

Buchalter

Does My Business Have the Right Insurance?



Ryan Caplan
Of Counsel

Insurance Recovery Practice Group

San Diego Office

Does My Business Have the Right Insurance?

Overview and goals of this presentation

- Insurance policy basics
- Considerations when selecting insurance
- Types of insurance products available
- Best practices

Consult with your insurance broker!

Does My Business Have the Right Insurance?

Insurance Policy Basics

- The purpose of insurance
- First-Party vs. Third-Party coverages
- Individual vs. Group
- Primary vs. Excess/Umbrella
- Self-Insuring (“Fronting” Policies)
- Understanding of what types of losses can be covered
- Where else can you recoup losses

Does My Business Have the Right Insurance?

Considerations for Selecting Insurance

Selecting the Appropriate Types of Policies

- What your business does
- Size of your business
- Location(s) of your business
- Types of employees
- Types of potential liabilities
- Contractual and/or statutory obligations

Does My Business Have the Right Insurance?

Considerations for Selecting Insurance (cont.)

Considerations Regarding Policy Attributes

- Cost considerations (premiums, deductibles, retentions, etc.)
- Defense counsel control
- Sublimits
- Arbitration/ADR requirements and choice of law
- Retroactive dates and continuity issues
- Carrier considerations

Does My Business Have the Right Insurance?

Types of Policies to Consider

The “Basics” for Most Businesses

- Commercial General Liability (CGL)
- Property Insurance
- Employment Practices Liability (EPL)
- Workers Compensation

Many carriers offer “package” policies

Does My Business Have the Right Insurance?

Types of Policies to Consider (cont.)

More Specialized Insurance Products

- Directors & Officers (D&O)
- Errors & Omissions (E&O)
- Automobile
- Cyber Insurance
- Crime
- Pollution
- Builder's Risk
- Cargo / Inland Marine

Not a complete list!

Does My Business Have the Right Insurance?

Types of Policies to Consider (cont.)

Gap Filling and Policy Limit Expansion

- Umbrella Coverage
- Excess Coverage

Does My Business Have the Right Insurance?

Best Practices

- Understand what risks are posed to your business, and continually reassess
- Have an understanding of what your portfolio looks like and what's available to you (talk to your broker!)
- Make sure you have full copies of all of your policy documents readily accessible
- Be mindful of any notice requirements
- In the event of a loss or claim, don't be afraid to think outside the box! Consult coverage counsel (more on this later)

Does My Business Have the Right Insurance?

Additional Questions?

Ryan Caplan

rcaplan@buchalter.com

619.219.5429

Insurance Recovery

Buchalter

RESOLVE TO SOLVE YOUR PROBLEMS WITH OTHER PEOPLES'
MONEY: CONTRACTUAL RISK TRANSFER ISSUES & STRATEGIES

Bradley W. Hoff
bhoff@Buchalter.com

Goals

- Survey available contractual risk transfer protections for third-party claims against your company
- Identify strategies for maximizing strength of those protections, both in drafting contractual risk transfer protections and in pursuing/enforcing those protections when claims arise
- All in 30 minutes...

Two Primary Sources of Risk Transfer Protections

- Contractual indemnification – contractual counterparty provides protection
- Additional Insured (AI) status – contractual counterparty's liability insurer provides protection
- Both relate back to contractual insurance requirements (later)

Contractual Indemnification

- Third-party provides goods or services enabling you/your client to perform duties to others (sell products, perform services, etc.)
 - Subcontractor performs construction services for general contractor
 - Manufacturer supplies products sold by retailer
- Contract with that third-party protects you/your client against claims relating to those goods or services
- Protection comes directly from counterparty

Sample Contractual Indemnification Provision

10. INDEMNIFICATION. Contractor [manufacturer] shall defend, hold harmless and indemnify Owner [seller] from and against any and all third-party claims, actions, liabilities, losses, and causes of action arising out of out of Contractor's services performed [manufacturer's product provided] pursuant to this Agreement.

- Can be limited to certain types of injury/damage claims - e.g., bodily injury, property damage, etc.
- Can contain exceptions akin to insurance exclusions - e.g., sole negligence, gross negligence, willful/intentional acts, etc.
- Enforceable scope depends upon governing law (varies widely)

Contractual Indemnification Pointers

- Draft carefully: what are the risks you want protection against?
- Make sure indemnity is backed up by indemnitor's insurance (also required in same contract and enforced/confirmed by indemnitee)
- Indemnitee's sole negligence usually non-indemnifiable
- Understand "arising out of" vs. "caused by" indemnification triggers
- Understand/manage governing law through contract language – e.g., claims by counterparty's employees
- Consider specifying law governing indemnification rights to maximize enforceability
- Pursue indemnification rights separately from additional insured rights (discussed later)

Additional Insured Status

- Again, third-party provides goods or services enabling you/your client to perform duties to others (sell products, perform services, etc.)
- Contract with third-party protects you/your client against claims relating to those goods or services
- Protection comes directly from counterparty's liability insurer

Sample Contractual Insurance Provision

12. INSURANCE. Contractor shall purchase and maintain, at its own expense, a policy or policies of:

- (a) Commercial General Liability insurance written on an occurrence basis, including coverage for bodily injury and property damage, products and completed operations, contractual liability, with minimum limits of \$1,000,000 per occurrence and \$2,000,000 annual aggregate
- (d) All policies of insurance purchased pursuant to this Section shall expressly name Owner as an additional insured pursuant to ISO form CG 20 10 11 85 or its substantive equivalent....

- Important: Not enforceable directly against the insurer unless/until contractual counterparty has satisfied foregoing obligation
- Additional insured status depends upon:
 - Language of contractual insurance requirement
 - Language of required additional insured endorsement; if it is important, specify it
 - Coverage actually provided under required policy or policies
 - Law governing the required policy or policies (willful acts, punitive damages, etc.), which can difficult for you/your client to control

AI Endorsement Example: CG 20 10 (ongoing operations)

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION

- A. Section II - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury” or “property damage” caused, in whole or in part, by “your work” at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the “products-completed operations hazard.”

AI Endorsement Example: CG 20 15 (products)

ADDITIONAL INSURED - VENDORS

- A. Section II - Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business.

Additional Insured Pointers

- Require the right insurance coverage, including scope, limits and duration
- Specify the proper AI scope/endorsement
- Require AI to fullest extent of liability limits, regardless of contractual requirement
- Follow through; don't rely upon Certificates of Insurance
- Require and make sure AI coverage is primary/non-contributing
- "Push down" requirements to others involved (subcontractors, agents, etc.)
- Specify maximum deductible/SIR and who pays deductible/SIR
- Don't let counterparty's insurer "squish" indemnification and coverage claims
- Don't buy "caused by" argument often raised by insurer
- Understand/manage applicable law to maximize benefits/leverage

Key Differences Between Contractual Indemnification and AI Coverage Rights

- Right (dispute) against counterparty vs its liability insurer, each essentially governed by a separate contract
- Sole negligence exception to contractual indemnification right, but not necessarily to AI coverage right
- AI coverage subject to policy limits, while contractual indemnification subject to counterparty's financial ability to pay
- Contractual indemnification right expressly governed by applicable law provision, while AI coverage rights governed by forum choice of law principles
- AI coverage subject to additional consumer protection laws, while contractual indemnification subject solely to contract
- Pursuing both indemnification and AI coverage for a third-party claim maximizes strategic options and arguments for full protection

Separately pursuing both contractual indemnification and AI coverage for a third-party claim maximizes strategic options and arguments for full protection

Common Issues & Answers

Re: AI Coverage Pursuit

Issue #1: Counterparty admittedly did not obtain contractually required insurance required by vendor agreement

What to do:

- See for yourself: Obtain complete copy of counterparty's liability policy
- Assert breach of contract (failure to procure) claim against counterparty in underlying litigation
- Obtain counterparty's binding admission that it failed to procure required insurance; don't let it play both sides

Issue #2: Counterparty says it procured required insurance, but insurer says it didn't

What to do:

- Assert breach of contract (failure to procure) claim against counterparty
- Assert contractual indemnification claim against counterparty, always in consultation with your defense counsel
- Encourage counterparty to advocate for coverage through broker and/or coverage counsel
- Obtain complete copy of counterparty's liability policy
- Obtain counterparty's binding assertion that it procured required insurance
- Explain bad faith exposure to insurer
- Make economic argument to insurer

Issue #3: Insurer acknowledges you/your client's AI status, but parrots counterparty's denial of indemnification liability in denying coverage (duty to defend)

What to do:

- Assert colorable contractual indemnification claim against counterparty
- Consider asserting breach of contract (failure to procure) claim against counterparty
- Explain to insurer that it has separate and direct coverage obligations to you/your client as its insured, which are governed by policy language not terms of indemnification provision
- Explain broad meaning of "arising out of" and "caused in whole or in part by" trigger clauses in required AI endorsements
- Work with your defense counsel to obtain discovery confirming counterparty fault for or role in injury/damage
- Explain to insurer that plaintiff's allegations, not counterparty's or insurer's self-serving defenses, control duty to defend determination

Issue #4: Insurer acknowledges duty to defend you/your client as AI, but wants to do it through same counsel defending its Named Insured (the counterparty)

What to do:

- Assert colorable contractual indemnification claim against counterparty (if ROR)
- Explain to insurer that it has separate and direct coverage obligations to you/your client as if it were only insured
- Explain conflicts of interest, and possibly governing state law that necessitates separate counsel when conflict exists

Bradley W. Hoff



Buchalter

LOS ANGELES
NAPA VALLEY
ORANGE COUNTY
PORTLAND
SACRAMENTO
SAN DIEGO
SAN FRANCISCO
SCOTTSDALE
SEATTLE
BUCHALTER.COM

Buchalter

Insurance Practice Group 2024 Summit

Resolve to Trigger Coverage: You've Suffered a Loss—What Do You Do?

Cecilia O. Miller

cmiller@Buchalter.com

January 10, 2024

Roadmap for Seizing Insurance \$\$ in 2024!

- Identify All Potentially Relevant Coverages
 - Is the Loss First Party or Third Party?
- Best Practices for Advising the Insurer of the Loss
 - Tender Early & Often
 - The Pen *May* Be Mightier Than The Sword
- Can I Use My Own Defense Lawyer?
- Pro-actively Work Settlement Opportunities
- As Necessary—Litigate
- Lessons Learned in Maximizing Coverage



Let's Get Something Straight at the Beginning...

- **The Problem:** Insurance companies are **not** in the business of paying out on claims, they are in the business of collecting premiums—and then denying claims
- **The Solution:**
 - Recognize the role of insurance at the **outset** of every claim or dispute,
 - Maximize the insurer's coverage obligations—especially as to the broad duty to defend, *and*
 - Involve insurance coverage counsel early-on.



Identification of Potentially Relevant Coverages

- Upon learning of a claim (*or a potential claim*), identify all relevant coverages:
 - Consider all “forms” of insurance coverage
 - Consider historical policies of insurance

- A word about policy documentation ...
 - Contact all brokers if not in possession of policy documentation
 - Request policy copies from insurer in providing tender
 - Consider establishing repositories of policies (*both* current and historical) and tender charts

Insurance Primer

- First Party Insurance vs. Third Party Insurance
 - First Party: The policyholder suffers a direct loss of some property, and looks to the policy/carrier to be made whole
 - Third Party: The policyholder is accused by a third party of some form of liability, and looks to the policy/carrier to be made whole.
- Two Distinct Components to Third Party (Liability) Coverage:
 - Duty to Defend
 - Duty to Indemnify
- Triggers of Coverage
 - “Occurrence” vs. “Claims Made”

Occurrence vs. Claims-Made Policies

- Both are liability policies protecting insureds against third-party claims.
 - Any one loss could trigger both forms of coverage...
- Key Differences:
 - Types* of “claims” that trigger coverage
 - Timing*: Depending on the type of policy, historical policies versus in-place policies may apply
 - Notice*: Applicable notice requirements may vary
- *Trap for the Unwary*: Failure to identify correct policies and satisfy applicable notice requirements can result in loss of coverage.

Insurer's Duties Under Liability Policies

- Duty to Defend

- Insurer pays for costs of defending the policyholder.
- Broad duty, e.g., the standard in California is a “potential for coverage” based on the allegations of the complaint, on the one hand, and the policy provisions, on the other.
- Courts are required to err *in favor of the policyholder and coverage!*
- You may have a right to choose your own defense counsel and not merely accept the insurer's choice of defense counsel (more on this later)...

- Duty to Indemnify

- Insurer funds a judgment or settlement.
- Policyholder must prove judgment or settlement *fits within coverage.*

Tender Early & Often

- Do Tender Early: Most policies require prompt notice of a potentially covered loss.
 - Timing is Critical: Failure to provide prompt notice may result in forfeiture of coverage and/or no reimbursement for pre-tender defense fees & costs.
 - Beware of the 12:01 expiration rule
 - Prioritize “claims-made” notice
 - *Trap for the Unwary*: “Notice-prejudice rule” does not apply to “claims made” policies!
- Do Tender Often: Do not limit your tender to just one policy or just one policy period.
 - Other *forms* of coverage may apply (primary & excess, D&O, CGL).
 - Is your client an Additional Insured on a policy?
- **Follow the Rules**: Recent trend in case law to require strict compliance with tender requirements under claims-made policies.

Forms of Responses to the Tender

- Four Likely Responses from an Insurer to an Insured's Tender:
 - Failure to Respond
 - Consider applicable state regulations that provide specific timelines for response
 - Denial
 - Reservation of Rights
 - Will provide a laundry list of limitations on coverage
 - Likely will outline defense arrangement
 - May not even expressly acknowledge coverage
 - Acknowledgement of Coverage Without Reservation (the Unicorn!)



The Pen *May* Be Mightier Than the Sword...

- Seek **in writing** reconsideration of denial.
- Reserve **in writing** policyholder's rights to dispute coverage limitations outlined in reservation of rights.
- Seek **in writing** independent counsel if basis for same.
- Document **in writing** policyholder's cooperation.
- Why not save some trees?
 - Carriers can twist words
 - Obtain valuable insurer admissions
 - Exhibits in future insurance coverage litigation.



Can I Choose My Own Defense Lawyer?

- “Duty to Defend” policies accord to the insurer both the “right” and “duty to defend”
 - The good and the bad: insurer provides contemporaneous defense, but the insurer gets to choose defense counsel.
 - Insurers often have firms they regularly retain.
 - Thus, he who pays the piper calls the tune...
- Courts and legislatures have recognized the inherent conflict of interest and authorized the appointment of independent counsel:
 - California Civil Code §2860
 - San Diego Navy Federal Credit Union v. Cumis Ins. Soc.*, 162 Cal.App.3d 358 (1984).
- “Reimbursement” policies allow you to choose your own counsel, but receipt of reimbursement may be delayed.

Involve Insurers in Settlement Opportunities

- Involve insurers *early* and *fully* in settlement discussions through coverage counsel.
 - Work “Costs of Defense” settlement opportunities.
- Obtain insurer consent to any settlement for which you will seek insurer contribution.
 - Beware of the voluntary payment limitation!
- If possible, obtain a settlement demand within policy limits & pop the policy limits
 - *Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, 15 Cal. 3d 9 (1972).

Litigate as Necessary

- Declaratory Relief Litigation
 - Court-sanctioned approach for insurer to withdraw from defense *or* for an insured to obtain a coverage determination from the court during the underlying litigation.
- Bad Faith Litigation
 - Insurer's breach of the implied covenant of good faith and fair dealing.
 - Insured can seek punitive damages *and*, in several states, obtain reimbursement of coverage counsel fees
 - *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985)

Resolutions Achieved!

- *Beauty Entrepreneur v. Established Beauty Laboratory*

- The Claims: Trade Secret, breach of partnership, breach of fiduciary duties among beauty product entrepreneurs.
- The Problem: Insurer denied under the single CGL policy to which prior defense counsel tendered.
- The Solution: Coverage counsel tendered to D&O and negotiated claw back to earliest tender date to recoup more defense fee reimbursement.

- *Injured Volunteer v. Non-Profit Association*

- The Claims: Claims of serious and lasting physical injury to volunteer documented in surveillance video—potential for run-away jury and sensitive information in the public record.
- The Problem: Insurer agrees to defend, but only through insurer-selected counsel who is not motivated to seek out settlement opportunities and avoid potentially prejudicial discovery, insurer refuses to contribute.
- The Solution: Coverage counsel initiates letter-writing campaign with insurer that results in: (1) association of new counsel, and (2) settlement of underlying case before harmful discovery with millions contributed by insurer.

Your Resolution Checklist

Nearly every civil lawsuit has at least **three** parties (Plaintiff, Defendant & *Defendant's Insurer*). Utilize these best practices in 2024 to maximize insurance resources:

1. Identify *all* your potential coverages
2. Tender early and often!
3. The pen may be mightier than the sword
4. Consider if you can appoint your own counsel
5. Work settlement opportunities
6. Litigate as necessary



Thank You!

- Please reach out with any questions to our group!
- Cecilia (“Ceci”) Miller
 - cmiller@Buchalter.com
 - (619) 219-8076!





Insurance Solutions for a High-Tech World



Buchalter

PRESENTED BY



Susan White

**Buchalter (Los Angeles)
Insurance Recovery Group**

Harry Chamberlain

**Buchalter (Sacramento & LA)
Insurance Recovery Group**

OVERVIEW



Who needs this coverage? ... really?



Who needs this coverage? ... really?



MARKETS BUSINESS INVESTING TECH POLITICS CNBC TV INVESTING CLUB PRO

TECH

Bank of America spends over \$1 billion per year on cybersecurity, CEO Brian Moynihan says

PUBLISHED MON, JUN 14 2021 9:18 AM EDT | UPDATED MON, JUN 14 2021 10:12 AM EDT



Jessica Bursztynsky
@JBURSZ

SHARE

KEY POINTS

- Bank of America CEO Brian Moynihan said the company has ramped its cybersecurity spending to over \$1 billion a year.
- A series of sweeping cyberattacks have struck private companies and federal government networks over the past year.
- That's led firms and governments to reassess and modernize their cybersecurity defenses.

Buchalter

Who needs this coverage? ... really?

(CRWD)
CROWDSTRIKE
223.73
+2.26 [+1.02%]
VOL: 3,521,882

1-WK [5.62%]
230
190
JAN 4, 2021 JAN 8, 2021
MARKET CLOSED

VIDEO 05:17
CROWDSTRIKE SURGES 325% IN 2020
CrowdStrike CEO says 2020 was the worst year on record for cyberattacks

Who needs this coverage? ... really?



New Year, New Cyber Threats

Who needs this coverage? ... Equifax



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

The Equifax Breach – A Global Settlement



\$575,000,000+ settlement



Free credit monitoring
and identity theft services



Strong **data security** requirements

➔ **Learn more: ftc.gov/Equifax**

Who needs this coverage? ... oh no, not again!

THE QUESTION

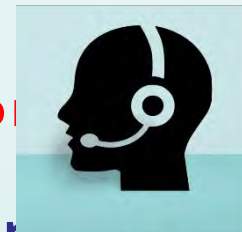
Are the Equifax Data Breach Settlement email and website real?

✓ Yes, this email offering credit monitoring for Equifax cyberattack victims legit Share

1:37 / 1:37 CC Settings YouTube Fullscreen

➤ Network Security, First Party Storage

- Data breaches, hacking, malware, ransomware, privacy risks
- Malware, negotiation and payment of ransomware
- Business email system compromised
- IT forensics, costs of improving network security
- Breach notification to clients, setting up a call center
- Credit monitoring, identity restoration



➤ Network Business Interruption

- lost profits, fixed expenses while network down
- security failure (hack) or system failure (human error, software patch failure)



es

Enhanced

➤ Social Engineering

- phishing emails
- fraudulent access, funds (employee duped)
- cf. traditional crime and fraud policies (e.g., cyber adds benefits, more expenses reimbursed, higher sublimits)



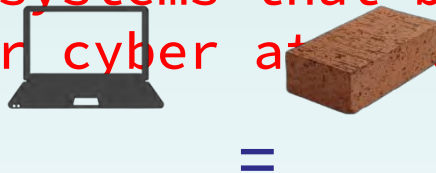
➤ Reputational Harm

- Public relations, media relations
- Restoring your brand



➤ “Bricking”

Enhanced replacement cost coverage for technology, systems that become as useful as a brick after cyber attack



LESSONS LEARNED FROM THE PANDEMIC

➤ Know what you buy

- Cyber insurance is specialized
- Identify the risk insured ... a
- What does the policy require to



➤ Application questions – why did we tell us?

- If underwriters ask :“Do you require multi-factor authentication for account access?” Accuracy counts, and the answers probably matter



➤ What are *you* doing out there?

- Business operations changed dramatically during the pandemic
- Expanding networks working from home – higher risks, less oversight (exposure to phishing, malware, human error, unsecure connections)

THE MARKET

View



Specialists:

- Even before the pandemic, cyber insurers were tightening underwriting guidelines, asking for more details about risk, which increased as a result of “new human and security vulnerabilities.”
- “Today the cyber insurance market has advanced from a very niche risk transfer tool to a critical requirement for enterprise risk management.” D. Burke, *Cyber 101* (Woodruff Sawyer, Oct. 8, 2021)
- Consequently, “cyber insurance carriers are now facing unprecedented losses ... this has

HARD MARKET: What to expect



HARD MARKET: Current Trends

- Higher premiums (supply side economics)
- Rigorous underwriting
 - Details on backup procedures
 - Specific security controls in
- Limitations on coverage
 - Higher co-insurance, deductibles
 - Lower sublimits (e.g., ransomware)
 - Narrower definitions of risks
 - Regular patching, system monitoring
- War in Ukraine
 - War exclusion as applied to cyber attacks?



Claims

Process

➤ What type of loss?

➤ First party, third party, both?

➤ Coverage Trigger

➤ Occurrence (first party)

➤ Claims made (third party)

➤ carefully review policy notice conditions ... and time limits



➤ I want “full coverage”

➤ Consider gaps, exclusions

➤ Deductibles, SIR, sublimits

➤ Without enhancements, cyber policy usually won't cover:

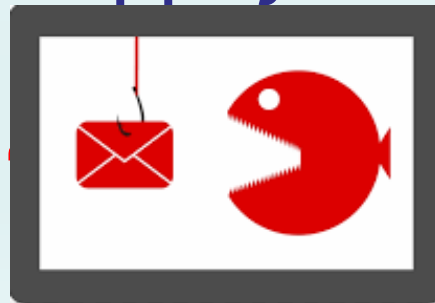
➤ Betterment

➤ Intellectual property

theft

Claims Process (continued)

- You purchased *specialized* coverage for:
 - Cyber security incidents ... data breaches, network outages, financial fraud, wrongful access, hacking, ransomware
 - Did you get what you paid for? Service when counts?
- Special rules apply to interpretation of policies



- A cautionary ... with a happy ending

Ernst & Haas Mgt. [redacted] Co., Inc., 23 F.4th 1195 (9th Cir. 2022)

Questions?





Susan Page White

Insurance Law/Litigation

- Litigation attorney in the firm's Los Angeles office specializing in insurance recovery
- Over 30 years of experience representing client insureds in complex insurance coverage matters, including bad faith against their insurers
- Provides advice to senior management and executives on how to mitigate risks and maximize insurance protections and recoveries with respect to policy procurement, negotiations, reviews, and renewals

(213) 891-5070 direct
swhite@buchalter.com

Harry W.R. Chamberlain II

Complex Litigation/Insurance/Appellate Law



Harry Chamberlain is a Shareholder of Buchalter, an Am Law 150 firm, with eleven Western U.S. offices. For over 40 years, he has served as trial and appellate counsel for Fortune 500 companies, and a variety of public and private sector clients in complex litigation matters. He is certified as an Appellate Specialist by the California State Bar Board of Legal Specialization, handling hundreds of appeals across the country, including numerous cases before the California Supreme Court and the highest courts of other states.

Shareholder
Los Angeles/Sacramento
(213) 819-5115 direct
hchamberlain@buchalter.com

Before joining Buchalter, Harry was general counsel for California-based professional liability insurers, and managed the law department of a national group of commercial insurance and financial service companies. He is past president of California Defense Counsel and the Association of Southern California Defense Counsel, preeminent associations of civil defense trial and appellate lawyers. He writes and lectures widely on topics regarding complex litigation and insurance law.



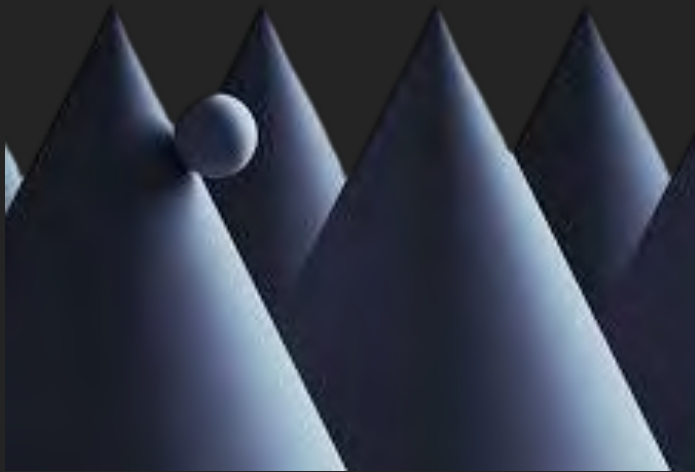
Recommended Reading

- Dan Burke, Sr. Vice President, National Cyber Practice Leader (Woodruff Sawyer), *Cyber 101: Understand the Basics of Cyber Liability* (Oct. 8, 2021)

Link: <https://woodruffswayer.com/cyber-liability/cyber-101-liability-insurance/>

- GUIDE TO CYBER LIABILITY INSURANCE – Woodruff Sawyer (2021)

Link: <https://woodruffswayer.com/wp-content/uploads/2021/10/Cyber->



Thank You!

Buchalter

Buchalter

What You Should Know About EPL Insurance Policies

Jeanine Donohue & Zhasmina Kolarova

January 10, 2024



Agenda

- Insurance Policy Basics—the Problem & the Solution
 - Insurance Policies ARE Negotiable
- Best Practices for EPL Coverage
 - Tender Early & Often
 - Speak Softly, But Carry A Big Stick (or Pen)
 - Work Settlement Opportunities
 - Litigate As Necessary

Let's Get Something Straight at the Beginning...

- The Problem: Insurance companies are **not** in the business of paying out on claims, they are in the business of collecting premiums—and then denying claims.
- The Solution:
 - Recognize the **value** and role of insurance at the outset of every claim or dispute,
 - Maximize the insurer's broad duty to defend, including, if applicable, your right to independent defense counsel, and
 - Involve insurance coverage counsel early-on.

EPL Insurance Primer

- First Party Insurance vs. Third Party Insurance
- Two Distinct Components to Third Party (Liability) Coverage:
 - Duty to Defend
 - Duty to Indemnify
- Triggers of Coverage
 - “Occurrence” vs. “Claims Made”
 - Loss

Insurer's Duties Under Liability Policies

- Duty to Defend
 - Insurer pays for costs of defending the policyholder in third party lawsuit.
 - Broad duty: the standard in California is a “**potential for coverage**” based on the allegations of the complaint, on the one hand, and the policy provisions, on the other.
 - Courts are required to err in favor of the policyholder and coverage!
 - You may have a right to choose your own defense counsel and not merely accept the insurer's choice of defense counsel.
- Duty to Indemnify
 - Insurer funds a judgment or settlement.
 - Policyholder must prove the judgment or settlement fits within coverage—not a potential for coverage, there must be “actual” coverage.

EPL Policies ARE NEGOTIABLE

- Sample Provisions to Identify and Negotiate
 - Retentions & Sub-limits (e.g., Wage & Hour)
 - Panel Counsel
 - Arbitration
 - Choice of Law



EPL Insurance Market Outlook

- BUT, the EPL Insurance Market Remains Hard in California due to a number of factors
 - Rise of Social Movements, e.g., #MeToo
 - Pandemic-Related Claims, including increase in Workplace Health & Safety Violations
 - Wage & Hour Claims
- Solution: Partner with an experienced insurance broker and your coverage counsel, shop the market early and aggressively.

Best Practices For EPL Coverage

- Tender Early & Often
- Speak Softly, But Carry A Big Stick (or Pen)
- Work Settlement Opportunities
- Litigate As Necessary

Tender Early & Often

- Do Tender Early: Most policies require prompt notice of a potentially covered loss.
 - Timing is Critical: Failure to provide prompt notice may result in forfeiture of coverage and/or no reimbursement for pre-tender defense fees & costs.
 - Trap for the Unwary: “Notice-prejudice rule” does not apply to “claims made” policies!
- Do Tender Often: Do not limit your tender to just one policy or just one policy period.
 - Other *forms* of coverage may apply (primary & excess, D&O, CGL).
 - Is your client an Additional Insured on a policy?

Speak Softly, But Carry a Big Stick (Or Pen)

- Seek **in writing** reconsideration of denial.
- Reserve **in writing** policyholder's rights to dispute coverage limitations outlined in reservation of rights.
- Seek **in writing** independent counsel if basis for same.
- Document **in writing** policyholder's cooperation.
- Why not save some trees?
 - Carriers love to twist words from conversations.
 - Letter writing campaign can yield valuable insurer admissions.
 - Letters are exhibits in future litigation.



Work Settlement Opportunities

- Involve insurers *early* and *fully* in settlement discussions through coverage counsel.
 - Work “Costs of Defense” settlement opportunities.
 - Avoid application of certain exclusions by settling before trial.
- Obtain insurer consent to any settlement for which you will seek insurer contribution.
 - Avoid the prohibition on “voluntary payments.”
- If possible, obtain a settlement demand within policy limits to bust the policy limits.
 - Insurer’s failure to fund a reasonable settlement within policy limits exposes insurer to liability in excess of policy limits. *Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, 15 Cal. 3d 9 (1972).

Litigate as Necessary

- Declaratory Relief Litigation
 - Court-sanctioned approach for insurer to withdraw from defense.
 - Insured can seek stay of prejudicial indemnity-related litigation.
- Bad Faith Litigation
 - Insurer's breach of the implied covenant of good faith and fair dealing.
 - Insured can seek punitive damages and reimbursement of coverage counsel fees.

Take-Aways

Nearly every civil lawsuit has at least **three** parties (Plaintiff, Defendant & Defendant's Insurer). Utilize the following best practices to maximize results:

1. Policy provisions are negotiable
2. Tender early and often!
3. Speak softly, but carry a big stick (or pen)
4. Work settlement opportunities
5. Litigate as necessary

THANK YOU!!!

QUESTIONS? CONTACT US!

Jeanine Donohue, Of Counsel

(415) 227-3574

jdonohue@buchalter.com

Zhasmina Kolarova, Attorney

(619) 219-8184

zkolarova@buchalter.com

Buchalter

INSURANCE FOR REAL ESTATE RISK – *TITLE INSURANCE*

John L. Hosack Esq.
1000 Wilshire Blvd., Suite 1500
Los Angeles, California 90017
Tel: (213) 891-0700
Email: jhosack@buchalter.com

Jason E. Goldstein, Esq.
18400 Von Karman Ave., Suite 800
Irvine, California 92612
Tel: (949) 760-1121
Email: jgoldstein@buchalter.com

January 10, 2024
11:00 - 11:30 a.m.
Buchalter
Webinar

LOS ANGELES
NAPA VALLEY
ORANGE COUNTY
PORTLAND
SACRAMENTO
SAN DIEGO
SAN FRANCISCO
SCOTTSDALE
SALT LAKE CITY
SEATTLE
BUCHALTER.COM

1. Why do you want title insurance coverage?
2. Why do your escrow instructions go “hand in hand” with title insurance?
3. Why make certain your loan or owner's policy is appropriately endorsed?

- A. Escrow claims are separate and in addition to title insurance policy claims.
- B. The escrow agent and the title insurer should be the same person (or at least the same family of companies).

1. Title Insurer.
2. Underwritten Title Company.
3. "Independent" escrow.
4. Banks.
5. Attorneys.
6. Mortgage Broker.

1. Using an underwritten title company or title insurer as the escrow agent.
 - A. Avoids claims by insurer that information disclosed to the escrow agent was not known by the insurer.
 - B. Avoids claims by the insurer that something that occurred at escrow voids insurance coverage.
 - C. May make title insurer an escrow agent.
2. Errors and omissions insurance.
3. Closing protection letter.
4. Loan Policy of Title Insurance (ALTA, CLTA or *other*).

1. Historic background
 - Holding of money (title insurer did not trust the escrow company).
2. Current developments
 - Attempting to avoid escrow liability by claiming that the word “sub” negates the term “escrow.”

California Insurance Code § 332:

§ 332. Required disclosure

Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

California Insurance Code § 330:

§ 330. "Concealment" defined

Neglect to communicate that which a party knows, and ought to communicate, is concealment.

WHAT YOU OR YOUR AGENTS SAID OR WROTE AND WHAT DOCUMENTS YOU HAVE WILL BE USED BY THE TITLE INSURER TO TRY AND DENY YOUR CLAIM.

The Insurer's disclosure obligations may be of a quasi-fiduciary nature.

“ ... an insurer holds itself out as a fiduciary. With a public trust must go public responsibility consonant with the trust, including qualities of decency and humanity inherent in a responsibilities of a fiduciary.”

See, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 820 and *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 215. *See also, Village Northridge Homeowners Ass'n. v. State Farm Fire & Gas. Co.* (2010) 50 Cal.4th 913, 929 (“[the insurer] is in a legally recognized special relationship with [the insured], and it has duties that clearly encompass forthright and affirmative disclosures . . .”)

WHAT THE INSURER OR ITS UNDERWRITTEN TITLE COMPANY AGENT KNEW AND DID NOT DISCLOSE TO YOU IS A VALUABLE TOOL TO PROTECT AN INSURED IN LITIGATION.

THE INITIAL TITLE PRODUCT - The Preliminary Report Or Commitment - What Is It, What It Is Not And What It Can Be – *TIP #3*

- A. It is an offer to issue a title insurance policy subject to the terms and exclusions therein.
- B. It is not an abstract of title.
- C. It can be a basis for a fraud claim.

THERE IS NO MORE "ABTRACTOR'S LIABILITY" – BUT IF AN INSURER OR ITS UNDERWRITTEN TITLE COMPANY AGENT "FINDS" SOMETHING AND DOES NOT DISCLOSE IT – THE INSURED CAN USE THAT AS A TOOL IN LITIGATION.

WHAT THE PRELIMINARY REPORT CONCEALS FROM YOU – *TIP #4*

1. Accepting the offer in the preliminary report or commitment does not really get you an indisputably valid Loan or Owner's Policy of Title Insurance.

A TITLE INSURANCE POLICY IS A CONTRACT OF INDEMNITY AND NOT OF GUARANTEE. THE ISSUE OF "LOSS" IS A HOTLY CONTESTED ISSUE.

DON'T FORGET TO RAISE LACK OF MARKETABILITY AS PART OF YOUR LITIGATION PLAN.

WHAT THE PRELIMINARY REPORT CONCEALS FROM YOU – *TIP #5*

2. There is a reason why there is no written application for a Loan or Owner's Policy of Title Insurance.
3. Vague and ambiguous exclusions in the policy which are designed to provide the insurer with bogus grounds to deny valid claims.

TITLE INSURANCE IS ONE OF THE ONLY TYPES OF INSURANCE WHICH YOU CAN OBTAIN WITHOUT FILLING OUT AN APPLICATION.

BUT THERE IS A DISGUISED APPLICATION FOR THE TITLE POLICY CONTAINED WITHIN EXCLUSIONS 3(a)-(b).

EXCLUSIONS 3(a)-(d) ARE GENERALLY CONSTRUED AS AMBIGUOUS AND THEY ARE THE MOST LITIGATED EXCLUSIONS IN A TITLE INSURANCE POLICY.

EXCLUSIONS 3(a) and (b) – *TIP #6*

“The following matters are expressly excluded from coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees or expenses that arise by reason of: ... 3. Defects, liens, encumbrances, adverse claims, or other matters (a) *created, suffered, assumed, or agreed to* by the Insured Claimant; (b) not *Known* to the Company, not recorded in the Public Records at Date of Policy, but *Known* to the Insured Claimant *and not disclosed in writing* to the Company by the Insured Claimant prior to the date the Insured Claimant became and insured under this policy.” (emphasis added)

THE HIGHLIGHTED TERMS IN (A) ARE ALL CONSIDERED AMBIGUOUS AND HAVE JUDICIALLY CREATED DEFINITIONS WHICH THE TITLE INSURANCE COMPANY MAY NOT VOLUNTEER THE COURT. IT IS CRITICAL YOU DO.

THE TERM “KNOWN” IS DEFINED IN THE POLICY.

Insurance Code § 333, “Required inquiry”:

Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows.
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant.
3. Those of which the other waives communication.
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.
5. Those which relate to a risk excepted from insurance, and which are not otherwise material.

WHEN THE TITLE INSURER CLAIMS YOU SHOULD HAVE DISCLOSED SOMETHING – SECTION 333 (AND 332) MAY FRAME YOUR RESPONSE.

Insurance Code § 336, “Waiver”:

The right to information of material facts may be waived, either (a) by the terms of insurance or (b) by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

WHEN THE TITLE INSURER CLAIMS YOU SHOULD HAVE DISCLOSED SOMETHING – SECTION 336 MAY FRAME YOUR RESPONSE.

– TIP #9

1. What did your appraiser, broker, CPA or lawyer know?
2. What did the borrower's, buyer's or seller's credit report, building permit, leases, etc., show about the ownership of the property?
3. What did you know?

*TITLE INSURER'S DO MOST OF THEIR UNDERWRITING *AFTER* A CLAIM IS MADE IN ORDER TO TRY AND DENY COVERED CLAIMS.*

ESCROW INSTRUCTIONS MAY ASSIST YOU IN FUTURE LITIGATION IF IT HAS THE RIGHT LANGUAGE IN IT.

A TITLE INSURANCE POLICY IS SIMILAR TO A HOUSE – *SHORT ENDORSEMENT PRIMER*



BUT A TITLE INSURANCE POLICY WITH NO ENDORSEMENTS IS A HOUSE WITH A HOLE
IN THE ROOF – *SHORT ENDORSEMENT PRIMER*



UNLESS YOU LIKE HOLES IN YOUR TITLE INSURANCE POLICY, YOU SHOULD CONSIDER OBTAINING ENDORSEMENTS – *ENDORSEMENT PRIMER*



1. ALTA Forms Of Endorsements.
2. CLTA Forms Of Endorsements.
3. Title Insurer Forms Of Endorsements.
4. Lender's Forms Of Endorsements.
5. Special Endorsements.



SMART LAWYERS LIKE TO LITIGATE REAL PROPERTY DISPUTES. SMART LENDERS AND PROPERTY OWNERS PREFER THEIR TITLE INSURER PAY THE BILL.

PRESENTERS

John L. Hosack—*Presenter*

John L. Hosack is a Shareholder in the firm's Litigation Practice Group in Los Angeles and Co-Chair of the firm's Title Insurance and Escrow Group. Mr. Hosack represents mortgage brokers, secured lenders and property owners at trial and on appeal in real property disputes including, broker liability, lender liability, fraud, breaches of contract, mechanic's liens, stop notices, judicial foreclosures, receiverships, escrow claims and title insurance claims. His transactional practice includes commercial real property loan documentation, loan workouts, REO sales and foreclosures. He is an Affiliate Member of the California Mortgage Association and a member of the Los Angeles Mortgage Association, a Fellow of the American College of Real Estate Lawyers and a Fellow of the American College of Mortgage Attorneys. He is the author of "California Title Insurance Practice (First Ed., Calif. Cont. Ed. Bar), the first book on title insurance, and is a past Chair of the ABA's Title Insurance Litigation Committee.



John L. Hosack
Shareholder
Los Angeles Office

Jason E. Goldstein—*Presenter*

Jason Goldstein is a Shareholder in the Firm's Litigation Practice Group in Irvine and Los Angeles and Co-Chair of the Firm's Title Insurance and Escrow Group. Mr. Goldstein specializes in resolving complex business disputes for a diverse cross-section of clients, which include "private money" lenders, "private money" brokers, insureds, mortgage servicers, banks, credit unions, foreclosure trustees, investors, trade secret owners, individuals which own real property and general contractors. Mr. Goldstein Jason is a fellow of the American College of Mortgage Attorneys ("ACMA"), a ACMA Title Insurance Committee member, and a former President of the Orange County Bar Association Insurance Law section.



Jason E. Goldstein
Shareholder
Irvine Office