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FROM THE EDITOR

True or false: the only parties that can receive proceeds from an insurance claim settlement are those the policy specifically identifies as named or additional insureds.

Widespread belief might say this statement is true. But it is not ***always.*** *There are circumstances under which modern insurance policies can apply coverage to non-insureds. The most prominent of these are discussed in this issue of* Adjusting Today, *authored by Donald Malecki.*

Mr. Malecki was one of the most renown insurance experts and authors of our time and remained keenly involved in the industry until his recent passing. His legacy continues to be enlightening to all who could be impacted by an insured loss with information that can help them recover — especially by better understanding the sometimes little-known intricacies of insurance protection.

It is in that spirit that we are pleased once again to share Mr. Malecki's wisdom.

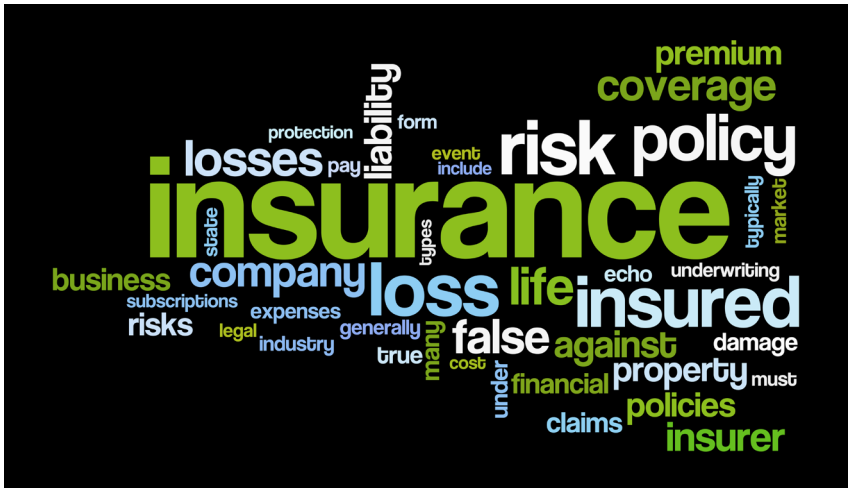
Sheila E. Salvatore
Editor

Being a Named or Additional Insured Not Always Necessary for Coverage

By Donald S. Malecki, CPCU

Having the status of "additional insured" has become such a popular subject that everyone seems to think it is a magic solution to obtaining coverage under all kinds of policies. In reality, whether being an insured is necessary — named or additional — depends on the circumstances.

What can lead to trouble is when a policy requires that an insured be specifically named for purposes of covering its insurable interest in property — but the individual entity merely asks to be an additional insured and nothing more. These kinds of requests are frequent and are made because the entity is under the mistaken impression that being an additional insured applies to all coverages; in fact, additional insured



status is usually limited solely to liability coverage. It is not until after a loss happens and a dispute arises that the individual entity learns for the first time that its additional insured status does not apply to property losses.

A case in point is *Ionian Corp. v. Country Mutual Insurance Company v. Ionian Corp. et al, No. 3:10-cv-0199-HZ (U.S. Dist. Ct. Dist. OR, 2012).* This was an interpleader action where the insurance proceeds were deposited with the court by the insurer following a fire that destroyed a building that was leased to PSC. Ionian Corporation, the lessor of the building, was under the impression that as an additional insured, it was entitled to some of the proceeds. The issue before the court was whether Ionian's coverage was limited to liability only.

The Achilles' heel was the endorsement entitled, "Additional Insured – Multiple Interests," which amended the policy's "Who Is An Insured" provision stating: "If the person(s) or organization(s) shown in the Schedule … is an owner … from whom you have leased land, this insurance is limited to their liability arising out of the ownership, maintenance or use of the premises or land leased to you."

It is not until after a loss happens and a dispute arises that the individual entity learns for the first time that its additional insured status does not apply to property losses.

While Ionian agreed that the endorsement in question only applied to liability insurance, it maintained that it was still covered for property insurance under the Building and Personal Property (BPP) Coverage Form. It asserted, in somewhat of an unusual argument, that this BPP Coverage Form which provided coverage for the fire loss to Ionian did not exclude additional insureds but only certain causes of loss and, therefore, provided additional insured coverage. It was, however, a futile attempt to obtain coverage because no forms or endorsements related to commercial property coverage mention coverage for additional insureds. The court, in ruling against coverage for Ionian, stated that to award proceeds for the property loss when the policy does not provide for such an award had no support in the law.

Departures from Being Named as an Insured

Tracing the history of property insurance reveals that for a person or entity to obtain coverage against fire or other causes of loss, it would have been necessary for them to be named as insureds. As a general rule, the fact that a person or entity had an insurable interest in the damaged property would not have been sufficient to qualify for coverage. This requirement that the person or entity be named as an insured has changed over time so that currently, depending on the policy and nature of the loss, being specifically named as an insured on a property coverage form is not a requirement to collect insurance against loss to covered property.

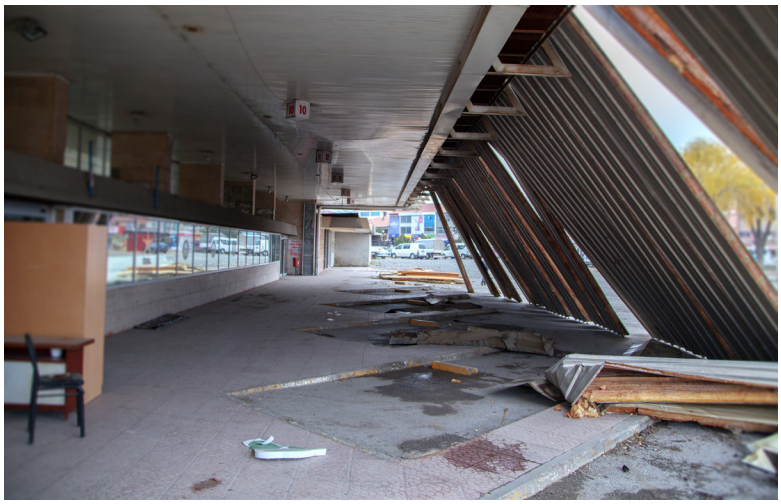
Some examples where coverage is provided despite the fact that an individual or entity is not specifically named as an insured are: The Commercial Output Program — Property Coverage Part CP-1Ed 2.0 of the American Association of Insurance Services (AAIS). The AAIS Business Personal Property coverage part CP-12. Ed 1.0 also applies to personal property of others that is in the named insured's care, custody or control and located on or within 1,000 feet of covered locations. This coverage also applies to personal property of others that is sold under an installation agreement, where the named insured's responsibility continues until the property is accepted by the buyer.

The Building and Personal Property Coverage Form CP 00 10 of Insurance Services Office (ISO) also includes coverage for the personal property of others, but situated within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater. Like the AAIS coverage provision, the property also must be in the care, custody or control of the named insured — and the insurer's payment for loss or damage to such personal property of others only applies for the benefit or account of the owner of such property. What this means is that payment of loss is made to the owner of property and not to the policy's named insured who had care, custody or control of the property.

Generally, coverage for "property of others" applies to personal property. It is possible, however, for coverage to also apply to real property. A case in point is *Ramparts, Inc. d/b/a Luxor Hotel and Casino v. Fireman's Fund Insurance Company, et al., Case No. 2:09-cv-0371-RLH-LRL (U.S. Dist. Ct. NV 2010).* The hotel (lessor) which owned and operated the hotel and casino entered into a lease agreement with a lessee who agreed to construct, develop and operate a restaurant in the complex. Shortly after signing the lease agreement the lessee demolished the existing interior fixtures, designed and performed structural modifications, and installed new finishes, fixtures and equipment. During this period the lessee had obtained a policy that included builder's risk coverage. After completion of the work, the policy was cancelled and rewritten on a package policy.

During the restaurant's peak operating hours, part of the restaurant's premises became overloaded with people and, as a result, a portion of the structure began to buckle and fall. The floor collapsed, damaging the structures of both the restaurant and hotel. Both the lessor and lessee paid to repair the structural deficiencies and damage to their respective properties.

The lessee then made a claim for loss of income and property damage under its policy for nearly $500,000, which was paid. When the lessor submitted claims for indemnification as an additional insured under the lessee's initial builder's risk and subsequent (package) policies, they were denied. Coverage under the builder's risk policy was held not to apply because the loss occurred after that coverage had ended. Likewise, additional insured status was held to be inapplicable under the subsequent package policy because an additional insured was entitled to coverage only when bodily injury, property damage or personal and advertising injury was caused by its acts or omissions, and the lessee was not sued by anyone.



The lessor, however, was able to obtain coverage for loss to its property under the lessee's property policy in light of the coverage applicable to "property of others." The lessee's policy stated that it "will cover the property of others while it is at a covered location … against loss from a cause of loss we cover that applies to your business personal property at the location."

In its analysis of this provision the court found for coverage because: (1) "property of others" was determined not to be property that belonged to the lessee (named insured); (2) a "covered location" included the hotel and casino of the lessor; and (3)

the "causes of loss" covered by the policy included loss or damage caused by … collapse of a building or any part of a building caused only by … weight of people or personal property.

What is interesting about this case is that while the property policy required the lessee (named insured) to sustain a loss to its business personal property to activate coverage for loss to property of others, the coverage applicable to the lessor also applied to its real property.

Searching for Coverage

When it comes to covering the property of others, what seems to be overlooked are the provisions of independently filed policies that automatically cover the interests of contractors and subcontractors in property to the extent that the named insured has assumed liability or has agreed to cover through insurance. This becomes an important issue when property owners undertake construction work and agree in their contracts to obtain property insurance covering the interest of contractors.

In these situations contractors seldom, if ever, are named as insureds and therefore are commonly overlooked after a loss. Some claims personnel simply look at the provisions of policies that address named insureds (or insureds), additional insured interests, and possibly the section on property and interests insured. The entire policy, however, should be reviewed thoroughly to see if the insurable interests of others are also covered.

To the extent that a property policy includes course-of-construction coverage, it would be prudent for claims personnel, in particular, to locate the provision that addresses new construction, additions, improvements and repairs. The reason being that if a policy provides this kind of coverage, chances are that this provision will mention the extent to which contractors' interests are covered.

One such clause of a property policy reads as follows:

NEW CONSTRUCTION, ALTERATIONS AND REPAIRS

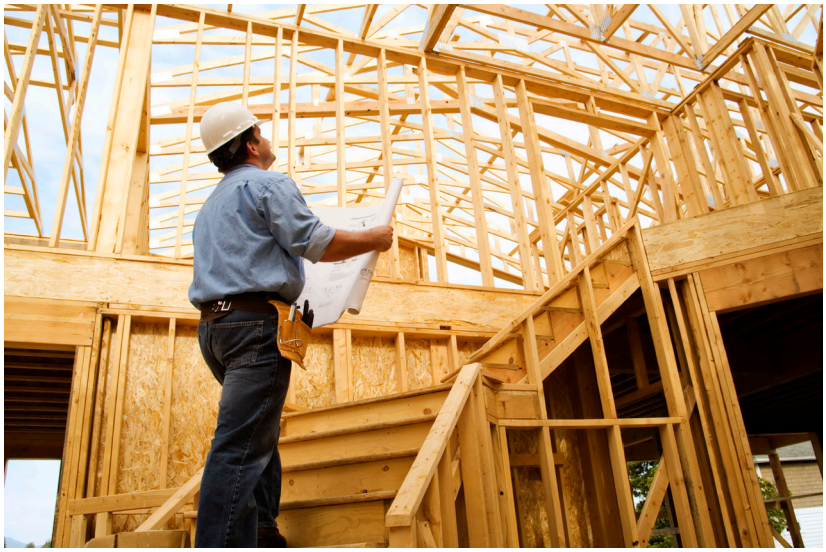
This policy also covers new buildings and structures at any location while in the course of construction and when completed; additions, extensions, alterations and repairs to buildings and structures insured hereunder including:

(a) materials, supplies, equipment, machinery and apparatus therefore;

(b) contents of such buildings, structures, additions and extensions;

(c) the interest of contractors and subcontractors in such property to the extent the insured has assumed liability therefore.

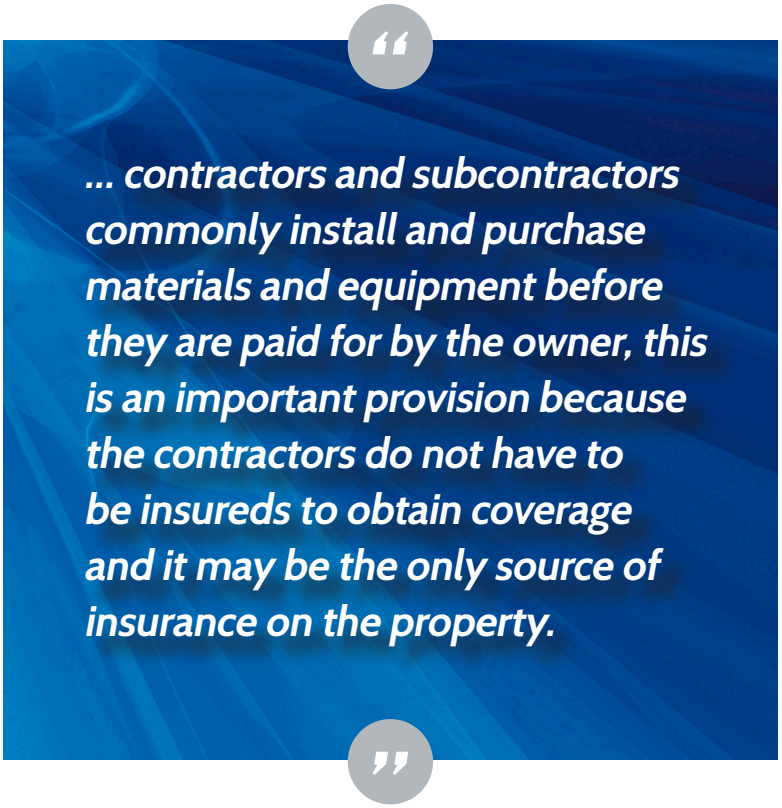
Considering that contractors and subcontractors commonly install and purchase materials and



equipment before they are paid for by the owner, this is an important provision because the contractors do not have to be insureds to obtain coverage and it may be the only source of insurance on the property. Not to be overlooked, either, is the fact that contractors in this category also pay for this protection because they in all likelihood reduced their construction bids by an amount they would have paid had they purchased their own insurance for this exposure.

Relatively Recent Developments

As mentioned, additional insured status has customarily applied solely to liability insurance. In recent years, however, some insurers have introduced endorsements adding certain persons or entities as additional insureds under property coverages. One such example is the endorsement introduced by ISO in 2007: Additional Insured – Building Owner CP 12 19 06 07. This endorsement may be a little confusing because its title refers to "additional insured," whereas the language of the actual endorsement refers to the building owner as a "named insured."



This endorsement should alleviate some of the problems that have developed over time on how to protect a property owner's interest. For example, in one instance the following question was asked: "We have an insured who is leasing a building from its owner on a triple net lease basis — meaning responsibility for all taxes, insurance and maintenance. The owner, however, wants to be named as a mortgagee on our insured's property policy written on that building. How can this be accomplished, since showing the owner as a mortgagee would be inappropriate?"

It is true that showing the owner as a mortgagee would be inappropriate because to qualify as a mortgagee requires some kind of financing arrangement between the building owner and the insured lessee in this case. What eliminates this kind of question is issuance of the above-mentioned Additional Insured endorsement CP 12 19.

If this endorsement were used with a liability coverage form, it would likely be confusing because there are significant differences between being a named insured and an additional insured. It does not matter for purposes of property coverage because this endorsement limits the building owner's coverage to that provided under the applicable coverage part or policy for direct loss or damage to the described building. As a result, it does not matter whether the building owner is a named insured or additional insured. The reason is that in the event of a covered loss, the insurer is only required to pay an amount that corresponds to the building owner's insurable interest.

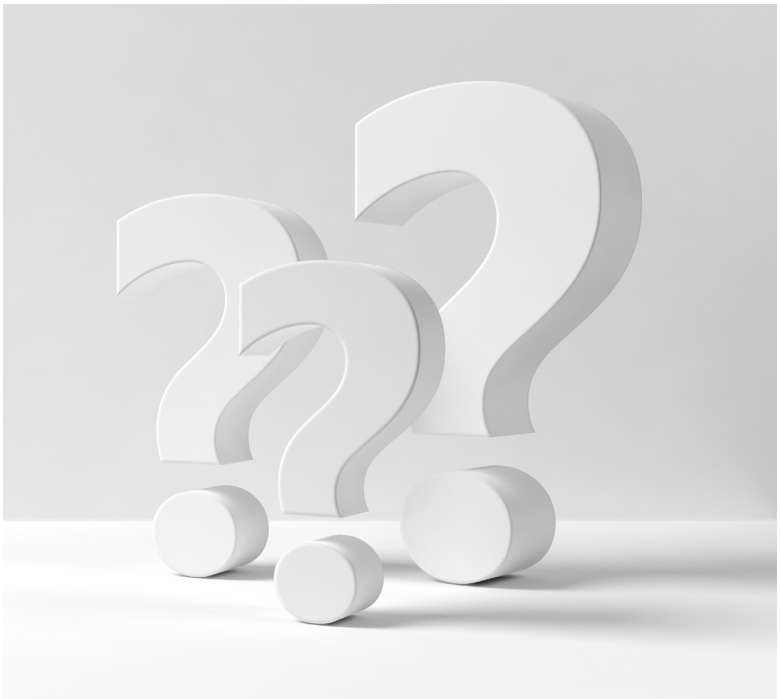
The second endorsement introduced in 2007 was Business Income – Landlord as Additional Insured (Rental Value) CP 15 03 06 07. This endorsement deals with the situation in which a landlord has a non-abatement of rents provision in

its lease and wants its rents paid even though the property has been partially damaged and is not usable. In such cases, the appropriate coverage is still rental value and can be effective with the above endorsement.

As an endorsement, rental value coverage cannot be activated until it is endorsed to the appropriate coverage form designated by number. The forms are CP 00 30, which is the Business Income (and Extra Expense) Coverage Form or CP 00 32, which is the Business Income (Without Extra Expense) Coverage Form. It is important to note, however, that it is not necessary for the named insured to actually purchase business income coverage under either of those coverage forms in order to activate the rental value endorsement. Rental value can be purchased alone or in conjunction with business income coverage.

Important Questions

Questions that may not arise until after a loss occurs but are important to ponder prior to a loss include the following:



- Was the loss sustained by someone whose property is in the care, custody or control of another?
- Was the loss to property of one or more contractors where a project owner has agreed to be responsible for covering damage?
- Are these factors sufficient to trigger coverage even in the absence of loss sustained by an insured who is responsible for such loss?
- Or expressed another way, is it sufficient to trigger coverage here even though the owners of property or contractors are not insureds and are the ones to have sustained a loss?

The reason for these questions is that the opinion has been expressed that loss does not become payable to property of others until an insured has first sustained a covered loss and decides to make a claim. In other words, until a claim is made by an insured, the interests of others in the property, including contractors, are not covered even though an insured has assumed liability for loss.

This position or opinion is self-serving and certainly not justified based on the language of policies providing coverage for loss to property of others who are not insureds. Such an opinion, for example, also overlooks the facts that (1) the insurable interests in property under construction or repair may belong solely to contractors, (2) the contractors likely provided some consideration for the protection provided, and (3) the insurer has confirmed by way of specific reference to a policy or endorsement provision that coverage is to apply to the extent of an insured's promise.

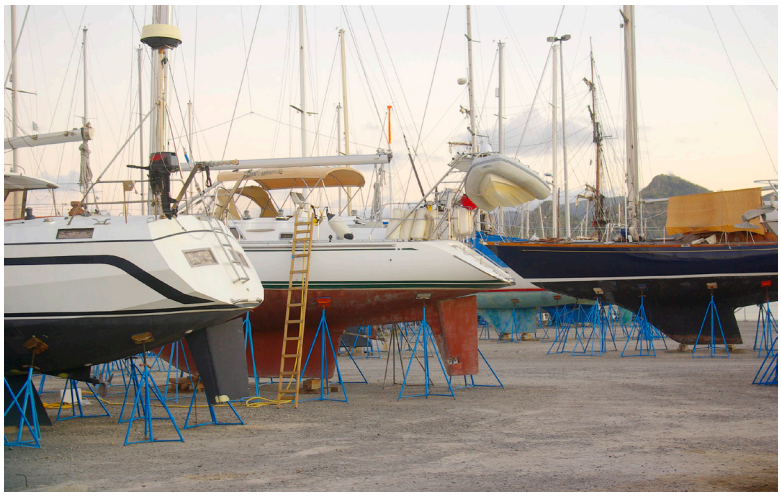
Simply reading through a coverage form granting coverage for loss to property of others defies the opinion that the insured must first sustain a loss and make a claim before loss becomes payable for damage to property of others. Note, for example, ISO Building and Personal Property Coverage Form

CP 00 10 which, as noted earlier, includes coverage for the property of others situated within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater. The preamble of this form states that the insurer "will pay for direct physical loss of or damage to covered property at a covered location from a covered cause. Covered property consists of the described (1) building or structure, along with fixtures and equipment, (2) the named insured's business personal property, or (3) personal property of others."

Given that the payment of loss or damage to the property of others is for the account of the owner, all the insurer has to do is determine the facts of the matter, the value of the property, the limits, any policy limitations — and pay the loss. The coverage under this form assumes, of course, that it was specifically purchased by the insertion in the Declarations of a limit. The owner of a boat while at a marina in the case of *Kenneth Pizzetta v. Lake Catherine Marina, LLC, 995 So. 2d 26. (La. App. Cir. 2008)* did not find this out until after loss to his watercraft that was in the marina's possession for repairs.

The owner of the boat brought it to the marina for repairs and refurbishment. The boat, however, remained at the marina for nine months until Hurricane Katrina struck the area. Having sustained damage to his boat, the owner argued that he was entitled to coverage under the "Personal Property of Others" provision of the marina's policy. While that coverage applied to property in the marina's (named insured's) care, custody or control, the coverage required that a limit be inserted in the Declarations. None, however, was inserted for two categories: (1) Your Business Personal Property, and (2) Personal Property of Others. Therefore, no coverage applied.

The boat owner attempted to raise an issue of material fact concerning the marina's diligence and prudence with his contention that he was told that his boat was safe because "hurricanes don't come



this way." The implication of his contention was that because the marina had a lack of concern about the approaching storm, it failed to take proper precautions given that it would have taken at least four hours to complete the repairs on his boat.

The marina maintained, however, that faced with the possibility of a storm, rather than spend time repairing the boat, it made the decision to place extra boat stands under all of the vessels in its care, custody or control. This step, they said, proved to be sufficient in the past. In effect, the court found that the undisputed actions taken by the marina in preparation for the storm were, as a matter of law, sufficient to fulfill the marina's obligations with diligence and prudence, and that the alternative suggested by the boat owner did not raise an issue of material fact.

The marina here appeared to be lucky that the loss to the boat did not occur under less intensive means since, as a bailee, in a bailment situation the ending could have been different. It also behooves bailees to check their policies having to do with coverage at all times — especially when they are bailees.

Conclusion

This article is not meant to present an exhaustive discussion of the subject. We hope to have pointed out, however, that while it is advisable to be an

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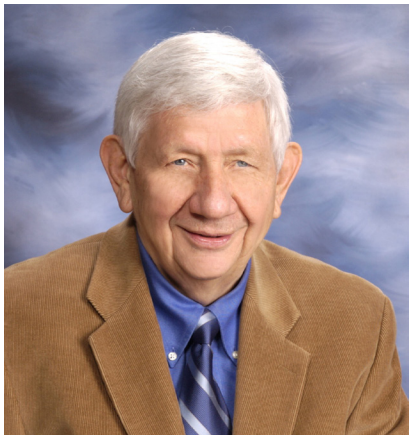
insured on a property coverage form when there is an insurable interest, in certain situations a person or entity may still be able to obtain insurance payment following loss even when that person or entity is not an insured.

The way in which insurance policies are structured today, coverage can apply to non-insureds in a variety of ways. Of course, having named insured status may be more advantageous simply because insurers are precluded from exercising their right of subrogation against insureds. In fact, non-insureds, unlike most insureds, usually are only covered on a limited basis, for a limited amount.

What is important about the coverage of non-insureds is that while policy language is the controlling factor, property policies generally do not contain restrictions to the effect that loss to the property of non-insureds does not become payable until an insured also sustains loss and decides to make a claim. Such an opinion without substantial support is unreasonable and should be viewed as self-serving.

ABOUT THE AUTHOR



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