Table of Contents

PART I LIABILITY INSURANCE POLICIES 1

Chapter 1: Navigating the Insurance Policy.....3
1-1 INTRODUCTION.....3
1-2 POLICY DECLARATIONS 4
1-3 PACKAGE POLICIES.....6
1-4 THE POLICY FORM 7
1-4:1 Insuring Agreements.....8
1-4:2 Exclusions.....9
1-4:3 Definitions.....10
1-4:4 Conditions.....11
1-5 ENDORSEMENTS.....12
1-6 SCHEDULES 13

Chapter 2: Commercial General Liability.....15
2-1 INTRODUCTION.....15
2-2 RISKS INSURED 16
2-3 INSURING AGREEMENTS.....19
2-3:1 Coverage A—Bodily Injury and Property Damage.....19
2-3:1.1 Bodily Injury 20
2-3:1.2 Property Damage.....20
2-3:1.3 "Accident" Requirement 22
2-3:1.4 Fortuity.....24
2-3:1.5 "Legally Obligated to Pay" 25
2-3:2 Coverage B—Personal and Advertising Injury.....25
2-3:3 Coverage C—Medical Payments.....26
2-4 INSUREDS.....27
2-4:1 Named Insured.....27
2-4:2 Other Insureds.....28
2-4:2.1 Additional Insureds.....28
2-4:2.2 Statutory Limitations on Additional Insured Coverage.....31

00_TX_Insurance_Litigation_FM.indd 15 8/25/2021 2:46:30 PM

2-4:2.3 Contractual Limitations on Additional Insured Coverage 33
2-4:2.4 Newly Acquired Corporations 36
2-5 OCCURRENCE V. CLAIMS-MADE POLICIES 37
2-5:1 Occurrence-Based Coverage 37
2-5:2 Claims-Made Coverage 38
2-6 COVERAGE TRIGGERS AND LONG-TAIL CLAIMS 40
2-7 COMMON EXCLUSIONS 43
2-7:1 Coverage A—Bodily Injury and Property Damage 43
2-7:1.1 Intentional-Injury Exclusion 44
2-7:1.2 Contractual-Liability Exclusion 44
2-7:1.3 Business-Risk Exclusions 45
2-7:1.4 Pollution Exclusion 48
2-7:1.5 Fungi and Bacteria Exclusion 50
2-7:1.6 Communicable Disease Exclusion 51
2-7:2 Coverage B—Personal and Advertising Injury 52
2-7:2.1 Knowing-Violation-of-Rights-of-Another Exclusion 52
2-7:2.2 Knowledge-of-Falsity Exclusion 53
2-7:2.3 Prior-Publication Exclusion 53
2-7:3 Coverage C—Medical Payments 54
2-7:4 Endorsements 54
2-8 OTHER INSURANCE 55
2-9 CONTRIBUTION BY MULTIPLE INSURERS 58
2-10 DAMAGE DURING MULTIPLE POLICY PERIODS 58
2-11 LIMITS 61
2-12 SEVERABILITY CLAUSE 62
2-13 ALLOCATION 63

Chapter 3: Professional Liability: Errors and Omissions 67
3-1 INTRODUCTION 67
3-2 RISKS INSURED 68
3-3 INSURING AGREEMENT 69
3-4 INSUREDS 72
3-5 CLAIMS-MADE COVERAGE 72
3-5:1 Retroactive Date 74
3-5:2 Extended Reporting Period and Tail Coverage 74
3-6 COMMON EXCLUSIONS 75
3-6:1 Crime/Fraud Exclusion 75
3-6:2 Known Claims or Circumstances 76
3-6:3 Personal-Profit Exclusion 77

00_TX_Insurance_Litigation_FM.indd 16 8/25/2021 2:46:30 PM

3-7 INSURABILITY OF PUNITIVE OR EXEMPLARY DAMAGES 78
3-8 INSURED'S CONSENT TO SETTLE 81

Chapter 4: Directors and Officers Liability 83
4-1 INTRODUCTION 83
4-2 RISKS INSURED 83
4-3 INSURING AGREEMENTS 84
4-3:1 Individual D&O Coverage—Coverage A 85
4-3:2 Corporate Reimbursement Coverage—Coverage B 87
4-3:3 Entity Coverage—Coverage C 88
4-3:4 Outside-Director Liability Coverage 89
4-4 CLAIMS-MADE COVERAGE 90
4-4:1 Notice of Potential Claims 91
4-4:2 Retroactive Date—Prior Acts Coverage 92
4-4:3 Pending or Prior Litigation—Prior Notice 93
4-5 DEFINITION OF "CLAIM" 94
4-6 INSURED CAPACITY 99
4-7 COVERED LOSS 100
4-8 COMMON EXCLUSIONS 103
4-8:1 Intentional Fraud and Dishonesty 104
4-8:2 Personal Profit 104
4-8:3 Claims Brought by Insureds 105
4-8:4 Breach of Contract 107
4-9 OTHER KEY POLICY PROVISIONS 108
4-9:1 Severability 108
4-9:1.1 Severability of Exclusions 108
4-9:1.2 Severability of the Application 109
4-9:1.3 Limitations on Representations and Severability Provisions 112
4-9:2 Presumptive Indemnification 114
4-9:3 Apportionment or Allocation 115
4-9:4 Recoupment of Defense Costs 119

Chapter 5: Employment Practices Liability 121
5-1 INTRODUCTION 121
5-2 RISKS INSURED 121
5-3 INSURING AGREEMENT 122
5-4 WRONGFUL ACTS 123
5-5 COVERED "LOSS" 125
5-6 COMMON EXCLUSIONS 126

00_TX_Insurance_Litigation_FM.indd 17 8/25/2021 2:46:30 PM

Chapter 6: Fiduciary Liability 127
6-1 INTRODUCTION 127
6-2 RISKS INSURED 127
6-3 INSURING AGREEMENT 128
6-3:1 Definition of Wrongful Act 128
6-3:2 Definition of Settlement Program 130
6-3:3 ERISA Roles and Responsibilities 130
6-3:3.1 Plan Fiduciaries 130
6-3:3.2 Plan Sponsors 131
6-3:3.3 Plan Administrators 132
6-3:4 Not Wrongful Acts 132
6-4 WHO IS INSURED 135
6-5 COVERED LOSS 136
6-6 COMMON EXCLUSIONS 137

Chapter 7: Cyber and Privacy Liability 139
7-1 INTRODUCTION 139
7-2 THE RISKS 139
7-3 LIMITATIONS OF CONVENTIONAL COVERAGE 142
7-3:1 CGL Coverage 142
7-3:2 Commercial Crime Policies 146
7-3:3 Errors & Omissions or Professional Liability Policies 150
7-3:4 Commercial Property Policies 151
7-4 BASIC CONCEPTS 152
7-5 INSURING AGREEMENTS 153
7-5:1 Cyber Liability 153
7-5:2 Media Content Liability 156
7-5:3 Event Management 158
7-5:4 E-Crime 160
7-5:5 Network Interruption 163
7-5:6 E-Vandalism 164
7-5:7 Cyber Extortion 165
7-6 COMMON EXCLUSIONS 166
7-7 CYBER POLICY INTERPRETATION 168

Chapter 8: Excess and Umbrella Policies 171
8-1 INTRODUCTION 171
8-2 EXCESS LIABILITY COVERAGE 171
8-2:1 True Excess Policies 171
8-2:2 Umbrella Policies 173
8-3 SCHEDULE OF UNDERLYING INSURANCE 173

00_TX_Insurance_Litigation_FM.indd 18 8/25/2021 2:46:30 PM

8-4 PRIORITY OF INSURANCE 174
8-5 EXCESS CARRIER'S DUTY TO DEFEND 176
8-6 EXCESS CARRIER'S DUTY TO SETTLE 178
8-7 PRIMARY INSURER INSOLVENCY 179
8-8 NOTICE 181

PART II TEXAS INSURANCE LAW—KEY CONCEPTS 183

Chapter 9: The Ground Rules—Construction of Insurance Contracts 185
9-1 RULES OF CONTRACT CONSTRUCTION 185
9-2 AMBIGUITY 187

Chapter 10: The Insured's Obligations in Event of a Claim 191
10-1 NOTICE TO INSURER—REPORTING 191
10-2 NOTICE OF POTENTIAL CLAIMS 194
10-3 LATE NOTICE AND PREJUDICE REQUIREMENT 196
10-3:1 Occurrence-Based Policies 196
10-3:2 Claims-Made Policies 197
10-4 TENDER OF THE DEFENSE 200
10-5 COOPERATION 202
10-5:1 The Cooperation Clause 202
10-5:2 Prejudice 204

Chapter 11: The Insurer's Obligations in Event of a Claim 209
11-1 INTRODUCTION 209
11-2 THE DUTY TO DEFEND 210
11-2:1 Eight-Corners Rule 211
11-2:1.1 No Extrinsic Evidence 212
11-2:1.2 Doubts Resolved in Favor of Duty 212
11-2:1.3 Focus Is on Facts Alleged 214
11-2:2 Possible Exception to Eight-Corners Rule? 216
11-2:2.1 *GuideOne* 217
11-2:2.2 *Graham* 220
11-2:2.3 More Relevant Cases 221
11-2:3 Duty to Defend Entire Case 225
11-2:4 Reservation of Rights 228
11-2:5 Conflicts of Interest and Control of the Defense 229
11-2:6 Duty to Defend vs. Duty to Pay 232
11-3 DUTY TO INDEMNIFY 232
11-4 TEXAS INSURANCE CODE 234
11-4:1 Unfair and Deceptive Acts or Practices 234

00_TX_Insurance_Litigation_FM.indd 19 8/25/2021 2:46:31 PM

11-4:1.1 Section 541.051 235
11-4:1.2 Section 541.060 236
11-4:1.3 Section 541.061 238
11-4:2 Prompt Payment of Claims Act 239
11-5 THE *STOWERS* DUTY 242

PART III THE INSURANCE COVERAGE LAWSUIT 243

Chapter 12: Pre-Litigation Considerations 249
12-1 INTRODUCTION 249
12-2 THE INITIAL ASSESSMENT 249
12-3 EARLY RESOLUTION STRATEGIES 252
12-3:1 Confer With Opposing Counsel 252
12-3:2 Settlement Conference or Mediation 253
12-3:3 Demand Letter 254
12-4 PRESENTMENT REQUIREMENTS AND DEMAND LETTERS 254
12-4:1 Presentment of Contract Claim 255
12-4:2 Statutory Pre-Suit Notice—DTPA 257
12-4:3 Statutory Pre-Suit Notice—Insurance Code 258
12-4:4 Strategic Considerations 261
12-5 MANDATORY ALTERNATIVE DISPUTE RESOLUTION 261
12-5:1 ADR Provisions 261
12-5:2 Mediation Under the DTPA 264
12-5:3 Mediation Under the Texas Insurance Code 264
12-6 STATUTES OF LIMITATIONS 265

Chapter 13: The Lawsuit—Procedural Considerations 267
13-1 INTRODUCTION 267
13-2 JURISDICTION AND FORUM SELECTION 267
13-2:1 Forum-Selection Clauses 268
13-2:2 State Court Jurisdiction 269
13-2:3 Federal Court Jurisdiction—Diversity of Citizenship 270
13-2:4 Removal 271
13-2:5 Joinder 272
13-3 CHOICE OF LAW 275
13-4 VENUE 278
13-4:1 Venue-Selection Clauses 278
13-4:2 Statutory Venue—Texas State Court 279
13-4:3 Federal Court Venue 281

00_TX_Insurance_Litigation_FM.indd 20 8/25/2021 2:46:31 PM

Chapter 14: The Pleadings—Petition and Answer 285
14-1 DECLARATORY JUDGMENT ACTIONS 285
14-1:1 Statutory Authority 287
14-1:2 Federal Court Abstention 288
14-1:3 Case or Controversy Requirement 289
14-1:4 Common Issues 290
14-1:5 Available Relief 292
14-1:6 Advantages and Disadvantages 293
14-2 BREACH OF CONTRACT 293
14-2:1 Elements 293
14-2:1.1 Duty to Defend 294
14-2:1.2 Duty to Indemnify 297
14-2:2 Remedies 298
14-2:2.1 Duty to Defend 298
14-2:2.2 Duty to Indemnify 303
14-3 INSURANCE CODE VIOLATIONS 303
14-3:1 *Menchaca*'s Rules for Extra-Contractual Claims 305
14-4 DECEPTIVE TRADE PRACTICES 310
14-5 FAILURE TO SETTLE—*STOWERS* 313
14-6 PROMPT PAYMENT OF CLAIMS 313
14-7 OTHER PLEADING CONSIDERATIONS 315
14-7:1 Notice 315
14-7:2 Conditions Precedent 315
14-8 DEFENSES 316
14-8:1 Lack of Notice 316
14-8:2 Failure to Perform Conditions Precedent 317
14-8:3 Waiver and Estoppel 317
14-8:4 Exceptions to General Liability Coverage 319
14-8:5 Ambiguity 320
14-8:6 Fraud as a Defense 320
14-8:7 Mistake and Reformation 320
14-8:8 Policy Procurement Defenses and Rescission 321
14-8:9 Fortuity 324

Chapter 15: Litigation Planning 327
15-1 TAKING INVENTORY 327
15-2 SCHEDULING ORDERS 328
15-3 BIFURCATION AND SEVERANCE 329

Chapter 16: Fact Discovery 333
16-1 DISCOVERY PLANNING 333
16-1:1 Initial Investigation 333

00_TX_Insurance_Litigation_FM.indd 21 8/25/2021 2:46:31 PM

16-1:2 Outline of Claim Elements 334
16-1:3 Phased Discovery and Strategic Considerations 334
16-2 SCOPE OF DISCOVERY 338
16-3 Formal Written Discovery 340
16-3:1 Written Disclosures 340
16-3:2 Interrogatories 343
16-3:3 Requests for Admission 344
16-3:4 Requests for Production 345
16-4 E-DISCOVERY 347
16-4:1 The E-Discovery Rules 347
16-4:2 The E-Discovery Process 351
16-4:3 Litigation Support Vendors 353
16-4:4 Predictive Coding 354
16-5 PRIVILEGE ISSUES 354
16-5:1 Disclosure to the Insurer 354
16-5:1.1 Conflicting Interests 355
16-5:1.2 Waiver and the "Advice-of-Counsel" Defense 357
16-6 CONFIDENTIALITY AGREEMENTS AND PROTECTIVE ORDERS 360
16-7 EXPERT WITNESSES 361
16-8 DEPOSITIONS 362
16-8:1 Taking Depositions 362
16-8:1.1 Preparation Is Key 362
16-8:1.2 To Video or Not to Video? 363
16-8:2 Defending Depositions 364
16-8:2.1 Avoid "Insurance-ese" 364
16-8:2.2 Clarify Confusing Questions 365
16-8:2.3 Review Exhibits 365
16-8:2.4 Avoid Waiving Privileges 365
16-8:2.5 Avoid Negative Visual Cues 366
16-8:2.6 Stay Focused 366

Chapter 17: Alternative Dispute Resolution 367
17-1 INTRODUCTION 367
17-2 ARBITRATION 367
17-3 JURY WAIVERS 371
17-4 SUMMARY JURY TRIAL 372

Chapter 18: Pretrial Considerations 375
18-1 INTRODUCTION 375
18-2 PRETRIAL JURY RESEARCH 375

00_TX_Insurance_Litigation_FM.indd 22 8/25/2021 2:46:31 PM

18-2:1 Jury Research Tools 376
18-2:2 Timing 376
18-2:3 Preparation 377
18-2:4 Jury Consultants 378
18-3 DEMONSTRATIVE AIDS 379
18-4 MOTION *IN LIMINE* 380
18-5 DESIGNATION OF EXHIBITS 382
18-6 USE OF TRIAL BRIEFS 382

Chapter 19: Jury Selection and Trial 383
19-1 JURY SELECTION 383
19-1:1 Considerations for *Voir Dire* 383
19-1:2 Jury Questionnaire 386
19-2 EVIDENCE—STRATEGIC CONSIDERATIONS 387
19-3 WITNESS PREPARATION 389
19-4 BURDENS OF PROOF 389

Chapter 20: Appellate Issues 393
20-1 INTRODUCTION 393
20-2 DEADLINES 393
20-2:1 Texas Procedure 393
20-2:2 Federal Procedure 396
20-3 PERMISSIVE INTERLOCUTORY APPEALS 398
20-4 CERTIFIED QUESTIONS 401
20-5 BRIEFS OF AMICUS CURIAE 406
20-5:1 Texas Procedure 407
20-5:2 Federal Procedure 407

Appendix A: Glossary 409

Appendix B: Texas Insurance Code, Chapters 541 and 542 423

Appendix C: Forms 505

Table of Cases 607

Index 631

00_TX_Insurance_Litigation_FM.indd 23 8/25/2021 2:46:32 PM

00_TX_Insurance_Litigation_FM.indd 24 8/25/2021 2:46:32 PM