

CONTENTS

Dedication

Acknowledgments

About the Author

Summary of Contents

Part I Overview of Basic Insurance Issues

Chapter 1: Liability Insurance: A General Introduction

- § 1.01 Introduction
- § 1.02 Obtaining Insurance—Applications
- § 1.02A Severability
- § 1.03 —Binders
- § 1.04 —Certificates of Insurance
- § 1.05 Automobile Insurance
- § 1.06 —General Policy Terms in Auto Policies
- § 1.07 —Uninsured and Underinsured Motorists Clauses
- § 1.08 Commercial General Liability Insurance
- § 1.09 —Professional Liability Insurance
- § 1.10 Directors' and Officers' Liability Insurance
- § 1.11 —Workers' Compensation Liability Insurance
- § 1.12 Layers of Insurance—Primary Insurance
- § 1.13 —Excess Insurance
- § 1.14 —Umbrella Insurance
- § 1.15 —Reinsurance

Chapter 2: How to Read a Business Liability Policy

- § 2.01 Part of a Liability Policy—Introduction
- § 2.02 —Declarations
- § 2.03 —Insuring Agreement
- § 2.04 —Definitions
- § 2.05 —Exclusions
- § 2.06 —Endorsements
- § 2.07 —Conditions
- § 2.08 Analysis of Liability Policy—Introduction
- § 2.09 Declarations—Named Insured
- § 2.10 —Policy Period and Monetary Limits of Liability
- § 2.11 —Insuring Clause with Definitions
- § 2.12 —Conditions
- § 2.13 Issues Concerning Lost Policies—Introduction
- § 2.14 —Secondary Evidence of Lost Policies

Litigating Insurance Disputes

§ 2.15 —Types of Secondary Evidence

§ 2.16 Conclusion

Chapter 3: Rules of Liability Policy Construction

§ 3.01 General Rules of Policy Construction—Insurance Policy as Contract

§ 3.02 —Plain Meaning of Insurance Contract

§ 3.03 Ambiguous Policy Terms

§ 3.04 —Contra-Insurer Doctrine

§ 3.05 —States Applying Contra-Insurer Doctrine

§ 3.06 —Reasonable Expectations Doctrine

§ 3.07 —Application of the Reasonable Expectations Rule

§ 3.08 —States Applying the Reasonable Expectations Doctrine

§ 3.09 —Extrinsic Evidence Concerning Intentions of the Parties

§ 3.10 Rules of Construction in Business Insurance—Application of Contra-Insurer Rule

§ 3.11 —Size and Insurance Sophistication of Business Insured

§ 3.12 —Disputes between Insurers

§ 3.13 —Involvement of Brokers and Counsel

§ 3.14 —Manuscript Policy

§ 3.15 —Rejection of Business Insured Exception

§ 3.16 Renewal of Insurance Policy

§ 3.17 —Notice of Proposed Changes in Renewal Policy

§ 3.18 Cancellation of Policy

§ 3.19 —Notice

§ 3.20 Conclusion

Chapter 4: Insured's Duty of Notice and Cooperation

§ 4.01 Purpose of Notice Requirement

§ 4.01A Tender versus Notice

§ 4.02 Insured's Duty to Notify Insurer—Sufficiency of Notice

§ 4.03 —To Whom Given

§ 4.04 —By or Through Whom Given

§ 4.05 —Timeliness of Notice

§ 4.06 Late Notice

§ 4.07 —Prejudice and Late Notice

§ 4.08 —Majority View: Prejudice Required

§ 4.09 —Minority and Traditional View: Prejudice Not Required

§ 4.10 Circumstances Excusing Late Notice

§ 4.11 —Lack of Knowledge of the Occurrence

Table of Contents

§ 4.12	—Reasonable Belief That a Claim Would Not Arise or Be Asserted
§ 4.13	—Lack of Knowledge of Coverage
§ 4.14	—Other Circumstances Excusing Late Notice
§ 4.15	Notice Required by Other Types of Policies—Excess Insurance
§ 4.16	—Notice by Insurer
§ 4.17	—Claims-Made Policies
§ 4.18	Insured’s Duty to Cooperate with the Insurer
§ 4.19	Insured’s Failure to Cooperate—Failure to Disclose Information
§ 4.20	—Insured’s Cooperation or Settlement with Claimant
§ 4.21	—Insured’s Refusal to Testify or Attend Trial
§ 4.22	Insurer’s Waiver of Insured’s Breach of Cooperation
Chapter 5: Insurer’s Duty to Defend	
§ 5.01	Assessing Insurer’s Duty to Defend—Existence of Duty in General
§ 5.02	—Duty to Defend Determined by Allegations of Complaint against Insured
§ 5.02A	— —Pre-Notice (Tender) Decrease Costs
§ 5.03	— —Insurer’s Knowledge of Extrinsic Information Concerning Allegations of Complaint
§ 5.04	—Conflicts of Interest
§ 5.05	—Self-Insured Retention
§ 5.06	—Directors’ and Officers’ Policy
§ 5.07	—Excess Insurer’s Duty to Defend
§ 5.08	Limits of Duty to Defend—Amendment or Dismissal of Claims
§ 5.09	—Exhaustion of Policy Limits
§ 5.09A	Exhaustion of Policy on Behalf of Less Than All Insurers
§ 5.10	—Tender of Policy Limits
§ 5.11	—Apportioning Duty to Defend Between Potentially Covered and Non-Covered Claims
§ 5.11A	—Reimbursement of Defense Costs
§ 5.12	Effect of Insurer’s Refusal to Defend—Waiver and Estoppel
§ 5.13	—Theories of Recovery for Refusal to Defend
§ 5.14	Damages Recoverable for Breach of the Duty to Defend
Chapter 6: Reservation of Rights and Conflicts of Interest	
§ 6.01	Introduction
§ 6.02	Reservation of Rights—Legal Basis
§ 6.03	—Types of Reservation of Rights Letters
§ 6.04	Non-Waiver Agreements
§ 6.05	Disclaimers/Declinations

Litigating Insurance Disputes

- § 6.06 Effect of Failure to Reserve Rights—Waiver
- § 6.07 —Estoppel
- § 6.08 —Election of Remedies
- § 6.09 Excess Insurer’s Reservation of Rights
- § 6.10 Conflicts of Interest Created by Reservation of Rights
- § 6.11 —Intentional Act/Negligence
- § 6.12 —Late Notice
- § 6.13 —Permissive Use
- § 6.14 —Punitive Damages
- § 6.15 Insured’s Selection of Independent Counsel
- § 6.16 Fees of Independent Counsel

Chapter 7: Number of Occurrences or Claims—Deductibles and Limits

- § 7.01 Accident or Occurrence Giving Rise to Liability
- § 7.02 CGL Insurance Damage—Fortuity Requirement
- § 7.03 —Damage Expected or Intended Is Not an Occurrence
- § 7.04 —Insured’s Expectation or Intention Is Based on an Objective Reasonable Person Standard
- § 7.05 Number of Occurrences
- § 7.06 Causation Analysis
- § 7.07 —Unfortunate Event Test
- § 7.08 Effects Analysis
- § 7.09 Policy Language and Single or Multiple Occurrences
- § 7.10 Timing of Bodily Injury or Property Damage
- § 7.11 —Exposure Theory
- § 7.12 —Manifestation Theory
- § 7.13 —Continuous Trigger Theory
- § 7.14 —Injury-in-Fact Theory
- § 7.15 Special Problems Relating to Claims-Made Policies
- § 7.16 —Definition of Claim
- § 7.17 —When Is a Claim Made?
- § 7.18 —Number of Claims—Related Claims
- § 7.19 Conclusion

Chapter 8: Relationship of Multiple Insurers

- § 8.01 Primary and Excess Insurance
- § 8.02 —Duties Owed between Primary and Excess Insurers
- § 8.03 —Equitable Subrogation
- § 8.04 —Direct Independent Duty
- § 8.05 —Triangular Reciprocity
- § 8.06 —The Nature of the Duty
- § 8.07 Settlement of Claims Involving Primary and Excess Insurers
- § 8.08 Settlement for Less Than Primary Insurer’s Limits of Liability

Table of Contents

§ 8.09	Primary Insurer Insolvency and Drop Down Liability of Excess Insurers
§ 8.10	—Cases Holding No Drop Down
§ 8.11	—Cases Holding the Excess Insurer Must Drop Down
§ 8.12	Other Insurance Clauses
§ 8.13	—Resolving Conflicts between “Other Insurance” Clauses
§ 8.14	—Similar “Other Insurance” Clauses
§ 8.15	—Dissimilar “Other Insurance” Clauses
§ 8.16	—Contribution by Equal Shares versus. Contribution by Limits
§ 8.17	Conclusion
Chapter 9:	Failure to Settle: Bad Faith and Extra-Contractual Liability
§ 9.01	Introduction
§ 9.02	Extent of Bad Faith Required—Negligence Standard
§ 9.03	—Bad Faith Standard
§ 9.04	—Circumstances Demonstrating Bad Faith or Negligence
§ 9.05	—Amount of Consideration Given to Insured’s Interest
§ 9.06	Bad Faith Actions under Unfair Claim Settlement Practice Statutes
§ 9.07	Insured’s Bad Faith Refusal to Settle—Limitations to Bad Faith Actions
§ 9.08	—Defenses to Bad Faith Actions
§ 9.09	Damages for Bad Faith Refusal to Settle—Compensatory Damages
§ 9.10	—Punitive Damages
§ 9.11	—Damages for Emotional Distress
§ 9.12	—Attorney Fees
§ 9.13	Conclusion
Chapter 10:	The Role of the Broker
§ 10.01	Introduction
§ 10.02	Definition of Broker
§ 10.03	Legal Effect of Broker’s Agency Status
§ 10.04	Duties Owed by Broker to Insured
§ 10.05	—Broker’s Duty to Procure Insurance
§ 10.06	—Broker’s Duty to Place Insured with Solvent or Authorized Insurer
§ 10.07	—Broker’s Duty to Renew or Service the Insured’s Policy
§ 10.08	—Broker’s Duty to Notify Promptly of Rejection or Cancellation
§ 10.09	—Broker’s Duty to Advise the Insured of Alternative Coverages or Higher Limits and to Disclose Commissions

Litigating Insurance Disputes

- § 10.10 Duties Owed by Broker to Insurer
- § 10.11 Theories of Liability Asserted Against the Broker
- § 10.12 —Negligence Theory
- § 10.13 —Negligent Misrepresentation and Fraud
- § 10.14 —Breach of Fiduciary Duty
- § 10.15 —Breach of Contract
- § 10.16 The Insured's Duty to Read the Policy as a Defense to Broker's Misconduct
- § 10.17 The Broker's Right to Litigate the Issue of Coverage as a Defense to Liability

Part II Litigating Insurance Disputes

Chapter 11: Choice-of-Law Resolution in Insurance Cases

- § 11.01 Introduction
- § 11.02 Choice-of-Law Resolution
- § 11.03 —The First Restatements Lex Locī Approach
- § 11.04 —The Second Restatements Most Significant Relationship Test
- § 11.05 —Governmental Interest Analysis
- § 11.06 —Choice Influencing Considerations
- § 11.07 Variations in Method Application—Issue Splitting and Multiple Risk Policies—Depeçage
- § 11.08 —Multiple Risk Policies
- § 11.09 —Federal-State Differences
- § 11.10 —Tort-Contract Distinctions
- § 11.11 Conclusion

Chapter 12: Declaratory Judgment Litigation Issues and Strategies

- § 12.01 Introduction
- § 12.02 Statutory Basis for Declaratory Judgment Actions
- § 12.03 Jurisdiction, Venue, and Service of Suit Clauses
- § 12.04 Proper Parties
- § 12.05 Justiciable Controversy
- § 12.06 Preemptive Suits and Prior Pending Actions
- § 12.07 Burden of Proof of Insured and Insurer in Declaratory Judgment Action
- § 12.08 Right to Trial by Jury in a Declaratory Judgment Action
- § 12.09 Attorney Fees Incurred in Declaratory Judgment Actions
- § 12.10 —Fees Not Recoverable
- § 12.11 —Fees Recoverable

Chapter 13: Discovery and Case Management in Declaratory Judgment Actions

- § 13.01 Scope of Discovery
- § 13.02 —Attorney-Client Privilege

Table of Contents

- § 13.03 —Work Product Doctrine
- § 13.04 —Waiver of Privilege
- § 13.05 —Protective Orders
- § 13.06 Reinsurance and Privilege
- § 13.07 Reserves Information and Privilege
- § 13.08 Discovery of Claims of Other Insureds
- § 13.09 Case Management and Cost Sharing

Chapter 14: Arbitration in Insurance Disputes

- § 14.01 Introduction
- § 14.02 Arbitration Statutes
- § 14.03 The Arbitration Agreement—Formal Requirements
- § 14.04 —Broad and Narrow Arbitration Clauses
- § 14.05 Avoiding the Arbitration Agreement for Drafting Deficiencies or Formation Defects
- § 14.06 Arbitration Procedure—The Demand to Arbitrate
- § 14.07 —Appointing the Arbitration Panel
- § 14.08 — —Arbitrator Partiality
- § 14.09 — —Time within Which Arbitrators Must Act
- § 14.10 —Scope of Discovery in Arbitration
- § 14.11 —Parties to the Arbitration
- § 14.12 Arbitration Award—Form and Content of the Award
- § 14.13 —Effect of the Award
- § 14.14 —Grounds for Vacating the Award
- § 14.15 —Appealing the Award

Part III Special Litigation Problems

Chapter 15: Litigating Directors' and Officers' Coverage Claims

- § 15.01 Introduction
- § 15.02 Directors' and Officers' Policies—Two-Part Claims-Made Policy
- § 15.03 —Possible Insureds
- § 15.04 —Wrongful Act
- § 15.05 —Loss
- § 15.06 —Costs Included in Limits
- § 15.07 “Claims-Made” Form
- § 15.08 Rescission of the D&O Policy Based on Fraud or Misrepresentation and Severability
- § 15.09 Cancellation/Non-Renewal of Policy
- § 15.10 Defense Cost Reimbursement under D&O Policies
- § 15.11 —Obligation to Reimburse Contemporaneously
- § 15.12 —No Obligation to Reimburse Contemporaneously
- § 15.13 Allocation
- § 15.14 Exclusions

Litigating Insurance Disputes

- § 15.15 —Deliberate Dishonesty Exclusion
- § 15.16 —Insured versus Insured Exclusion
- § 15.17 —Regulatory Exclusion
- § 15.18 —Personal Profit Exclusion
- § 15.19 —The Securities Exclusion
- § 15.20 Fines and Penalties

Chapter 16: Advertising Liability Coverage

- § 16.01 Introduction
- § 16.02 Advertising Liability Clauses
- § 16.03 The Importance of the Nexus to Advertising Activity in Restricting Policy Coverage
- § 16.04 —*International Insurance Co. v. Florists' Mutual Insurance Co.*
- § 16.05 —*National Union Fire Ins. Co. v. Siliconix, Inc.*
- § 16.06 —*Bank of the West v. Superior Court*
- § 16.07 —*A. Meyers & Sons Corp. v. Zurich American Insurance Group*
- § 16.08 —*Lazzara Oil Co. v. Columbia Casualty Co.*
- § 16.09 Nexus Requirement Need to Be Satisfied
- § 16.10 —*Jefferson-Pilot Fire & Casualty Co. v. Boothe, Prichard & Duizy*
- § 16.11 —*John Deere Insurance Co. v. Shamrock Industry, Inc.*
- § 16.12 Coverage for Infringement of Trademark and Trade Dress

Chapter 17: Litigating Environmental and Toxic Tort Coverage Claims

- § 17.01 Overview of Environmental Coverage Concerns
- § 17.02 Potentially Available Coverages—Commercial General Liability Coverage
- § 17.03 —Environmental Impairment Liability Coverage
- § 17.04 —Other Coverages
- § 17.05 Typical Environmental Coverage Issues
- § 17.06 Is There a “Suit” Requiring a Defense? — Potentially Responsible Party Letters
- § 17.07 —Administrative Orders
- § 17.08 —Are Damages Sought?
- § 17.09 Was There an “Occurrence,” and Related Issues? — Accidental, Unexpected, and Unforeseen Injury
- § 17.10 —Known Risk
- § 17.11 —Number of “Occurrences”
- § 17.12 —Timing of Property Damages—Trigger of Coverage
- § 17.13 Potentially Applicable Exclusions—Overview
- § 17.14 The Standard Pollution Exclusion

Table of Contents

- § 17.15 —Types of Pollution Governed by the Standard Pollution Exclusion Clause
- § 17.16 —To What Type of Pollution Does the Pollution Exclusion Apply?
- § 17.17 —The Sudden and Accidental Exception
- § 17.18 —Cases Holding That “Sudden” Means “Unexpected”
- § 17.19 —Cases Holding That “Sudden” Has Temporal Meaning
- § 17.20 —What Does Accidental Mean in the Sudden and “Accidental” Exception?
- § 17.21 —Interplay between “Occurrence” and the Standard Pollution Exclusion
- § 17.22 —Cases Holding Pollution Exclusion Clause Is Coextensive with “Occurrence” Definition
- § 17.23 —Cases Holding Pollution Exclusion Clause Not Coextensive with “Occurrence” Definition
- § 17.24 The Absolute Pollution Exclusion
- § 17.25 Owned Property and Care, Custody, or Control Exclusions
- § 17.26 Choice of Law
- § 17.27 Forum Non Conveniens in Multi-Site Litigation
- § 17.28 Personal Injury Coverage for Environmental Claims
- § 17.29 Regulatory Estoppel
- § 17.30 Allocation
- § 17.31 Investigation Costs—Defense or Indemnity

Chapter 18: Employment Liability Coverage

- § 18.01 Introduction
 - A. Does Complaint Allege Conduct That Fits within Insuring Clause of Relevant Policy?
 - B. Are Exclusions Applicable?
 - C. Public Policy Considerations
- § 18.02 Comprehensive General Liability Insurance
 - A. Property Damage or Bodily Injury Caused by an Occurrence
 - 1. Bodily Injury
 - 2. Occurrence
 - B. Typical Exclusions
 - C. Personal Injury Coverage
- § 18.03 Review of Other Liability Insurance
 - A. Worker’s Compensation
 - B. Directors’ and Officers’ Policies
 - C. Umbrella Insurance
- § 18.04 Employment Practices Liability Insurance (EPLI)
 - A. The History of Employment Practices Liability Insurance

Litigating Insurance Disputes

- B. Claims Made Policy
- C. Names Insured
- D. Trigger of Coverage
- E. Reporting or Notice Requirements
- F. Scope of Coverage for Wrongful Employment Practices
- G. Coverage for Losses or Damages
- H. Limits and Deductibles
- I. Defense and Settlement
- J. Exclusions
- Conclusion

Chapter 19: Fiduciary Responsibility Insurance

- § 19.01 Introduction
- § 19.02 Fiduciary Liability
- § 19.03 Claims-Made Policy
- § 19.04 Named Insured
- § 19.05 Wrongful Act
- § 19.06 Loss or Damages
- § 19.07 Insuring Agreement
- § 19.08 Deductible and Limits
- § 19.09 Exclusions
- § 19.10 Claims-Made Extension Clause
- § 19.11 Other Key Policy Provisions
- § 19.12 The FRI Policy as Compared to Other Insurance Policy Forms
- § 19.13 Conclusion

Table of Cases

Table of Authorities

Index

Appendices (CD-ROM)

CD-ROM CONTENTS

Part I Overview of Basic Insurance Issues

Ch. 1: Liability Insurance: A General Introduction

- Appendix 1A** Commercial General Liability Coverage Form and General Liability Extension Endorsement
- Appendix 1B** General Terms and Conditions; Specialty Professional Liability Insurance
- Appendix 1C** Professional Indemnity Policy

Ch. 3: Rules of Liability Policy Construction

- Appendix 3A** States Following Contra-Insurer Doctrine
- Appendix 3B** States Following Reasonable Expectations Doctrine

Ch. 6: Reservation of Rights and Conflicts of Interest

- Appendix 6A** Insurer's Letter to Insured, Conflict of Interest
- Appendix 6B** Non-Waiver Agreement
- Appendix 6C** Insurability of Punitive Damages

Ch. 7: Number of Occurrences or Claims — Deductible and Limits

- Appendix 7A** Directors and Officers Insurance and Company Reimbursement Policy

Part II Litigating Insurance Disputes

Ch. 11: Choice-of-Law Resolution in Insurance Cases

- Appendix 11A** State-by-State Approach
- Appendix 11B** Summary of Results—Breakdown by Rules Applied

Ch. 13: Discovery and Case Management in Declaratory Judgment Actions

- Appendix 13A** Joint Defense Agreement
- Appendix 13B** Sample Protective Order
- Appendix 13C** Sample Case Management Order
- Appendix 13D** Sample Cost Sharing Agreement

Ch. 14: Arbitration in Insurance Disputes

Appendix 14A Sample Arbitration Clauses (1-10)

Appendix 14B Sample Arbitrator Disclosure Statement

Part III Special Litigation Problems

Ch. 15: Litigating Directors' and Officers' Coverage Claims

Appendix 15A American International Specialty Lines Insurance Company

Appendix 15B Officers and Private Company Liability Insurance

Ch. 18: Employment Liability Coverage

Appendix 18A Executive and Organization Liability Insurance Policy

Ch.19: Fiduciary Responsibility Insurance

Appendix 19A Fiduciary Liability Coverage and EL Declarations

<http://www.pbookshop.com>