

# TABLE OF CONTENTS

## CHAPTER 1

### The Basic Types of Policies and Coverages

§ 1.01	Components of an Insurance Policy . . . . .	1-2
	[1] Declarations . . . . .	1-2
	[a] Per Occurrence and Aggregate Limits . . . . .	1-3
	[b] SIRs and Deductibles . . . . .	1-4
	[2] Insuring Agreement . . . . .	1-6
	[a] Duty to Defend . . . . .	1-6
	[b] Duty to Indemnify . . . . .	1-6
	[3] Exclusions . . . . .	1-7
	[4] Definitions . . . . .	1-7
	[5] Conditions . . . . .	1-7
	[6] Endorsements . . . . .	1-8
§ 1.02	Other Evidence of Insurance . . . . .	1-10
§ 1.03	Types of Insurance Policies . . . . .	1-12
	[1] Claims Made vs. Occurrence . . . . .	1-12
	[2] Primary vs. Excess . . . . .	1-12
	[a] Primary Insurance . . . . .	1-13
	[b] Excess Insurance . . . . .	1-13
	[c] Umbrella Insurance . . . . .	1-15
	[3] Subscription/Participation Policies . . . . .	1-16
	[4] “Manuscript” Policies . . . . .	1-17
	[5] Fronting Insurance . . . . .	1-17
	[6] Retrospectively Rated Insurance . . . . .	1-18
§ 1.04	Types of Coverages . . . . .	1-20
	[1] Comprehensive General Liability (CGL) . . . . .	1-20
	[a] Property Damage/Bodily Injury . . . . .	1-20
	[b] Personal Injury . . . . .	1-24
	[c] Advertising Injury . . . . .	1-28
	[d] Contractual Liability . . . . .	1-29
	[2] First-Party Property . . . . .	1-30
	[a] Named Peril . . . . .	1-30

**INSURANCE COVERAGE DISPUTES**

	[b] All Risk . . . . .	1-30
	[c] Business Interruption . . . . .	1-30
[3]	Directors' & Officers' (D&O) Liability . . . . .	1-31
[4]	Products Liability . . . . .	1-33
[5]	Errors & Omissions (E&O) Liability . . . . .	1-34
[6]	Fidelity/Dishonesty Coverage . . . . .	1-34
[7]	Professional Liability . . . . .	1-35
[8]	Environmental Impairment Liability (EIL) . . . . .	1-36
[9]	Employers' Liability . . . . .	1-36
[10]	Kidnapping and Ransom (K&R) . . . . .	1-37
[11]	Mortgage Insurance . . . . .	1-38
[12]	Cyber Risk Insurance . . . . .	1-41
	[a] Availability of Cyber Risk Coverage Under Traditional CGL Policy Forms and Other Coverages . . . . .	1-42
	[b] Availability of Standalone Cyber Risk Coverage . . . . .	1-46.1
[13]	Coverage for Violations of Biometric Data Privacy Laws . . . . .	1-49
	[a] Coverage Under Cyber Liability Policies . . . . .	1-51
	[b] Other Sources of Coverage . . . . .	1-52
[14]	Coverage for Regulated Marijuana Businesses . . . . .	1-52
	[a] Relevant Exclusions . . . . .	1-53
	[b] Public Policy . . . . .	1-54
[15]	Drone Insurance . . . . .	1-54
	[a] Coverage A Issues . . . . .	1-55
	[b] Coverage B Issues . . . . .	1-56

**CHAPTER 2****Duties of Policyholder and Insurer in  
Claims Submission and Handling**

§ 2.01	Introduction . . . . .	2-2
§ 2.02	Duties of Policyholder . . . . .	2-3
[1]	Duty to Provide Notice to Insurer . . . . .	2-3
	[a] Occurrence-Based Policies . . . . .	2-4
	[i] Why Notice Must Be Given . . . . .	2-4

**TABLE OF CONTENTS**

vii

	[ii]	Who Must Give Notice . . . .	2-5
	[iii]	Where Notice Must Be Sent . . . . .	2-7
	[iv]	What Notice Must Be Given. . . . .	2-8
	[v]	When Notice Must Be Given. . . . .	2-11
	[vi]	<i>Chart: Late Notice/ Prejudice in Occurrence Policies . . . . .</i>	2-19
	[b]	Claims-Made Policies. . . . .	2-27
	[2]	Assistance and Cooperation. . . . .	2-31
	[3]	Consent to Settlement . . . . .	2-34
	[4]	Proof of Loss . . . . .	2-38
	[5]	Suit Limitation Issues . . . . .	2-38
§ 2.03		Duties of Insurer . . . . .	2-38.5
	[1]	Investigate/Adjust. . . . .	2-38.5
	[2]	Reservations of Rights/Disclaimers. . . . .	2-42
	[a]	Waiver or Estoppel. . . . .	2-43
	[b]	Mend the Hold Doctrine . . . . .	2-46
	[3]	Claims-Handling Statutes. . . . .	2-52
	[4]	Defense Obligation: Tripartite Relationship; Conflicts of Interest . . . . .	2-55
	[a]	Reservation of Rights and the Tripartite Relationship . . . . .	2-58
	[b]	Judicial Response to Conflicts of Interest Created by the Tripartite Relationship . . . . .	2-59
	[i]	The Policyholder’s Entitlement to Independent Counsel . . . . .	2-59
	[ii]	Enforcing Counsel’s Obligations to the Policyholder . . . . .	2-62
	[c]	Special Ethical and Professional Considerations Occasioned by Insurers’ Use of In-House Counsel to Represent Policyholders . . . . .	2-69
	[i]	Conflicts of Interest Threaten Defense Counsel’s Professional Judgment . . . . .	2-69
	[ii]	The Unauthorized Practice of Law by Insurers. . . . .	2-72

	[d] Litigation Management Guidelines . . . . .	2-75
[5]	Duty to Inform Policyholder of Available Coverage . . . . .	2-82
[6]	Equitable Duties to Underlying Counsel . . . . .	2-84

## CHAPTER 3

### Preliminary Litigation Considerations

§ 3.01	Case Management . . . . .	3-2
	[1] Introduction . . . . .	3-2
	[2] Phasing, Bifurcating or Limiting the Case . . . . .	3-2
	[a] By Claim or Loss . . . . .	3-2
	[i] Bellwether Trials . . . . .	3-3
	[ii] Statistical Sampling . . . . .	3-4
	[b] By Issue . . . . .	3-5
	[c] By Parties . . . . .	3-5
	[d] By Scope of Coverage—Duty to Defend or Duty to Indemnify . . . . .	3-6
	[3] Timing of Different Types of Discovery . . . . .	3-6
	[4] Protective Orders/Non-Waiver Agreements . . . . .	3-7
	[a] Protective Orders . . . . .	3-7
	[b] Non-Waiver Agreements . . . . .	3-8
§ 3.02	Venue . . . . .	3-9
	[1] Introduction . . . . .	3-9
	[2] General Principles . . . . .	3-10
	[3] The Doctrine of <i>Forum Non Conveniens</i> . . . . .	3-11
	[4] <i>Forum Non Conveniens</i> in Insurance Coverage Cases . . . . .	3-12
	[a] Location of Underlying Claim/Loss vs. Place of Contracting . . . . .	3-12
	[b] Statutory Preferred Venue Provisions . . . . .	3-14
	[c] Application of Private Interest Factors . . . . .	3-14
	[d] Application of Public Interest Factors . . . . .	3-16

## TABLE OF CONTENTS

ix

	[e]	Influence of Choice of Law Issues . . . . .	3-17
	[f]	Influence of Service of Suit Provisions . . . . .	3-18
§ 3.03		Proper Parties . . . . .	3-20
	[1]	Proper Plaintiffs . . . . .	3-20
	[a]	Coverage for After-Acquired Subsidiaries . . . . .	3-20
	[b]	Corporate Successorship/ Assignment . . . . .	3-23
	[i]	Application of Non-Assignment Clauses Generally . . . . .	3-23
	[ii]	Assignment by Operation of Law . . . . .	3-28
	[2]	Defendants and Others . . . . .	3-35
	[a]	Absent Insurers as Necessary or Indispensable Parties . . . . .	3-36
	[b]	Underlying Claimants as Necessary or Indispensable Parties . . . . .	3-39
	[c]	Other Insureds as Necessary or Indispensable Parties . . . . .	3-40
§ 3.04		Justiciability Issues . . . . .	3-41
§ 3.05		Litigation Considerations Regarding Insurer Insolvencies . . . . .	3-46

## CHAPTER 4

### Choice of Law Issues in Insurance Coverage Litigation

§ 4.01		Choice of Law Paradigms . . . . .	4-1
	[1]	Traditional Choice of Law Approach: Vested Rights and <i>Lex Loci Contractus</i> . . . . .	4-3
	[2]	Modern Choice of Law Approaches: Significant Contacts, Governmental Interests . . . . .	4-4
§ 4.02		Applying Modern Choice of Law Paradigms in Insurance Coverage Litigation . . . . .	4-7
	[1]	Focus on Insurance Policy Facts . . . . .	4-7

## INSURANCE COVERAGE DISPUTES

	[2] Focus on Loss/Liability Facts . . . . .	4-9
	[3] Focus on Public Policy . . . . .	4-10
§ 4.03	Timing of the Choice of Law Determination . . . . .	4-14

## CHAPTER 5

## Discovery

§ 5.01	Areas of Discovery . . . . .	5-2
	[1] Insurer's Claim File . . . . .	5-2
	[a] Attorneys as Claims Handlers . . . . .	5-2
	[b] Bad Faith Cases . . . . .	5-5
	[c] <i>Chart: Discoverability of Insurer         Claim Files by Insured of         Third Parties</i> . . . . .	5-8
	[2] Drafting History of the Policy . . . . .	5-32
	[3] Reinsurance Information . . . . .	5-35
	[4] Reserve Information . . . . .	5-38
	[5] Other Insureds, Other Claims . . . . .	5-39
	[6] Claims Handling and Underwriting Manuals and Guidelines . . . . .	5-42
	[7] Advertising and Marketing Materials . . . . .	5-42
	[8] Electronically Stored Information . . . . .	5-43
	[9] Insured's Defense Counsel's Files . . . . .	5-43
	[a] "At Issue" . . . . .	5-44
	[b] Common Interest . . . . .	5-46
	[c] Cooperation Clause . . . . .	5-49
	[d] <i>Chart: Discoverability of         Insured's Defense Counsel         Files by Insurer</i> . . . . .	5-51
§ 5.02	Discovery from Third Parties . . . . .	5-64
§ 5.03	The Propriety of <i>Ex Parte</i> Contacts with a Policyholder's Former Employees . . . . .	5-66

## CHAPTER 6

## Lost Policies

§ 6.01	Introduction to the Problem of Lost Policies . . . . .	6-1
--------	---	-----

## TABLE OF CONTENTS

xi

§ 6.02	Diligent Search and Absence of Bad Faith as Preconditions for Proving the Existence and the Terms of Lost Policies . . . . .	6-3
§ 6.03	Proving the Existence and the Terms of Lost Policies . . . . .	6-6
	[1] Burden of Proof . . . . .	6-6
	[2] Standard of Proof . . . . .	6-11
	[3] Types of Secondary Evidence . . . . .	6-14
	[a] Standard Policy Forms or Specimen Policies . . . . .	6-14
	[b] Other Policies . . . . .	6-15
	[c] Practice or Custom . . . . .	6-16
	[d] Premium Information . . . . .	6-17
	[e] Experts . . . . .	6-18
	[f] Depositions, Affidavits and Live Testimony . . . . .	6-18
	[g] Other Secondary Evidence . . . . .	6-19
§ 6.04	Use of Secondary Evidence in Practice . . . . .	6-22
	[1] Preponderance of the Evidence Standard . . . . .	6-22
	[2] Clear and Convincing Evidence Standard . . . . .	6-25

## CHAPTER 7

### Rules of Policy Interpretation and Construction

§ 7.01	Contract Interpretation Generally . . . . .	7-1
§ 7.02	Insurance Policy Interpretation . . . . .	7-5
	[1] General Rules of Interpretation . . . . .	7-5
	[2] Use of the Doctrine of <i>Contra</i> <i>Proferentem</i> . . . . .	7-7
	[3] <i>Contra Proferentem</i> and the Sophisticated Insured . . . . .	7-13
	[4] Coverage Grants vs. Exclusions . . . . .	7-16
§ 7.03	The Application and Limitations of the Parol Evidence Rule . . . . .	7-18
	[1] The Parol Evidence Rule . . . . .	7-18
	[2] The Practical Application of the Parol Evidence Rule . . . . .	7-19
§ 7.04	Determining Ambiguity . . . . .	7-21
	[1] Defining Ambiguity . . . . .	7-22

	[2] Ambiguity and the Parol Evidence Rule .....	7-23
§ 7.05	Reasonable Expectations.....	7-31
§ 7.06	Estoppel.....	7-36

## CHAPTER 8

### Establishing the Duty to Defend Under CGL Policies

§ 8.01	Standard for Determining.....	8-1
§ 8.02	Divisibility/Allocation.....	8-11
	[1] Between Insurer and Insured.....	8-12
	[2] Between and Among Insurers.....	8-12.1
	[a] Equal Shares.....	8-13
	[b] <i>Pro Rata</i> Apportionment.....	8-13
	[c] Primary and Excess.....	8-15
	[d] Targeted Tender.....	8-17
§ 8.03	What Constitutes a “Suit”.....	8-19
	[1] Discussion.....	8-19
	[2] <i>Chart: Duty to Defend: “Suit”</i> Clause.....	8-23
§ 8.04	What Constitutes Defense Costs.....	8-29
§ 8.05	Consequences of Breach of Duty To Defend.....	8-32
§ 8.06	Terminating the Duty to Defend.....	8-39
	[1] Exhaustion of the Policy Limit.....	8-39
	[2] Discovery That There Is No Covered Claim.....	8-41

## CHAPTER 9

### Establishing the Duty to Indemnify Under CGL Policies

§ 9.01	Standards for Determining.....	9-3
	[1] Judgment.....	9-4
	[2] Settlement.....	9-9
	[3] Special Issues Involving Bankruptcy Code Section 524(g).....	9-14
§ 9.02	“Damages” Covered.....	9-16
	[1] Discussion.....	9-16

**TABLE OF CONTENTS**

xiii

	[2] <i>Chart: “As Damages”</i> . . . . .	9-24
	[3] Insurability of Liability for Punitive Damages. . . . .	9-29
	[a] Rationale for Prohibiting the Insurance of Punitive Damages. . . . .	9-32
	[b] Rationale for Allowing the Insurance of Punitive Damages. . . . .	9-33
	[c] Interpreting Policy Language Regarding Coverage. . . . .	9-35
	[d] <i>Chart: Insurability of Liability for Punitive Damages</i> . . . . .	9-36.1
§ 9.03	Accident/Occurrence/Advertising Injury . . . . .	9-36.9
	[1] Accident Policies . . . . .	9-36.9
	[2] Occurrence Policies . . . . .	9-36.15
	[a] Expected or Intended. . . . .	9-36.15
	[b] Single Occurrence vs. Multiple Occurrences. . . . .	9-36.22
	[3] Event Policies. . . . .	9-46
	[4] Advertising Injury Coverage. . . . .	9-50
	[a] In General. . . . .	9-50
	[b] Insurance Coverage for Internet-Related Trademark and Domain Name Claims. . . . .	9-64.6
	[i] Basics of Trademark and Domain Name Law . . . . .	9-65
	[ii] Establishing “Advertising Injury”. . . . .	9-71
	[iii] Coverage Under ISO’s 1981 CGL Policy Form Endorsement. . . . .	9-76
	[iv] Coverage Under ISO’s 1986 CGL Policy Form. . . . .	9-78
	[v] Coverage Under ISO’s 1998 CGL Policy Form. . . . .	9-78.3
	[vi] Coverage Under ISO’s 2001 CGL Policy Form. . . . .	9-78.3
	[vii] Coverage Under ISO’s 2007 CGL Policy Form. . . . .	9-78.4

		[viii] Particularized Insurance Issues that May Arise with Respect to Internet-Related Trademark Claims . . . . .	9-78.4
		[ix] New Forms of Coverage . . . . .	9-78.6
§ 9.04		“Trigger” of Coverage . . . . .	9-78.8
	[1]	Exposure . . . . .	9-78.9
	[2]	Manifestation . . . . .	9-78.10
	[3]	Continuous/Multiple . . . . .	9-78.13
	[4]	Injury-In-Fact . . . . .	9-78.16
	[5]	Product Liability Triggers . . . . .	9-78.17
	[6]	Toxic Tort Coverage Claims . . . . .	9-78.19
	[7]	Environmental Insurance Coverage Claims . . . . .	9-78.22
	[8]	<i>Chart: Trigger of Coverage</i> . . . . .	9-78.23
§ 9.05		Construction Defects. . . . .	9-79
	[1]	In General. . . . .	9-79
	[2]	The Insuring Agreement . . . . .	9-79
	[a]	“Legally Obligated to Pay as Damages”. . . . .	9-80
	[b]	Property Damage . . . . .	9-83
	[c]	Occurrence . . . . .	9-86

## CHAPTER 10

### Common Exclusions and Defenses to Coverage Under CGL Policies

§ 10.01		Exclusions . . . . .	10-2
	[1]	Pollution Exclusion . . . . .	10-2
	[a]	Introduction and History . . . . .	10-2
	[b]	Burden of Proof . . . . .	10-10
	[c]	The Meaning of “Sudden”. . . . .	10-12
	[d]	Estoppel . . . . .	10-23
	[e]	The Relevant Event . . . . .	10-25
	[f]	<i>Chart: “Sudden and Accidental” Exception in Pollution Exclusion . . . . .</i>	10-30
	[g]	The Meaning of “Abrupt” . . . . .	10-38
	[h]	Initial Application of the Exclusion . . . . .	10-43
	[i]	Is There a Pollutant? . . . . .	10-43

**TABLE OF CONTENTS**

	[ii] Has There Been a Discharge, Dispersal, Release or Escape? . . . . .	10-51
	[i] <i>Chart: Initial Application of Pollution Exclusion</i> . . . . .	10-56
	[j] “Personal Injury” Coverage . . . . .	10-63
	[k] <i>Chart: Personal Injury Coverage for Pollution Claims</i> . . . . .	10-73
	[l] Climate Change Claims . . . . .	10-77
	[m] The Related Contamination Exclusion . . . . .	10-83
[2]	Business Risks . . . . .	10-84
	[a] Own Product/Own Work . . . . .	10-85
	[b] Sistership. . . . .	10-89
	[c] Loss of Use/Impaired Property . . . . .	10-91
[3]	Owned Property/Alienated Premises. . . . .	10-93
[4]	War Risk and Terrorism Exclusions . . . . .	10-99
	[a] War Risk Exclusion Generally . . . . .	10-100
	[b] Applying War Risk Exclusion Clauses to Acts of Terrorism. . . . .	10-101
	[c] Explicit Terrorism Exclusions . . . . .	10-105
[5]	Contractually Assumed Liability Exclusion . . . . .	10-108
[6]	Prior Publication Exclusion for Advertising Injury . . . . .	10-111
[7]	Failure to Conform with Advertisement . . . . .	10-112
§ 10.02	Defenses to Coverage . . . . .	10-113
	[1] Known Loss/Loss-in-Progress . . . . .	10-113
	[2] Late Notice . . . . .	10-123

**CHAPTER 11**

**Establishing Coverage Under Other Than CGL Policies and Special Provisions of CGL Policies**

§ 11.01	First-Party Property Coverage . . . . .	11-3
	[1] Direct Physical Loss . . . . .	11-5
	[2] Covered Property . . . . .	11-7
	[3] Covered Cause/Peril. . . . .	11-15
	[4] “Trigger” of Coverage . . . . .	11-20
	[5] Conditions and Exclusions . . . . .	11-24

	[6]	Business Interruption Coverage . . . . .	11-31
		[a] Business Income Coverage . . . . .	11-32
		[b] Civil Authority Coverage . . . . .	11-35
		[c] Ingress/Egress Coverage . . . . .	11-36
		[d] Contingent Business Interruption Coverage . . . . .	11-36
		[e] Extra Expense Coverage . . . . .	11-37
		[f] Other Considerations . . . . .	11-38
	[7]	“Sue and Labor” Provisions . . . . .	11-41
	[8]	First-Party Property Coverage for Mold-Related Property Damage . . . . .	11-43
		[a] Mold Exclusions . . . . .	11-46
		[b] Pollution Exclusions . . . . .	11-46.3
	[9]	The World Trade Center First-Party Property Insurance Litigation: A Case Study of the Hazards in Placement of a Multi-Layer Coverage Program . . . . .	11-46.5
§ 11.02		Directors’ and Officers’ Coverage . . . . .	11-46.22
	[1]	Components of a D&O Liability Policy . . . . .	11-46.22
		[a] Declarations . . . . .	11-46.22
		[i] Claims Made vs. Occurrence . . . . .	11-46.22
		[ii] Named Corporation . . . . .	11-46.23
		[iii] Each Wrongful Act and Aggregate Limits . . . . .	11-46.23
		[iv] SIRs and Deductibles . . . . .	11-46.24
		[v] Policy Period . . . . .	11-46.25
		[vi] Retroactive Date . . . . .	11-46.26
	[b]	Insuring Agreements . . . . .	11-46.26
		[i] Direct Coverage of Directors and Officers . . . . .	11-46.26
		[ii] Corporate Reimbursement Coverage . . . . .	11-46.30
		[iii] Entity Coverage . . . . .	11-46.33
		[iv] Derivative Investigations Coverage . . . . .	11-46.37
		[v] Defense Coverage . . . . .	11-46.38
	[c]	Exclusions . . . . .	11-46.38
	[d]	Definitions . . . . .	11-46.39
		[i] Claim . . . . .	11-46.40
		[ii] Loss . . . . .	11-46.41
		[iii] Wrongful Act . . . . .	11-46.49

**TABLE OF CONTENTS**

xvii

	[iv]	Related Claims and Related Wrongful Acts . . . . .	11-46.51
	[e]	Conditions. . . . .	11-46.53
	[i]	Notice of Claim/ Circumstances. . . . .	11-46.53
	[ii]	Consent to Settlement/ Defense. . . . .	11-46.57
[2]		Misrepresentations in the Application. . .	11-46.58
[3]		Common Exclusions . . . . .	11-46.64
	[a]	Insured vs. Insured Exclusion . . . . .	11-46.64
	[i]	The Regulatory Context. . . . .	11-46.65
	[ii]	The Bankruptcy Context . . . . .	11-46.66
	[b]	Regulatory Exclusion. . . . .	11-46.68
	[c]	SEC Exclusion . . . . .	11-46.69
	[d]	Personal Profit Exclusion. . . . .	11-46.70
	[e]	Prior Acts Exclusion . . . . .	11-46.71
	[f]	Dishonest, Fraudulent, and Criminal Acts Exclusion . . . . .	11-46.72
[4]		Allocation of Settlement and Defense Costs . . . . .	11-46.76
	[a]	Settlements and Judgments . . . . .	11-46.76
	[b]	Defense Costs. . . . .	11-46.79
§ 11.03		Fidelity/Dishonesty Coverage. . . . .	11-46.80
	[1]	Covered Loss . . . . .	11-46.81
	[2]	Dishonest/Fraudulent Act. . . . .	11-46.84
	[3]	Manifest Intent. . . . .	11-46.85
	[4]	Causation . . . . .	11-46.87
	[5]	Exclusions. . . . .	11-46.89
§ 11.04		Environmental Impairment Liability (EIL) Coverage . . . . .	11-46.92
	[1]	Pollution Incident/Environmental Impairment. . . . .	11-46.94
	[2]	Trigger . . . . .	11-46.95
	[3]	Primacy of EIL and CGL Coverage . . . .	11-52.2
	[4]	Exclusions. . . . .	11-52.3
§ 11.05		Professional Liability Coverage . . . . .	11-52.5
	[1]	Insuring Agreement . . . . .	11-52.5
	[a]	Insured’s Capacity . . . . .	11-53
	[b]	“Claim” Requirement. . . . .	11-57
	[2]	When a Claim Must Be Reported. . . . .	11-62
	[3]	Limits of Liability . . . . .	11-65
	[4]	Potential Defenses to Coverage. . . . .	11-67
	[a]	Business Enterprise Exclusion. . . . .	11-67
	[b]	Prior Acts Exclusion . . . . .	11-68

	[c]	Dishonesty Exclusion . . . . .	11-69
	[d]	Media Liability Coverage Employment Exclusion . . . . .	11-70.3
§ 11.06	[5]	Insured's Consent to Settlement . . . . .	11-70.3
		Employment Practices Liability Insurance . . . . .	11-71
	[1]	Covered Claims and Exclusions . . . . .	11-72
	[2]	Coverage under Other Types of Policies . . . . .	11-73
	[a]	Comprehensive General Liability (CGL) Policies . . . . .	11-73
	[b]	Directors' and Officers' (D&O) Liability Policies . . . . .	11-77
	[c]	Workers' Compensation Insurance . . . . .	11-77
	[3]	What Constitutes a "Claim" . . . . .	11-78
	[4]	Selection of Counsel . . . . .	11-80
	[5]	Public Policy Considerations and Limitations . . . . .	11-80
§ 11.07		The Vendor's Endorsement and the Manufacturer/Vendor Relationship . . . . .	11-84
	[1]	Methods Available to Vendors to Reduce or Avoid Liability and Defense Costs . . . . .	11-84
	[a]	Comparative Negligence, Contribution, and Indemnification . . . . .	11-84
	[b]	Indemnity Agreement . . . . .	11-85
	[c]	The Vendor's General Liability Insurance . . . . .	11-85
	[d]	The Manufacturer's CGL Insurance . . . . .	11-85
	[e]	Vendor's Liability Endorsement . . . . .	11-85
	[2]	Purpose of Vendor's Endorsement . . . . .	11-85
	[3]	The Vendor's Endorsement . . . . .	11-86
	[4]	Scope of Coverage . . . . .	11-87
	[5]	Exclusions . . . . .	11-89
	[a]	The Product Change Exclusion . . . . .	11-89
	[b]	The Labeling/Relabeling Exclusion . . . . .	11-90

## CHAPTER 12

**Bad Faith and Other Extracontractual Claims**

§ 12.01	Bad Faith . . . . .	12-2
	[1] Historical Background . . . . .	12-2
	[2] The Implied Covenant of Good Faith and Fair Dealing . . . . .	12-7
	[3] Bad Faith Breach of the Duty to Settle Third Party Actions . . . . .	12-9
	[4] Bad Faith Conduct That May Prejudice the Policyholder's Defense of an Underlying Action . . . . .	12-14
	[5] Bad Faith Litigation Tactics . . . . .	12-16
	[6] Bad Faith In The First Party Insurance Context . . . . .	12-19
	[7] Reverse Bad Faith . . . . .	12-22
§ 12.02	Damages Available in Bad Faith Actions . . . . .	12-23
	[1] Excess Judgments . . . . .	12-23
	[2] Punitive Damages . . . . .	12-25
	[3] Consequential Damages . . . . .	12-26
	[4] Damages for Mental Suffering . . . . .	12-29
	[5] Attorneys' Fees . . . . .	12-29
§ 12.03	Statutory Claims . . . . .	12-30.1
	[1] The Model Unfair Claims Settlement Practices Act . . . . .	12-30.1
	[2] Statutory Bad Faith Damages and Penalties . . . . .	12-34
	[3] Consumer Protection Statutes . . . . .	12-35
§ 12.04	Equitable Remedies and the Doctrine of Reasonable Expectations . . . . .	12-38
	[1] Reformation and Rescission . . . . .	12-38
	[2] Adhesion and Unconscionability . . . . .	12-40
	[3] Estoppel . . . . .	12-43
	[4] Reasonable Expectations . . . . .	12-45
§ 12.05	Broad-Based Leveraged Corporate-Owned Life Insurance . . . . .	12-48
§ 12.06	Extracontractual Claims Relating to Contingent Commissions . . . . .	12-53

## CHAPTER 13

**Litigating Claims Against the London Market**

§ 13.01	The London Market: What It Is and How It Functions . . . . .	13-2
	[1] Lloyd's of London . . . . .	13-3
	[2] London Companies Market . . . . .	13-4
	[3] The Participation/Subscription Concept: Lead Underwriters and Following Market Underwriters . . . . .	13-5
	[4] The Role of "Lloyd's Brokers" . . . . .	13-5
§ 13.02	Litigating With the London Market: Some General Considerations . . . . .	13-7
§ 13.03	Jurisdictional Issues . . . . .	13-9
	[1] Determining Diversity of Lloyd's, London . . . . .	13-9
	[2] Removal to Federal Court of Lawsuits Against the London Market . . . . .	13-14
	[a] Diversity Cases . . . . .	13-14
	[b] Foreign Sovereign Immunity Act Cases . . . . .	13-15
§ 13.04	Special Discovery Issues Involving the London Market . . . . .	13-21
	[1] Discovery from Following Market Insurers . . . . .	13-21
	[2] Discovery of Attorneys' Reports . . . . .	13-23
	[3] The Lloyd's Underwriters Non-Marine Association (NMA) . . . . .	13-27
§ 13.05	Insolvencies in the London Companies Market . . . . .	13-28
§ 13.06	Negotiating Settlements with the London Market . . . . .	13-32
	[1] The Specialist Claims Unit (SCU) . . . . .	13-32
	[2] Equitas and the Equitas Claims Unit . . . . .	13-32
	[3] Effect of Insolvencies—Gross vs. Net . . . . .	13-35

## CHAPTER 14

**Trial of the Coverage Case**

§ 14.01	Introduction . . . . .	14-1
§ 14.02	Judge vs. Jury Issues . . . . .	14-3
	[1] Existence of Contract . . . . .	14-3

## TABLE OF CONTENTS

xxi

	[2] Lost or Missing Policies . . . . .	14-3
	[3] Meaning of the Policy . . . . .	14-4
	[4] Application of Policy Terms to Facts . . . . .	14-7
§ 14.03	Phasing/Bifurcation . . . . .	14-8
§ 14.04	Evidentiary Issues: The “Case Within a Case” . . . . .	14-11
§ 14.05	Special Interrogatories vs. General Verdict Forms . . . . .	14-12
§ 14.06	Allocation and Related Issues . . . . .	14-13
	[1] Discussion . . . . .	14-13
	[2] <i>Chart: Allocation</i> . . . . .	14-29

## CHAPTER 15

### Settlement of Coverage Claims

§ 15.01	General Considerations . . . . .	15-2
§ 15.02	Types of Settlements . . . . .	15-3
	[1] Policy Buy-Back or Commutation . . . . .	15-3
	[2] Claim Release: Global or Specific . . . . .	15-5
	[3] Coverage in Place . . . . .	15-6
§ 15.03	Issues Arising Out of Settlements and Settlement Agreements . . . . .	15-7
	[1] Nonsettling Insurers’ Right to Setoff and Contribution . . . . .	15-7
	[a] Setoff . . . . .	15-7
	[b] Contribution . . . . .	15-11
	[2] Exhaustion of Underlying Limits . . . . .	15-18
	[3] Addressing the Impact of Settlements on Aggregate Limits and Retrospective Premiums . . . . .	15-24
§ 15.04	Addressing Contribution Concerns in Settlement Agreements Through Use of Indemnity Provisions . . . . .	15-25
§ 15.05	What to Include in the Settlement Agreement . . . . .	15-26
	[1] Parties Bound . . . . .	15-26
	[2] Policies Involved . . . . .	15-26
	[3] Scope of Release . . . . .	15-26
	[4] Reservation of Rights . . . . .	15-27
	[5] Effect of Settlement on Aggregate Limits and Retrospective Premiums . . . . .	15-27
	[6] Indemnity Provisions . . . . .	15-27

	[7]	Confidentiality . . . . .	15-28
	[8]	Definitions . . . . .	15-28
	[9]	Integration. . . . .	15-28
	[10]	Representations. . . . .	15-28
	[11]	Choice of Law . . . . .	15-28
§ 15.06		Arriving at Settlement: Arbitration, Mediation and Negotiation. . . . .	15-29

## CHAPTER 16

### Insurance Coverage for Claims Arising Out of Sexual Misconduct

§ 16.01		Introduction . . . . .	16-1
§ 16.02		Establishing Coverage. . . . .	16-3
	[1]	CGL and Homeowner's Policies. . . . .	16-5
		[a] The Perpetrator as Insured. . . . .	16-5
		[b] The Non-Perpetrator as Insured. . . . .	16-6
	[2]	Professional Liability Policies. . . . .	16-8
		[a] Physicians and Dentists . . . . .	16-9
		[b] Mental Health Therapists. . . . .	16-11
§ 16.03		Avoiding Coverage . . . . .	16-13
	[1]	Public Policy . . . . .	16-13
	[2]	Exclusion of Intentional Conduct . . . . .	16-14
		[a] Victim as Minor . . . . .	16-17
		[b] Perpetrator as Minor . . . . .	16-18
		[c] Victim as Adult . . . . .	16-20
	[3]	Sexual Molestation Exclusion . . . . .	16-21
	[4]	Business Pursuits Exclusion . . . . .	16-23

## CHAPTER 17

### Insurance Coverage for Claims Arising Out of COVID-19

§ 17.01		Introduction . . . . .	17-1
§ 17.02		Establishing Coverage. . . . .	17-3
	[1]	Physical Loss or Damage . . . . .	17-3
	[2]	Civil Authority . . . . .	17-24
	[3]	Communicable Disease Coverage . . . . .	17-30

**TABLE OF CONTENTS**

xxiii

§ 17.03	Avoiding Coverage .....	17-34
	[1] Virus Exclusion .....	17-34
	[2] Pollution and Contamination Exclusions .....	17-38
	[3] Fungi, Wet Rot, Dry Rot and Microbes Exclusion and Microorganisms Exclusions .....	17-42
	[4] Loss of Use or Loss of Market Exclusions .....	17-42
	[5] Law and Ordinance and Acts or Decisions Exclusions .....	17-44
<b>INDEX</b> .....		I-1

