

PART I

LIABILITY INSURANCE POLICIES



Chapter 1

Navigating the Insurance Policy

1-1 INTRODUCTION

Insurance policies are contracts governed by the general rules of contract construction.¹ As contracts go, however, insurance policies can be among the most challenging to read and understand. Even the most skilled litigators have experienced considerable frustration reviewing a policy. Insurance policies are often comprised of standardized forms containing provisions that have been revised over time and that may have been heavily litigated. Although the terms of an insurance policy are given their plain and ordinary meaning,² courts may have decided what that meaning is and whether a policy provision is susceptible to more than one reasonable interpretation. Other times, a provision may be confusing or may be interpreted by

¹. See *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015); *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010); *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008); *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 491 (5th Cir. 2000) (applying Texas law); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 740-41 (Tex. 1998); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); see also *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 488 (Tex. 2018) (an insurance policy is a contract that sets forth the rights and obligations of the parties); *Texas Ass'n of Counties Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 131 (Tex. 2000) (same); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994) (“Interpretation of insurance contracts in Texas is governed by the same rules as interpretation of other contracts.”).

². *Underwriters at Lloyds, London v. Harkins*, 427 S.W.2d 659, 662 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (noting that “terms used in an insurance contract, like any other contract, are to be given their plain, ordinary and generally accepted meaning unless the policy itself shows them to have been meant in a technical or different sense”) (quoting *General Am. Indem. Co. v. Pepper*, 339 S.W.2d 660, 662 (Tex. 1960)).

the insurer to mean something the insured says the parties did not intend when the policy was purchased.³

Faced with insurance coverage issues, many non-insurance practitioners will do almost anything to avoid the necessary policy analysis. The purpose of this guide is to demystify the process of analyzing and litigating an insurance policy. We begin with the basics—deconstructing the insurance contract.

Equipped with a functional familiarity of the organization of an insurance policy, the practitioner should find the indispensable analysis of the substantive provisions somewhat less daunting.

1-2 POLICY DECLARATIONS

The first substantive section of an insurance policy is typically the **declarations page**⁴—often called the “**dec**” page, which may be a single page or several pages. The policy declarations are part of the policy and their contents are as important to the interpretation of the policy as any other provision.⁵

The policy declarations contain, at a glance, key information relating to the coverage—the **named insured**,⁶ the named insured’s location (*i.e.*, where the policy issued), the insurer, the policy inception and expiration dates, the types of coverages afforded, **schedules**⁷ (or lists) of forms attached to the policy, the pertinent

³. When construing a written contract, the primary goal of the Court “is to give effect to the written expression of the parties’ intent.” *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). In this regard, “[t]he court should ‘ascertain the intent of the parties as expressed in the instrument.’” *McCarthy Bros. Co. v. Cont’l Lloyds Ins. Co.*, 7 S.W.3d 725, 728 (Tex. App.—Austin 1999, no pet.) (quoting *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)); see *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (“our primary concern is to ascertain the intentions of the parties as expressed in the document”). If the insurance contract is subject to more than one interpretation, the fact finder may be permitted to consider extrinsic evidence to determine the true meaning of the instrument. *Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 319-20 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (citing *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-21 (Tex. 1995)). If the insurance policy is ambiguous, it will be construed against the insurer and in favor of the policyholder. See *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998).

⁴. See Appendix A—Glossary (bolded terms in the text of this book are found in the glossary, located in Appendix A).

⁵. The policy may contain language that underscores the importance of the declarations, such as: “These declarations together with the common policy conditions, coverage part declarations, coverage part form(s), and endorsements, if any, issued to form a part thereof, complete the above-numbered policy.”

⁶. See Appendix A—Glossary.

⁷. See Appendix A—Glossary.

limits of liability,⁸ and the self-insured retention (SIR)⁹ or deductible¹⁰ for which the insured is responsible. In certain policies, the declarations may also designate a prior acts or retroactive date¹¹ or continuity date¹² applicable to the coverage, or may reflect other policy-specific details, such as the particular coverages included in the policy, the particular properties or locations covered by the policy, or whether the insured has purchased duty-to-defend¹³ coverage.

Notably, the named insured identified in the declarations may not be the only named insured. The policy may be endorsed (*i.e.*, amended) to list additional named insureds. A Broad Form Named Insured Endorsement may also be used to include as named insureds all subsidiaries, affiliates or other entities over which the named insured has control, sometimes subject to other specified requirements.¹⁴

The declarations may contain schedules that identify the insured's operations, locations or property, the values and addresses associated with enumerated items, and rates or classification codes used to determine the premium. Sublimits and deductibles applicable to different coverages or locations may also be reflected.

The declarations usually set forth a schedule of forms,¹⁵ listing all forms used to compile the policy. This schedule provides a useful checklist for taking inventory and ensuring that the policy is complete, with all appropriate forms. Because a single missing endorsement¹⁶ or other form can radically change the scope of coverage, taking the time to conduct an inventory at the outset of any coverage analysis pays dividends down the road, both in terms of accuracy and efficiency.

⁸. See Appendix A—Glossary.

⁹. See Appendix A—Glossary.

¹⁰. See Appendix A—Glossary.

¹¹. See Appendix A—Glossary.

¹². See Appendix A—Glossary.

¹³. See Appendix A—Glossary.

¹⁴. See Liberty Mutual Insurance Group, Broad Form Named Insured Endorsement LN 99 05 07 05.

¹⁵. See Appendix A—Glossary.

¹⁶. See Appendix A—Glossary.

1-3 PACKAGE POLICIES

Many insurers offer customized insurance packages that allow the insured to combine multiple coverages to create an insurance program that meets its specific business needs. For example, executive liability coverages—**directors and officers liability (D&O)**,¹⁷ **fiduciary liability**,¹⁸ **employment practices liability (EPL)**,¹⁹ and **outside director liability**²⁰—may be available as stand-alone policies or may be combined in a single insurance package designed to cover multiple risks managed by the insured. Health care companies and financial institutions may combine management liability protection with professional liability insurance. A trucking company might need **business automobile**²¹ insurance, combined with **commercial general liability (CGL)**²² insurance, **employee benefits liability**²³ coverage, and commercial property coverage. Many carriers offer small businesses the opportunity to purchase property insurance and CGL insurance in a package policy.

Package, or multi-line, policies may have combined declarations as well as separate declarations for each coverage part. Separate limits usually apply to each coverage section, as described in the declarations. An **aggregate limit of liability**²⁴ may also apply. The package policy typically has a section called “Common Terms and Conditions” or the like. This section contains provisions that apply across the board to all coverage parts and, in certain instances, that

PRACTICE TIP

Take a few minutes before beginning a policy analysis to make sure the policy is complete by reviewing carefully the declarations and schedule of forms and taking inventory of the forms compiled to create the policy.

¹⁷. See Appendix A—Glossary.

¹⁸. See Appendix A—Glossary.

¹⁹. See Appendix A—Glossary.

²⁰. See Appendix A—Glossary.

²¹. See Appendix A—Glossary.

²². See Appendix A—Glossary.

²³. See Appendix A—Glossary.

²⁴. See Appendix A—Glossary.

explain what happens if multiple coverage parts are triggered by the same **claim**²⁵ or lawsuit. For example, some policies set a maximum limit of liability that applies when multiple coverage sections are triggered by a single claim. Others may apply the highest limit; still others apply the limits of both coverage parts. The “General Terms and Conditions” or “Common Terms and Conditions” may also address the application of **retentions** when a single claim triggers multiple coverage parts.

The package policy may have broad “interline” **endorsements** that apply across the board to all coverage parts. These endorsements may impose additional **exclusions**,²⁶ modify the common terms and **conditions**, or impose an **aggregate limit of liability**.

1-4 THE POLICY FORM

Most insurance policies are constructed around a core **policy form**,²⁷ which may be a document drafted by the insurer or promulgated by the **Insurance Services Office, Inc. (ISO)**.²⁸ Subject to any applicable endorsements, the policy form sets forth the basic provisions of the policy—the **insuring agreements**,²⁹ **exclusions**, **definitions**,³⁰ and **conditions**.³¹

The policy’s **insuring agreements** define the scope of coverage under the policy. The **exclusions** remove specific matters from the scope of coverage. Sometimes

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²⁵. See Appendix A—Glossary.

²⁶. See Appendix A—Glossary.

²⁷. See Appendix A—Glossary.

²⁸. “The ISO is the [insurance] industry organization responsible for drafting . . . standard forms used by insurers.” *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 5 n.1 (Tex. 2007); see also Appendix A—Glossary.

²⁹. See Appendix A—Glossary.

³⁰. See Appendix A—Glossary.

³¹. See Appendix A—Glossary.

an exclusion contains a “carve-back,” which restores coverage that would otherwise have been removed by the exclusion.

A policy that provides a single type of coverage—for example, **commercial general liability** insurance—will typically be comprised of a single policy form,³² accompanied by pertinent **endorsements**. At the outset, the policy form will identify the type of coverage provided by the policy and may identify the insurer. In all other respects, the document is a form that will not contain information specific to the particular insured.

1-4:1 Insuring Agreements

The policy’s insuring agreements are often found on the first page of the policy form. Insuring agreements for various coverage sections within a policy generally appear at the beginning of each coverage section. The insuring agreements define the scope of the policy’s insurance coverage. In a **commercial general liability** policy, the insuring agreements typically reflect coverage for sums the insured is legally obligated to pay due to **bodily injury**,³³ **property damage**,³⁴ **advertising injury**,³⁵ and **personal injury**.³⁶ The Coverage A insuring agreement pertains to bodily injury and property damage and may read like this:

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury”

³². See Insurance Services Organization, Form CG 00 01 01 96 (ISO Properties, Inc. 1994).

³³. See Appendix A—Glossary.

³⁴. See Appendix A—Glossary.

³⁵. See Appendix A—Glossary.

³⁶. See Appendix A—Glossary.

or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any “suit” that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages – Coverages A and B.³⁷

By contrast, **D&O** liability policies, errors and omissions (E&O) policies, and professional liability policies typically provide coverage for claims made against an insured arising from the insured’s “wrongful acts,” which are specifically defined for different types of coverage.

Many cyber policies (as well as automobile and homeowners’ policies) provide both **first-party insurance**³⁸ (coverage for the insured’s own loss) and **third-party insurance**³⁹ (coverage for the insured’s liability to others). These blended policies contain **insuring agreements** that define the scope of the insurer’s obligations under the policy.

1-4:2 Exclusions

Exclusions⁴⁰ identify exposures that are not covered, removing specified risks, claims, or damages from the scope of coverage established in the insuring agreements. Because they limit coverage, exclusions are construed narrowly, in favor of the insured.⁴¹ Most

^{37.} Insurance Services Organization, Form CG 00 01 04 13 (ISO Properties, Inc. 2012).

^{38.} See Appendix A—Glossary.

^{39.} See Appendix A—Glossary.

^{40.} See Appendix A—Glossary.

^{41.} See *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987); *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977).

exclusions are driven by three general rationales: (1) the excluded coverage is provided by a different kind of policy; (2) the excluded damages or risks are deemed uninsurable based on public policy—*e.g.*, fraud or intentional losses; and (3) the excluded risks represent an increased exposure that can be purchased for an additional premium, such as pollution liability.

Some exclusions incorporate **exceptions**.⁴² In effect, an exception restores—or “carves back”—coverage for the matter within the exception. While an exception to an exclusion usually does not *create* coverage for a matter that falls outside the scope of the policy’s insuring agreement, it does reinstate coverage for covered claims that would otherwise come within the reach of the exclusion. The exception to the exclusion presumes that there are some claims that fall within the language of the exception, for which coverage is restored. To conclude otherwise would render the exception meaningless, violating fundamental principles of contract construction.⁴³

1-4:3 Definitions

When analyzing an insurance policy, the devil is in the details—or the **definitions**.⁴⁴ Words in the policy that are capitalized, italicized, bolded or enclosed with quotation marks are probably defined in the policy. Proceed with caution. Policy provisions containing defined terms must be read with the definitions close at hand, because the meaning set forth in the policy definition controls, regardless of whether it comports with the usual meaning of the terms. Absent a definition, terms in the policy are given their “plain and ordinary” meaning, which is “the ordinary, everyday meaning of the words to the general public.”⁴⁵ Sometimes courts

⁴². See Appendix A—Glossary.

⁴³. See *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003) (“When construing the policy’s language, we must give effect to all contractual provisions so that none will be rendered meaningless.”); *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999) (stating courts generally “striv[e] to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative” (quoting *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998)); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (“We must read all parts of the contract together[.]”).

⁴⁴. See Appendix A—Glossary.

⁴⁵. See *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (“Unless the policy dictates otherwise, we give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage.”); *Progressive Cty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003)

have supplied the meaning of undefined terms. Where common law does not provide a definition, a dictionary can be a valuable resource, often providing significant insight.⁴⁶

1-4:4 Conditions

The policy conditions impose various duties upon the parties to the insurance contract. Some **conditions**⁴⁷ are **conditions precedent**⁴⁸ to coverage, which may have to be satisfied before the insurer is obligated to perform under the policy.⁴⁹ Failure to comply with the policy's conditions may compromise or void the coverage available to the insured. Careful adherence to the conditions is the most conservative route. If the insurer has breached the policy, on the other hand, the insured may be able to argue that the insurer may not continue to insist on the insured's cooperation or compliance with other policy conditions.

Notice⁵⁰ is a responsibility borne by the insured as set forth in the policy conditions. (Under Texas law, however, notice is not a condition precedent to coverage under many insurance policies. *See Chapter 10.*) In most circumstances, the insured should give notice promptly to all carriers of any loss, **occurrence**,⁵¹ or **claim** that potentially triggers any of its insurance policies. The policy conditions likely detail how and where notice should be given. Policy conditions also contain

PRACTICE TIP

Conduct a thorough inventory of the client's insurance policies at the outset of the engagement. Find out if the client has other policies that might provide coverage. If necessary, obtain complete copies of all policies—including all pages of all forms—from the client or its insurance broker.

^{46.} “[W]e look to determine the ordinary, everyday meaning of the words to the general public.” (*citing U.S. Ins. Co. of Waco v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1954))).

^{47.} *But see generally* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419 (2013) (offering considerations for the use of dictionaries).

^{48.} *See Appendix A—Glossary.*

^{49.} *See Appendix A—Glossary.*

^{50.} *See Appendix A—Glossary.*

^{51.} *See Appendix A—Glossary.*

directives regarding the insured's obligation to cooperate with the insurer, participate in the defense, and avoid admitting liability or incurring expenses without the insurer's consent. The policy conditions may also address the insurer's **duty to defend**.

A policy comprised of multiple coverage sections—*e.g.*, **D&O**, **fiduciary**, and **EPL** coverages are commonly packaged together—may be preceded by a separate section called “General Terms and Conditions,” which applies across the board to all of the coverage sections contained in the policy and should be read in conjunction with each section analyzed.

1-5 ENDORSEMENTS

The policy's **endorsements**⁵² are, in essence, the amendments to the main **policy form**. They are used to delete, modify, or expand the terms of the policy form. Because endorsements can make sweeping adaptations to a policy, it is always useful and may be critical to review the endorsements closely as the first step in a careful analysis of any policy. As each endorsement is reviewed, it can be helpful to mark the policy provisions affected by the endorsement to reflect the changes. For example, an endorsement may state: “Exclusion . . . in the Directors and Officers Liability Coverage Part is deleted in its entirety and is replaced by the following: [modified language].” In a package policy comprised of more than one coverage part, pay particular attention to which coverage parts are modified by each endorsement. Some endorsements list the modified coverage parts at the top and may apply to one or more parts.

PRACTICE TIP

Endorsements change the policy. Analyze the endorsements closely as the first step in a careful analysis of the policy. Using a paper copy of the complete policy, separate each policy form from its endorsements. Review the endorsements, word for word, alongside the policy form and mark up the form to reflect the changes implemented by endorsement. Then, when you review the form, you can analyze the policy as modified by endorsement without flipping back and forth.

^{52.} See Appendix A—Glossary.

Once the endorsements have been applied to the policy form during your initial review, you can analyze the policy with all changes incorporated. *Never* rely on the policy form without first ascertaining the changes implemented by the endorsements.

Common endorsements add **named insureds**, insured locations, and **additional insureds**.⁵³ Endorsements may append or delete **exclusions**; add, modify, or delete **definitions**; add **conditions** or eliminate them entirely; or add new **insuring agreements**. In a professional liability or errors and omissions policy, for example, the definition—or multiple definitions—of professional services may be supplied, augmented, or altered completely by endorsement. Many endorsements are forms, some promulgated by **ISO**, but they may also be adapted entirely for a particular insured or situation. State “amendatory endorsements” are often used to conform a policy to the specific requirements imposed by the laws of particular states that may apply to the policy. Additional coverages can be added by endorsement—**EPL** coverage and **employee benefits liability** coverage are common examples.

1-6 SCHEMES

Insurance policies contain various **schedules**,⁵⁴ most commonly a “schedule of forms and endorsements.” Imagine a buffet of insurance forms from which the insurer selects to fashion a complete policy customized to the insured’s needs. This compilation of selected forms becomes the policy, and the **schedule of forms** is an inventory of those forms. At the outset of any analysis, use the schedule to check the policy for completeness. If forms listed on the schedule are not part of the policy, or if there are forms included in the policy that are not on the schedule, the policy is likely incomplete or may contain additional endorsements that were added mid-term. Check with your client or its insurance broker to ensure that you are working with an accurate copy of the policy.

^{53.} See Appendix A—Glossary.

^{54.} See Appendix A—Glossary.

PRACTICE TIP

The schedule of forms is an inventory of the forms used to create the policy. At the outset of any analysis, use the schedule to check the policy for completeness. Imagine a buffet of insurance forms from which the insurer selects in order to fashion a complete policy that is more or less customized to the insured's needs. This compilation of selected forms becomes the policy.

In addition to the schedule of forms, policies may contain other schedules listing applicable coverages; named insureds; job classifications; properties, sites, or locations; or, in an excess or umbrella policy, underlying coverages.