

**Hart, Lita**

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**From:** Travis Childers [Travis.Childers@bbleesburg.com]  
**Sent:** Tuesday, September 22, 2009 5:05 PM  
**To:** Howell, Sandee  
**Cc:** Arnold, Bradley; Hart, Lita; Scott Hindman ; Brian Brooks  
**Attachments:** PGIT and FACT Coverage Differences.doc

Sandee,  
At your request we have completed a basic comparison of the FACT and PGIT coverage forms. It appears that there really is not much difference between the 2 programs except for the pricing.  
Please note that I sent this document to Ken last week to review to make sure we are all on the same page but I think he is traveling this week and it has been difficult for him to get back to me.  
So, review this document and feel free to call with questions.  
Thanks

Travis Childers  
Brown & Brown of Florida, Inc.  
Leesburg, FL  
Branch 72  
Phone 352-787-2431 X 212  
Fax 352-787-9922  
[Travis.Childers@bbleesburg.com](mailto:Travis.Childers@bbleesburg.com)

Please remember that insurance coverage can not be changed or bound by leaving an electronic message or voice mail message. Thank you.

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## **PGIT and FACT Coverage Differences**

**Consent to Settle** - FACT coverage form includes a clause that gives FACT the right to settle claims without the consent of the insured. "We may at our discretion investigate any "occurrence" and settle, in whole or in part, any "claim" that may result.  
PGIT's consent to settle clause requires the trust to consult the County and solicit their approval prior to settlement of claims.

**Defense Attorney** – FACT the Insured will accept the defense attorney or attorneys selected and retained by FACT.  
PGIT offers the insured a robust choice of panel attorneys from the approved list of panel attorneys and is willing to add attorneys at the request of the insured, subject to approval by PGIT excess carriers.

**Support & Opposition to Claim Bill Legislation** – Both trusts include language that the county must provide positive support & cooperation of opposition of claim bill legislation. FACT has an additional clause – If FACT hire lobbyist to represent and defend against a claims bill. This expense may reduce limit available to settle claim.

**E&O** – FACT Exclusion (g) of Coverage F – Errors or Omission liability shall not apply to liability for "damages" arising out of the performance of or failure to perform professional legal services by any **attorney** or **assistant attorney** who is your employee while such attorney is providing legal services to you.  
PGIT does not have this type of exclusion.

### **Employment Practices**

FACT excludes salary/wages/benefits  
"Damages" consisting or recovery of salary, wages, or other compensation or "benefits," back or front salary, back or front wages, back, front or other compensation or "benefits" or interest or penalties thereon payable to any person by the insured.  
PGIT does not have this type of exclusion.  
FACT excludes plaintiff attorney' fees under U.S. Code, Title 42, Section 1988

### **Defense Costs –**

GL, LEL & Automobile  
PGIT defense outside of limit, deductible does not apply to defense. FACT defense costs erodes the limit, deductible applies to defense.  
POL/EPLI  
Both PGIT & FACT defense erodes the limit, deductible applies to defense

### **Coverage form**

GL, LEL & Automobile – both trust use occurrence form  
POL/EPLI – PGIT claims made form FACT occurrence form

### **Non-Monetary/Injunctive Relief coverage**

PGIT included at \$10,000 or \$100,000 sub limit  
FACT excludes

### **Pre Termination Employment Counseling Sub limit**

PGIT \$2,500 per occurrence/\$5,000 Annual Aggregate  
FACT – not included

### **Notice of Cancellation**

PGIT 60 days  
FACT 30 days

Both trusts – 10 days for nonpayment

**GL Exclusions**

FACT – stadiums, arenas or grandstands with a seating capacity in excess of 5,000 people

FACT – Distribution or sale of natural or L.P. gas

FACT – Inverse Condemnation

PGIT - \$100,000 sub limit for Eminent Domain/Inverses Condemnation

Liquor Liability – Both trusts exclude

Host Liquor – Both trusts include

**Automobile Liability and Physical Damage**

PGIT- fleet automatic, no charge for liability or physical damage on acquired autos throughout the term.

FACT- premium will be charged for new autos added throughout the term.

**Automobile Exclusions**

FACT – Racing

**Automobile Extensions**

Bail Bonds

PGIT \$1,000

FACT \$250

Reasonable Expense – time off from work

PGIT \$250 per Day

FACT \$100 per Day



# **FACT**

## **Florida Association of Counties Trust**

### **Some Comments regarding its History, Structure and Coverages**

Coverage documents are different. While none cover everything, some are so full of conditions and exclusions that they severely limit or remove coverage. Others offer more broadly written language that delivers much greater real protection. It can be difficult to know the difference, but we believe you will find coverages provided by FACT are generally broader, particularly in key areas with great potential of loss.

### **History and Structure**

FACT was established over 20 years ago for the sole purpose of providing extensive liability coverage protection to meet the unique and challenging needs of Florida Counties. It is County owned and is overseen by a Board elected from member Florida Counties. FACT is managed by Counties for Counties, and its day to day operations are carried out on behalf of the board by FACT Risk Services Corporation (FRSC). All coverages and services are delivered to its members on an at-cost basis.

### **Financial Condition**

The long term financial strength of a trust or pool is of utmost importance to its participants. FACT follows the same Statutory Accounting Practices required of regulated insurance carriers. This structure provides a conservative and accurate view of the financial condition of the program. Any counties considering a pool or trust will want to request a Statutory Accounting basis financial statement from that entity, and have professionals who are experienced in insurance accounting matters review the statement thoroughly. After all, if the trust is insolvent, it does not matter what coverages or services were promised.

## Operating Philosophy

FACT's guiding principles include the following:

- Many coverages are more broadly written than competitor's forms, and the use of restrictive sub-limits is minimized.
- Claims are handled with the intent to serve the best interest of the FACT member.
- FACT's claims philosophy is to aggressively defend its members against non-meritorious suits, even when it may be less costly for FACT to settle.
- FACT's underwriting posture and pricing is consistent and stable.
- The protection, reputation and the integrity of the county is a primary consideration.

## Coverage Comments

### General Liability

- FACT provides broad coverage for professional healthcare services. Other programs exclude healthcare activities that are outside of Florida Statute 401.265. For example, those forms might exclude coverage if the doctor or nurse conducted a physical exam for a firefighter.
- FACT provides coverage for water systems and potable water delivered by pipe. Many other programs exclude this important exposure to loss.
- Assault and battery claims can be brought against anyone, not just law enforcement personnel. FACT coverage does not have unreasonable force exclusions for assault and battery related claims. Other carriers may limit coverage to only acts where reasonable force is used. But, if reasonable force is used, there are generally no grounds for a claim. If unreasonable force is alleged, the other carrier forms may not respond to protect the county.
- FACT provides Sexual Abuse or Molestation coverage for the county, though not for the alleged criminal perpetrator. Other programs often exclude all claims related to Sexual Abuse or Molestation, including defense of the county. FACT specifically preserves coverage for the county by including coverage for the typical allegations brought against a county in such a case: negligent hiring, supervision and retention of the perpetrator as well as failure to adequately do a background investigation. Many other programs create a dangerous coverage gap by excluding coverage for negligent hiring, supervision, retention and investigation.

- FACT coverage may include Limited Pollution Coverage for Pesticide or Herbicides, Sudden and Immediate Release of Petroleum from Above Ground Tanks, Paint Spray and Fire Scene Pollution, all subject to the full policy limit of liability. This is broader than other forms that have either no coverage or a small sub-limit.
- Although excluding coverage for the Sheriff's Department, FACT does not exclude coverage for related offices, such as a Bailiff, Clerk of the Courts or a Building Inspector, all of whom have law enforcement powers and responsibilities. Other programs commonly exclude this coverage.
- FACT understands that your governmental operations may include contracts you sign with other public entities as well as with private businesses. FACT's definition of "Covered Contract," under which you assume bodily injury or property damage liability of another party, includes any contract or agreement pertaining to your governmental operations. Other carriers may limit the definition of "Covered Contract" to only those contracts or agreements between governmental bodies (i.e. contracts the County signs with a city, another county, special district, etc.). This may pose a significant coverage restriction since the bulk of a county's contracts are typically with non-governmental entities,

### **Errors & Omissions**

- FACT coverage is offered on an occurrence basis. Other carriers often utilize claims-made forms. Claims-made forms can be more difficult to administer properly with their unique requirements, such as prior acts coverage, limited claims reporting provisions and extended discovery reporting requirements. If not handled properly, these can create significant coverage gaps for current, past or future local officials.

### **Designated Wrongful Employment Practices Liability (DWEPL)**

- FACT coverage includes all employees with its own separate DWEPL liability limit. Other carriers may include this coverage within the Public Officials Liability with just one limit for both. Their combined treatment of these two distinct coverages can create potential for coverage gaps and exhaustion of coverage limits.

- FACT includes coverage for the county for sexual harassment by including coverage for the typical allegations brought against a county in such a case: negligent hiring, supervision and retention of the perpetrator as well as failure to adequately do a background investigation. Many other programs create a coverage gap by excluding coverage for negligent hiring, supervision, retention and investigation. This can be a dangerous coverage gap in today's world of reduction-in-force issues where soon-to-be laid off employees find that making such allegations can be "profitable" for them.
- FACT also provides coverage for failure to hire, violation of whistleblower acts, and other common allegations which are routinely excluded by other carrier forms. Whistleblower claims have become far more common as employees are demoted or their job duties are changed as part of downsizing and departmental reorganization.
- FACT provides coverage for violation of employment related laws for employment discrimination and wrongful employment termination. Other programs often exclude coverage in all cases for violation of ERISA and other employment related laws.

### **Civil Rights**

- FACT provides coverage for lawsuits alleging violation of civil rights due to a practice, custom or policy of the county ("Monell" claims). Other carriers commonly exclude this coverage. Some examples of claims of this type include allegations of illegal discrimination in hiring, such as basing hiring decisions on age, race, gender, religion, etc.; claims result from allegations of illegal discrimination in zoning or housing decisions; claims alleging denial of funding for grants to certain groups on the basis of race, sex, religion, etc.
- FACT provides coverage for many Civil Rights claims that are neither law enforcement nor employment practices matters. Other carriers may restrict Civil Rights coverage they offer to only Law Enforcement or Employment Practices/Employment related issues. For example, FACT has covered due process and first amendment claims of individuals alleging they were not permitted to speak at a public meeting; zoning variance issues (non-takings) such as application of a comprehensive plan differently to one contractor than to others; and

allegations of illegal discrimination in allocation of grant money or other funds to some, while denying it to others.

- Any violation of civil rights involves an intentional illegal act by an insured employee or official. FACT does not have intentional or illegal acts exclusions regarding civil rights coverages as many other coverage providers do.
- Other insurance carriers typically provide a separate Law Enforcement Liability coverage form limited only to those engaged in law enforcement activities. FACT Civil Rights liability and Law Enforcement liability coverage applies to all covered employees and insureds.

These questions and comments are intended to stimulate dialogue regarding important public policy matters. No assertion is made that any insurance company will or will not provide any particular coverage or that FACT will or will not provide coverage for any claim or lawsuit. Each situation is different and subject to individual factual review. We suggest that the insured obtain complete specimen coverage forms of any policy they are considering, and conduct a thorough analysis of the coverage differences with particular emphasis on the liability policies. The insurance policy forms and endorsements determine coverage.

## **Example of Scope and Strength of FACT Coverage Agreement**

Allegations in one of a recent series of claims/lawsuits currently being defended by FACT:

*“The conduct of Defendant complained of herein, committed by virtue and under color of the authority of Defendant’s office, was in knowing and willful disregard of Plaintiff’s constitutional rights, with the express intent to harm Plaintiff.”*

If the FACT coverage agreement contained the following language:

*“The Trust shall not be liable for damages or claims expenses on account of any claim based upon, arising out of or attributable to any intentional or knowing violation of the law.”*

FACT would have declined coverage for the lawsuit.