We have represented, and currently do represent, several of the managers involved in the Thirtymile and Cramer fires who carried professional liability insurance (PLI). During the course of our representation, we received numerous inquires asking whether Forest Service employees really need PLI. Based upon what we learned about the dangers associated with wildland firefighting, and the scope of the criminal and administrative investigative inquires into firefighting fatalities due to entrapments or burnovers, we have come to an unmistakable conclusion that PLI is a must have for line officers, fire management officers, incident commanders and any employee involved in firefighting or fire management. The following is a brief overview of the foundation upon which this conclusion is based, including the potential criminal, administrative and civil liabilities all federal employees sometimes face in their careers, as well as information about the professional liability policy offered by Wright & Company.

I. Investigative Landscape

In the aftermath of the Thirtymile Fire tragedy, Congress enacted Public Law 107-203 (July 24, 2002), requiring that for each fatality of an employee of the Forest Service due to wildfire

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1We have also receive similar inquiries in our capacity as General Counsel to the Senior Executives Association (SEA), the Federal Managers Association (FMA) and the FAA Federal Managers Association (FAAMA) and as the publishers of FedAgent and FEDmanager (free online weekly publications), asking whether federal employees and managers need professional liability insurance (PLI).
entrapment or burnover, the Inspector General (IG) of the Department of Agriculture must conduct an independent investigation of the fatality and report its results to Congress. Given the jurisdiction conferred to the IG from the Inspector General Act of 1978, this new authority resulted in an IG criminal investigation of the Cramer Fire. This IG investigation, which was directed by the United States Attorney’s Office for the District of Idaho focused primarily on the federal crime of involuntary manslaughter. The applicable provision of the federal criminal code as it applied to the Cramer Fire investigation defines involuntary manslaughter as “the commission in an unlawful manner, or without due caution and the circumspection, of a lawful act which might produce death.” 18 U.S.C. § 1112. As with every federal criminal investigation, other federal crimes such as false statements made during the investigations, obstruction of justice, and witness tampering are always carefully considered. And in the case of Cramer, we were aware that the prosecution for an alleged false statement was aggressively considered, but ultimately not pursued by the United States Attorney’s Office.

Other investigations of burnover and entrapment fatalities include an Accident Investigation by the Forest Service and a safety investigation by the Occupational Safety and Health Administration (OSHA). Both of these investigations are administrative in nature and commence almost immediately after the accident. With the occurrence of the Thirtymile File, a third

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2 It is our understanding that Public Law 107-203 was enacted because certain members of congress desired to have an investigative requirement that was independent of the Forest Service and to have the report delivered to them. We do not believe it was Congress’ intent to mandate criminal investigations for every entrapment or burnover fatality, but simply to ensure an independent review of the event.
administrative investigation also commences several months later to investigate whether disciplinary action is warranted. The Forest Service hires a contract investigator to conduct the misconduct investigation.

**Problems Associated with this Legislative Landscape**

The first major problem arising from this post-Thirtymile Fire investigative landscape is the reality that dedicated federal employees involved in the very dangerous profession of fighting wildland fires will now be considered for criminal prosecution simply for trying to do their jobs. Both the dangers and unpredictability of wildland fire fighting dictate that fatalities are going to occur no matter what safety tactics or countermeasures are employed, so long as the political direction is to fight the fire. In our opinion, this precedent of criminally prosecuting well-intentioned federal employees involved in a dangerous profession is a bad one to set.

The second problem associated with this new investigative landscape is that the IG for the USDA does not have expertise in running a manslaughter investigation, nor does it have any experience in investigating wildland firefighting accidents. Interestingly enough, this lack of experience in investigating firefighting fatalities has resulted in the IG relying heavily on the Forest Service’s Accident Investigation – a result Congress specifically did not want in enacting the new law. With regard to the IG’s lack of experience in investigating supposed manslaughter crimes, this is because the IG’s statutory mandate is to investigate matters associated with fraud, waste and abuse of government funds or authority. Rarely will the USDA IG, or any IG for that matter, be called upon to conduct a criminal investigation involving a fatality. It has been our experience that the federal entity that usually investigates fatalities involving federal officials/employees is the Federal
Bureau of Investigations (FBI). The FBI and local law enforcement typically investigate all accidental shootings by federal employees (Border Patrol, INS agent, etc.) that result in injury or fatality, and it has been our experience that these federal officials are cleared by the FBI of any criminal wrongdoing within 24 to 48 hours of the shooting. Based on our experience in the very first IG investigation conducted under this new authority into the Cramer Fire, and the fact it resulted in an active criminal investigation achieving a criminal disposition for one employee (the Incident Commander), we are left with the distinct impression that criminal prosecutions will be aggressively considered in every burnover and entrapment fatality, which is unlike the outcome of other accident-related fatalities occurring throughout the federal government.

A final point of concern is that the USDA IG conducted its criminal investigation simultaneously with the above-mentioned administrative investigations, which raised a serious conflict with the employee’s constitutional rights in the criminal investigation. Under well-established federal law, employees who participate in an IG and administrative investigation “voluntarily,” do so with serious implications to their constitutional right to remain silent in any criminal investigation.3 If you participate in any of the administrative investigation(s) voluntarily, the IG and the prosecutor will have access to your statements and could use it against you in the

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3 It is our recommendation that no employee should participate in any investigation, particularly one involving the IG unless he or she is “required” or “compelled” to answer questions. “Compelled” means that you are instructed that you must answer questions in the investigation and that if you fail to answer questions, you would be vulnerable to disciplinary action up to and including removal from federal service for failure to do so. This type of warning will accord you “use immunity” during the criminal investigation, meaning anything you say during the investigation cannot be used against you in any criminal proceeding.

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criminal investigation, and your statement could be considered a testimonial waiver of your right to remain silent. Criminal defense lawyers involved in federal criminal prosecutions consistently advise their clients not to participate in any criminal or administrative investigation unless they are “compelled” to do so, regardless of their innocence.

This problem manifested itself in the Cramer investigation in a very troubling way. It essentially forced employees to choose between their constitutional right to remain silent in the IG investigation and their desire to answer questions from administrative investigators in order to clear their names in the administrative investigation(s). The problem was truly made worse when the Forest Service decided to propose disciplinary actions against employees while the IG investigation was ongoing and while the United State’s Attorney’s office was actively considering criminal prosecution of those involved in the Cramer fire. Thus, the Forest Service placed employees between the proverbial rock and a hard place, because employees facing disciplinary action were unable to avail themselves of their statutory and constitutional right to defend themselves in the disciplinary action without jeopardizing their constitutional right to silence in the separate but concurrent criminal investigation.4

We also note that the way the Forest Service handled the timing of its misconduct

4 Ultimately, we believe this problem resulted in the Cramer Fire Incident Commander being forced to accept the prosecutor’s pretrial diversion agreement which secured his removal from the Forest Service, rather than defend himself in either the administrative and criminal proceedings. In other words, if he was unable to respond in the disciplinary proceeding and knew he would be removed without presenting a meaningful defense, why not accept the deal being offered by the prosecutor which really only resulted in his removal from federal service and resolved the criminal matter.
investigation and disciplinary actions is contrary to the way every other federal agency handles similar matters. Every other agency waits until the criminal investigation comes to a discernable conclusion before it commences its administrative/misconduct process. The reason every agency waits is because it does not want to interfere with the criminal investigation. But more importantly, the deference to the criminal investigation is also so employees can be free to defend themselves and have meaningful due process in the disciplinary matter – the way the Civil Service Reform Act intended – because the end of a criminal investigation eliminates the concern that statements made to defend a disciplinary action will also be used to indict or convict the employee who made the statements. Notwithstanding the appropriateness of this landscape, this is the landscape that currently exists, and every affected employee should consider PLI in this type of environment.

II. What does PLI cover and why do need it?

PLI generally pays the cost of defense in a criminal investigation/prosecution, administrative investigation/disciplinary action, or judicial sanction proceeding, up to $100,000. It will also pay a personal judgment up to $1,000,000 in a civil suit and unlimited attorney fees to defend in a civil suit.

A. Criminal and Administrative Defense

The primary reason Forest Service employees need PLI is because of its defense provision. This provision entitles a federal employee when acting in the scope of employment to have his/her legal fees paid up to $100,000 if he/she 1) becomes the subject of an IG, Internal Affairs, criminal or Congressional investigation, or an investigation for alleged whistleblower reprisal by OSC; 2) is named as the responsible management official in an EEO complaint; or 3) has a disciplinary
action proposed against him/her from some alleged wrongdoing. Considering the investigative landscape discussed above, in the tragic event that an entrapment or burnover fatality occurs on a fire that you have anything do with, you will need an attorney to navigate through the process.

It is our experience that the actions or inactions of those employees directly involved in such fires are scrutinized with a magnifying glass and with the benefit of 20/20 hindsight, notwithstanding that fire management decisions are often made in a compressed time frame and only with the information then available. Applying that level of scrutiny to the inexactness of the 10 Standing Firefighting Orders and the discretionary nature of mitigating the 18 Watchout Situations in a political environment that demands accountability, it is hard for us to imagine that anyone directly involved in a burnover or entrapment fatality will not face some allegation of negligence or wrongdoing. In light of this reality, you will need an attorney to protect your interests. Regrettably, it can cost at least $30,000 to $70,000 to prevent a criminal indictment, protect your rights throughout the administrative process, including defending against any disciplinary action at the agency level or take your disciplinary case through the MSPB.

B. Civil Suits/Personal Liability

Federal employees at all levels can be sued by private persons for alleged violations of their constitutional and common law rights. These issues arise most often for law enforcement officials, but could arise for non-federal law enforcement managers and employees who have frequent dealings with the public. As this applies to Forest Service employees, any fatalities or injuries to
private citizens could make a federal employee vulnerable to civil actions. In addition, many Forest Service employees, like federal managers and executives throughout the federal government make decisions which could subject them to suit by a citizen (i.e., land use, water use and natural resources decisions). In most civil suits, the Department of Justice will defend the named individual defendant and judgments are rarely issued ordering individual employees to pay damages. On occasion, however, DOJ will refuse representation and the individual employee must then obtain representation to defend him or herself in court. With lawyer hourly rates running between $250 and $350 per hour for experienced lawyers, an individual forced to retain private counsel finds him or herself quickly paying a lot of money in legal fees, even if the allegation is ultimately disproved.

While federal employees are absolutely immune from suit for common law torts if they are performing their official duties, otherwise known as acting “within the scope of employment,” and have qualified immunity in suits alleging constitutional torts, this does not mean a federal employee cannot be sued. If DOJ determines that the federal employee is acting within the scope of his/her employment and that it is “in the interest of the United States” to represent that person, a discretionary decision, then DOJ will take over and seek to have the United States substituted as the defendant in suits based on common law torts or file a motion to dismiss in suits based on constitutional tort claims. The likely result under these circumstances is that the suit will be dismissed. But there are occasions when DOJ has taken the position that certain conduct is either not within the scope of employment or conduct not in interest of the U.S. to defend. In these cases, 

5 Damages associated with injuries and fatalities to federal employees is governed by and limited to the Federal Employees Compensation Act (FECA).
an employee is forced to retain private counsel at his/her own expense, and of course may become liable to pay a judgment if he or she unsuccessfully raises an immunity defense.

PLI provides protection against these civil actions. As long as any civil claim brought against you as a federal employee arises from actions taken in the scope of your employment, the insurance provides you coverage, paying up to $1,000,000 in damages, regardless of whether your agency authorizes payment of the judgment from agency appropriated funds. Even if DOJ represents you in a civil suit, DOJ is not authorized to pay a judgment entered against an individual federal employee from the Judgment Fund. Further, if you suddenly find yourself facing a civil suit without DOJ representation, defending yourself can run $25,000 to over $100,000 in legal fees.

III. What Does PLI Cost?

Wright & Company is an insurance agency in Washington, D.C. Its policy is administered by a nationally known claims administrator. The current Wright & Company policy offers $1,000,000 of liability coverage and the $100,000 legal defense provision for about $292 a year or approximately $25 per month. Its more limited policy provides $500,000 of liability coverage and the $100,000 legal defense provision for $229 per year (less than $20 per month). And, if you are a supervisor, manager or law enforcement officer, your agency will reimburse you for up to ½ of the premium cost. Your net cost is approximately $146 per year. It is our opinion that this law requiring reimbursement for supervisors and managers covers those employees who are red-carded for fire management responsibilities (including incident commanders) regardless of whether their position of record is a supervisory or manager position. If you are interested in speaking with someone at Wright & Company about their policy, their telephone number is 1-800-424-9801 (202-
289-0200 in D.C.), or you can visit their website at www.wrightandco.com, and click on Liability. Hopefully, this helps explain the professional liability insurance question for you. Over the years we have represented more than one thousand federal supervisors, managers, law enforcement officials and executives in all types of investigations, disciplinary proceedings and even civil and criminal actions. Some of our clients had PLI; others didn’t. Those who did breathed a sigh of relief as legal fees and expenses grew and they were still able to mount a defense without sacrificing retirement dollars, college savings funds and other savings. Those who didn’t wished they did.