unless and until we agree, after receipt of such information as we may require, to issue an endorsement to provide coverage to such acquired organization for "loss of use" taking place prior to such acquisition.

As a condition precedent to coverage with respect to such acquired organization:

- (1) The first Named Insured shown in the Declarations, will give written notice of such acquisition to us as soon as practicable, but in no event later than thirty (30) days after the effective date of such acquisition;
- (2) The insured will provide such information as we may require; and
- (3) The first Named Insured shown in the Declarations will pay any additional premium required by us.

**b. Acquisition of a Named Insured**

If during the policy period, another organization, or person or group of organizations and/or persons acting in concert, acquires securities or voting rights which result in ownership or voting control by such organization(s) or person(s) of more than fifty percent (50%) of the outstanding securities representing the present right to vote for the election of directors or equivalent executives of a Named Insured shown in the Declarations, then coverage under this endorsement for such Named Insured shown in the Declarations and its "subsidiaries" will continue until the later of:

- (1) Any subsequent date to which we may agree by endorsement; or
- (2) Termination of this endorsement,

but only with respect to "claims" arising out of a "loss of use" taking place prior to such acquisition. As a condition precedent to any coverage extension pursuant to Subitem **b. (1)** above:

- (a) The first Named Insured shown in the Declarations will give written notice of such acquisition to us as soon as practicable but in no event later than thirty (30) days after the effective date of such acquisition;
- (b) The insured will provide such information as we may require; and
- (c) The first Named Insured shown in the Declarations will pay any additional premium required by us.

Any "claim" made and reported during such coverage extension will be considered made during the policy period in which such acquisition occurred.

**c. Merger Into, Amalgamation or Consolidation with Another Organization**

If during the policy period, an insured merges into, amalgamates or consolidates with another organization, other than in the circumstances outlined in Subitem **a. (1)** above, then, unless other valid, collectible insurance is in place, such resultant organization will not be covered under this endorsement with respect to "loss of use" taking place prior to such merger, amalgamation or consolidation, unless and until we agree, after receipt of such information as we may require, to issue an endorsement to provide coverage to such resultant organization for "loss of use" taking place prior to such merger, amalgamation or consolidation.

As a condition precedent to coverage with respect to such resultant organization:

- (1) The first Named Insured shown in the Declarations, will give written notice of such merger, amalgamation or consolidation to us as soon as practicable, but in no event later than thirty (30) days after the effective date of such merger, amalgamation or consolidation;
- (2) The insured will provide such information as we may require; and
- (3) The first Named Insured shown in the Declarations will pay any additional premium required by us.

**d. Cessation of Subsidiaries**

If during the policy period an organization ceases to be a "subsidiary", then coverage with respect to such "subsidiary" and its insureds will continue until termination of this endorsement, but only with respect to "loss of use" taking place prior to the date such organization ceased to be a "subsidiary".

**5. Examination of Your Books and Records**

We may examine and audit your books and records as they relate to this endorsement at any time during the policy period and up to three years afterward.

**6. Insured's Duties in the Event of a Claim or in the Event of a Loss of Use that May Result in a Claim**

When you are reporting a "claim" to us, you must provide effective written notice to us, and this may also require proof of transmittal.

**a. Notice of Claim**

The insured will give to us written notice of any "claim" first made against any insured as soon as practicable but in no event later than thirty (30) days after expiration of the policy period.

**b. Notice of a Loss of Use**

If during the policy period the insured becomes aware of specific "loss of use", which could give rise to a "claim", and the insured gives written notice of such specific "loss of use" to us during the policy period, then any "claim" subsequently arising from such "loss of use" will be considered to have been made during the policy period in which such "loss of use" was first reported to us.

- c.** To the extent possible, the insured will include with any written notice of a "claim" or "loss of use" a description of such "claim" or "loss of use", the nature of the alleged "claim" or "loss of use", the nature of the alleged or potential "damages", the names of actual or potential claimants and the manner in which the insured first became aware of the "claim" or "loss of use".
- d.** All insureds will assist and cooperate with us in the investigation, settlement and defence of all "claims" made against any insured and upon our request will authorize the release of records and other information, secure and give evidence, attend hearings and trials and, to the extent possible, obtain the location of and cooperation of witnesses.
- e.** The insured agrees to provide us with all information, assistance and cooperation which we may reasonably request.
- f.** In the event of a "claim", the insured will do nothing to prejudice our position or potential or actual rights of recovery. The insured agrees not to settle any "claim", incur any "defence costs" or otherwise assume any contractual obligation or admit any liability with respect to any "claim" without our written consent. We will not be liable for any "damages", "defence costs", assumed obligation or admission to which we have not consented.

**7. Inspections and Surveys**

- a.** We have the right to:
  - (1)** Make inspections and surveys at any time;
  - (2)** Give you reports on the conditions we find; and
  - (3)** Recommend changes.
- b.** We are not obligated to make any inspection, survey, report or recommendation and any such inspection we do undertake relates only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. We do not warrant that conditions:
  - (1)** Are safe or healthful; or
  - (2)** Comply with laws, regulations, codes or standards.
- c.** Items **a.** and **b.** above of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
- d.** Item **b.** above of this condition does not apply to any inspection, survey, report or recommendation we may make relative to certification, under provincial or municipal statutes, ordinances, bylaws or regulations, of boilers, pressure vessels or elevators.

**8. Legal Action Against Us**

No person or organization has a right under this endorsement:

- a.** To join us as a party or otherwise bring us into an "claim" asking for "damages" from an insured; or
- b.** To sue us on this endorsement unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for "damages" that are not payable under the terms of this endorsement or that are in excess of the applicable Limit of Insurance shown in the Declarations. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

**9. Other Insurance**

If other valid and collectible insurance is available to the insured for a loss we cover under this endorsement, our obligations are limited as follows:

**a. Primary Insurance**

The insurance provided by this endorsement is primary except when Item **b.** below applies. If the insurance provided by this endorsement is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Item **c.** below.



**b. Excess Insurance**

The insurance provided by this endorsement is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
  - (a) Whose policy period begins or continues after the Automatic Extended Reporting Period described in **Section VI – Automatic Extended Reporting Period** takes effect;
  - (b) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
  - (c) That is Fire, Extended Coverage or similar coverage for premises rented to you or temporarily occupied by you with permission of the owner;
  - (d) That is insurance purchased by you to cover your liability as tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
- (2) Any other primary insurance available to you covering liability for "damages" arising out of the premises or operations or products-completed operations for which you have been added as an additional insured by attachment of an endorsement.

When the insurance provided by this endorsement is excess, we will have no duty to defend the insured against any "claim" seeking "damages" because of "loss of use" if any other insurer has a duty to defend the insured against that "claim" seeking "damages" because of "loss of use". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When the insurance provided by this endorsement is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this endorsement; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this **Excess Insurance** provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this endorsement.

**c. Method of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance shown in the Declarations or none of the loss remains, whichever comes first.

**10. Premium Audit**

- a. We will compute all premiums for this endorsement in accordance with our rules and rates.
- b. Premium shown in this endorsement as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured shown in the Declarations. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured shown in the Declarations subject to the retention of the minimum retained premium shown in the Declarations of this policy.
- c. The first Named Insured shown in the Declarations must keep records of the information we need for premium computation, and send us copies at such times as we may request.

**11. Premiums**

The first Named Insured shown in the Declarations:

- a. Is responsible for the payment of all premiums; and
- b. Will be the payee for any return premiums we pay.

**12. Representations**

By accepting this endorsement, you agree:

- a. The statements shown in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this endorsement in reliance upon your representations.

### 13. Separation of Insureds, Cross Liability

Except with respect to the Limits of Insurance shown in the Declarations, and any right or duty specifically assigned in this endorsement to the first Named Insured shown in the Declarations, this insurance applies:

- a. As if each Named Insured shown in the Declarations were the only Named Insured shown in the Declarations; and
- b. Separately to each insured against whom "claim" is made.

### 14. Termination

- a. The first Named Insured shown in the Declarations may terminate this endorsement by mailing or delivering to us advance written notice of termination.
- b. We may terminate this endorsement by mailing by registered mail or delivering to the first Named Insured shown in the Declarations written notice of termination at least:
  - (1) Fifteen (15) days before the effective date of termination if we terminate for non-payment of premium; or
  - (2) Thirty (30) days or as specified in the Declarations before the effective date of termination if we terminate for any reason other than for non-payment of premium.
- c. In all provinces and territories other than Quebec, if notice is mailed, termination takes effect the number of days specified in Item **b.** above after receipt of the letter by the post office to which it is addressed. Proof of mailing will be sufficient proof of notice. If notice is delivered, termination takes place the number of days specified in Item **b.** above after receipt.
- d. In Quebec, termination takes effect the number of days specified in Item **b.** above after receipt of the notice at the last known address of the first Named Insured shown in the Declarations.
- e. We will mail or deliver our notice to the last mailing address known to us of the first Named Insured shown in the Declarations.
- f. The policy period will end on the date termination takes effect.

If this endorsement is terminated, we will send the first Named Insured shown in the Declarations any premium refund due. If we terminate, the refund will be pro rata. If the first Named Insured shown in the Declarations terminates, the refund may be less than pro rata.

### 15. Transfer of Duties When a Limit of Insurance is Exhausted

- a. If we conclude, based upon "claims" that have been reported to us and to which this insurance may apply, that the:
  - (1) Aggregate Limit; or
  - (2) Each Claim Limitis likely to be exhausted in the payment of judgments, settlements, or "defence costs", we will notify the first Named Insured shown in the Declarations in writing to that effect.
- b. When the Aggregate Limit, or Each Claim Limit, of Insurance has actually been exhausted in payment of judgments, settlements, or "defence costs":
  - (1) We will notify the first Named Insured shown in the Declarations, in writing, as soon as practicable, that:
    - (a) Such a limit has actually been exhausted; and
    - (b) Our duty to defend "claims" seeking "damages" subject to that limit has also ended.
  - (2) We will initiate, and cooperate in, the transfer of control, to any appropriate insured, of all "claims" seeking "damages" subject to that limit and which are reported to us before that limit is exhausted. That insured must cooperate in the transfer of control of said "claims".
  - (3) We agree to take such steps, as we deem appropriate, to avoid a default in, or to continue the defence of, such "claim" until such transfer is completed, provided the appropriate insured is cooperating in such transfer.
  - (4) We will take no action whatsoever with respect to any "claim" seeking "damages" if the "claim" is reported to us after that Limit of Insurance shown in the Declarations has been used up.
  - (5) The first Named Insured shown in the Declarations, and any other insured involved in a "claim" seeking "damages" subject to that limit, must arrange for the defence of such "claim" within such time period as agreed to between the appropriate insured and us. Absent any such agreement, arrangements for the defence of such "claim" must be made as soon as practicable.

- c. The first Named Insured shown in the Declarations will reimburse us for expenses we incur in taking those steps we deem appropriate in accordance with Subitems **b. (2)** and **b. (3)** above.

The duty of the first Named Insured shown in the Declarations to reimburse us will begin on:

- (1) The date on which the applicable Limit of Insurance shown in the Declarations is used up, if we sent notice in accordance with Item **a.** above; or
  - (2) The date on which we sent notice in accordance with Subitem **b. (1)** above, if we did not send notice in accordance with Item **a.** above.
- d. The exhaustion of any Limit of Insurance shown in the Declarations by the payment of judgements, settlements, or "defence costs" and the resulting end of our duty to defend, will not be affected by our failure to comply with any of the provisions of this Condition.

#### **16. Transfer of Rights of Recovery Against Others to Us**

If the insured has rights to recover all or part of any payment we have made under this endorsement, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "action" or transfer those rights to us and help us enforce them.

#### **17. Transfer of Your Rights and Duties Under This Endorsement**

Your rights and duties under this endorsement may not be transferred without our written consent except in the case of death of an individual Named Insured shown in the Declarations.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

### **Section VI – Automatic Extended Reporting Period**

If either we or the first Named Insured shown in the Declarations fail, or refuse, to renew, or if the first Named Insured shown in the Declarations cancels this endorsement, a "claim" first made within thirty (30) days after the end of the policy period will be deemed to have been made on the last day of the policy period, provided that the "claim" is for "loss of use" that occurred before the end of the policy period (but not before any applicable Retroactive Date). No additional premium will be payable for such Automatic Extended Reporting Period. The Automatic Extended Reporting Period does not reinstate or increase the Limits of Insurance shown in the Declarations beyond the available Limits of Insurance shown in the Declarations or extend the policy period.

This section will not apply if we cancel for non-payment of premium.

### **Section VII – Definitions**

1. "Action" means a civil proceeding in which "damages" to which this insurance applies are alleged. "Action" includes:
  - a. An arbitration proceeding in which such "damages" are claimed and to which the insured must submit or does submit with our consent; or
  - b. Any other alternative dispute resolution proceeding in which such "damages" are claimed and to which the insured submits with our consent.
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 published include material placed on the Internet or on similar electronic means of communication; and
  - b. Regarding web-sites, only that part of a web-site 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. This includes mental anguish, mental injury, shock, fright or death resulting from bodily injury, sickness or disease.
4. "Claim" means
  - a. A written demand for monetary damages or the insured's receipt of such demand;
  - b. A civil proceeding commenced by the service of a complaint or similar pleading;
  - c. Receipt of an arbitration proceeding or any other alternative dispute resolution proceeding seeking monetary damages commenced by the insured's receipt of a request or demand for such proceeding.

5. "Coverage territory" means:
- a. Canada and the United States of America (including its territories and possessions);
  - b. International waters or airspace, but only if the injury or damage occurs in the course of travel transportation between any places included in Item a. above; or
  - c. All other parts of the world if the injury or damage arises out of:
    - (1) Goods or products made or sold by you in the territory described in Item a. above; or
    - (2) The activities of a person whose home is in the territory described in Item a. above, but is away for a short time on your business;

provided the insured's responsibility to pay "damages" is determined in an "action" on the merits, in the territory described in Item a. above or in a settlement we agree to.

6. "Damages" means the following amounts, costs, and expenses for which the insured is legally liable and which are covered by this endorsement.
- a. "Income" lost by the claimant during a "loss of use"; and
  - b. Costs and expenses paid by the claimant to reduce the "loss of use", but only if the costs and expenses paid reduce the total "damages".

"Damages" do not include:

- a. Costs and expenses incurred by you as the result of:
  - (1) The recall of "your manufactured product" or "your work" from the marketplace or from use by any person or organization,
  - (2) The withdrawal of "your manufactured product" or "your work" from the marketplace or from use by any person or organization, or
  - (3) The inspection of "your manufactured product" or "your work", or any part of such product or work, or any product or work in which "your manufactured product" or "your work" is incorporated.

However, this provision does not apply to "damages" for "loss of use" resulting from such withdrawal, recall, or inspection;

- b. Voluntary payments made by you without our prior consent;
- c. Costs, expenses, or refunds to your customers that result from any promise, representation, or warranty made or provided by or for you in connection with "your manufactured product" or "your work";
- d. Any punitive, aggravated or exemplary damages or the multiple portion of any multiplied damage award; or
- e. Costs or expenses arising from matters uninsurable under the law pursuant to which this endorsement is governed.

7. "Defence costs" means:
- a. Fees charged by any lawyer designated by us;
  - b. Fees charged by any lawyer you designate with our consent;
  - c. Reasonable expenses incurred by you at our request to assist us in the investigation or defence of a "claim", including actual loss of earnings up to two hundred and fifty dollars (\$250) a day because of time off from work;
  - d. All court costs awarded against the insured by a court of law in a civil proceeding;
  - e. Prejudgment interest awarded against you on that part of the judgment we pay. If we make an offer to pay the applicable Limit of Insurance shown in the Declarations, we will not pay any prejudgment interest based on the period of time after our offer to pay;
  - f. All interest on the full amount of any judgment that accrues after the entry of the judgment and before we have paid, or deposited in the court the part of the judgment that is within the applicable Limit of Insurance shown in the Declarations;
  - g. The premium on bonds to release attachments, but only for premium amounts within the applicable Limit of Insurance shown in the Declarations. We do not have to furnish these bonds; and
  - h. All other fees, costs, and expenses resulting from the investigation, adjustment, defence, and appeal of a "claim", if incurred by us.

8. "Employee" means any natural person whose labour or service is directed by you in the ordinary course of business and you compensate by salary, wages or commission, including, without limitation, any person who is a "leased worker", "temporary worker" or part time worker. Individuals classified by you as independent contractors or the employees of independent contractors are not "employees" for the purpose of this definition, regardless of any adjudicated employment status.
9. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
10. "Fissionable substance" means any prescribed substance that is, or from which can be obtained, a substance capable of releasing atomic energy by nuclear fission.
11. "Fungi" includes, but is not limited to, any form or type of mould, yeast, mushroom or mildew whether or not allergenic, pathogenic or toxigenic, and any substance, vapour or gas produced by, emitted from or arising out of any "fungi" or "spores" or resultant mycotoxins, allergens or pathogens.
12. "Income" means the difference between the net profit before income taxes that would have been earned during the period of "loss of use" and the net profit before income taxes actually earned during the period of "loss of use", less the salvage value of any property suffering the "loss of use".
13. "Interrelated loss of use" means all "loss of use" that are related, including all "loss of use" that have as a common nexus any event, transaction, cause or series of related events, transactions, or causes.
14. "Leased worker" means a person leased to you by a labour leasing firm under an agreement between you and the labour leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
15. "Loss of use" means loss of use of tangible property that is not physically injured, including loss of use arising out of:
  - a. Failure of "your manufactured product" or "your work" to meet the level of performance, quality, fitness, or durability warranted or represented by you, due to a defect, deficiency, inadequacy, or dangerous condition in "your manufactured product" or "your work"; or
  - b. Any negligent act, error, or omission in the design, manufacturing, labelling, packaging, instructions, or distribution of "your manufactured product" or "your work".
16. "Nuclear energy hazard" means the radioactive, toxic, explosive, or other hazardous properties of "radioactive material".
17. "Nuclear facility" means:
  - a. Any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of plutonium, thorium and uranium or any one or more of them;
  - b. Any equipment or device designed or used for:
    - (1) Separating the isotopes of plutonium, thorium and uranium or any one or more of them;
    - (2) Processing or packaging waste;
  - c. Any equipment or device used for the processing, fabricating or alloying of plutonium, thorium or uranium enriched in the isotope uranium 233 or in the isotope uranium 235, or any one or more of them if at anytime the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235; or
  - d. Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste "radioactive material";

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations.
18. "Personal and advertising injury" means injury arising out of one or more of the following offences:
  - a. False arrest, detention or imprisonment;
  - b. Malicious prosecution;
  - c. The 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;
  - d. 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;
  - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
  - f. The use of another's advertising idea in your "advertisement"; or
  - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

19. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odour, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
20. "Professional services" will include but not be limited to:
- a. Engineering, design, architectural, draftsman or surveying services, including:
    - (1) The preparing, approval or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; or
    - (2) Supervisory, inspection, architectural, design or engineering activities;
  - b. Accountant's, advertiser's, notary's (Quebec), public notary's, paralegal's, lawyer's, real estate broker's or agent's, insurance broker's or agent's, travel agent's, financial institution's, or consultant's professional advices or activities; or
  - c. Any computer programming or re-programming, consulting, advisory or related services.
21. "Property damage" means physical injury to tangible property.
22. "Radioactive material" means uranium, thorium, plutonium, neptunium, their respective derivatives and compounds, radioactive isotopes of other elements and any other substance which may be designated by any nuclear liability act, law or statute, or any law amendatory thereof, as being prescribed substances capable of releasing atomic energy, or as being requisite for the production, use or application of atomic energy.
23. "Spores" includes, but is not limited to, any reproductive particle or microscopic fragment produced by, emitted from or arising out of any "fungi".
24. "Subsidiary", either in the singular or plural, means, subject to **Section V – Conditions**, Item 4. a. of this endorsement, any organization while more than fifty percent (50%) of the outstanding voting securities or voting rights representing the present right to vote for election of directors or equivalent executives of such organization is owned or controlled, directly or indirectly, in any combination, by you.
25. "Technology services" mean any of the following:
- a. Advertising, web casting, electronic publishing, transmission, dissemination, distribution, serialization, creation, production, origination or exhibition of material over the Internet;
  - b. Designing, constructing or maintaining an Internet site;
  - c. The integration of electronic information or business processes with an Internet site;
  - d. Providing access to the Internet through a browser that enables others to send and receive electronic information;
  - e. Providing access to or dissemination of material, goods or services through the Internet;
  - f. Providing Internet search or navigational tools or Internet site tools or technology;
  - g. Providing others with a unique Internet address that can function as the beginning and end point of electronic information transfers;
  - h. Providing electronic mail services;
  - i. Establishing, operating, maintaining or monitoring chat rooms or bulletin boards;
  - j. Creating, manufacturing, developing, distributing, licensing, leasing, selling, operating, repairing or maintaining any computer hardware, software or related electronic product, or training others in the use of such computer hardware, software or related electronic product; or
  - k. Systems analysis, systems programming, data processing, systems integration, systems development, system design, system management or the installation, operation, repair or maintenance of computer products, networks or systems.
26. "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.
27. "Terrorism" means an ideologically motivated unlawful act or acts, including but not limited to the use of violence or force or threat of violence or force, committed by or on behalf of any group, organization or government for the purpose of influencing any government and/or instilling fear in the public or a section of the public.
28. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

**29. "Your manufactured product":**

- a.** Means any goods or products, other than real property, manufactured by:
  - (1)** You or for you;
  - (2)** Others trading under your name with your written approval or authority; or
  - (3)** A person or organization whose business or assets you have acquired; and
- b.** Means containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products; and
- c.** Includes:
  - (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of such products; and
  - (2)** The providing of or failure to provide warnings or instructions for a product; and
- d.** Does not include:
  - (1)** Goods or products that are still in your actual physical possession; or
  - (2)** Containers that are part of a vehicle.

**30. "Your work":**

- a.** Means work or operations performed by you or on your behalf; and
- b.** Means materials, parts or equipment furnished in connection with such work or operations; and
- c.** Includes:
  - (1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
  - (2)** The providing of or failure to provide warnings or instructions.

**All other terms and conditions remain unchanged.**