

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	INSURED.....	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

Table of Contents

	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

Table of Contents

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

Table of Contents

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

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 Exceptions 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..... 230
 11-2:4 Reservation of Rights 233
 11-2:5 Conflicts of Interest and Control of the Defense 234
 11-2:6 Duty to Defend vs. Duty to Pay..... 237
 11-3 DUTY TO INDEMNIFY 237
 11-4 TEXAS INSURANCE CODE..... 239
 11-4:1 Unfair and Deceptive Acts or Practices 239

Table of Contents

11-4:1.1	Section 541.051	240
11-4:1.2	Section 541.060	241
11-4:1.3	Section 541.061	244
11-4:2	Prompt Payment of Claims Act	245
11-5	THE <i>STOWERS</i> DUTY	248
PART III THE INSURANCE COVERAGE LAWSUIT.....		251
Chapter 12: Pre-Litigation Considerations		253
12-1	INTRODUCTION.....	253
12-2	THE INITIAL ASSESSMENT.....	253
12-3	EARLY RESOLUTION STRATEGIES.....	256
12-3:1	Confer With Opposing Counsel.....	256
12-3:2	Settlement Conference or Mediation	257
12-3:3	Demand Letter	258
12-4	PRESENTMENT REQUIREMENTS AND DEMAND LETTERS	258
12-4:1	Presentment of Contract Claim	259
12-4:2	Statutory Pre-Suit Notice—DTPA.....	261
12-4:3	Statutory Pre-Suit Notice—Insurance Code	262
12-4:4	Strategic Considerations	265
12-5	MANDATORY ALTERNATIVE DISPUTE RESOLUTION	266
12-5:1	ADR Provisions.....	266
12-5:2	Mediation Under the DTPA	268
12-5:3	Mediation Under the Texas Insurance Code.....	269
12-6	STATUTES OF LIMITATIONS	269
Chapter 13: The Lawsuit—Procedural Considerations		271
13-1	INTRODUCTION.....	271
13-2	JURISDICTION AND FORUM SELECTION.....	271
13-2:1	Forum-Selection Clauses	272
13-2:2	State Court Jurisdiction	273
13-2:3	Federal Court Jurisdiction—Diversity of Citizenship	274
13-2:4	Removal.....	275
13-2:5	Joinder	276
13-3	CHOICE OF LAW	279
13-4	VENUE.....	282
13-4:1	Venue-Selection Clauses.....	282
13-4:2	Statutory Venue—Texas State Court.....	283
13-4:3	Federal Court Venue.....	285

Chapter 14: The Pleadings—Petition and Answer	289
14-1 DECLARATORY JUDGMENT ACTIONS.....	289
14-1:1 Statutory Authority	291
14-1:2 Federal Court Abstention	292
14-1:3 Case or Controversy Requirement	293
14-1:4 Common Issues	294
14-1:5 Available Relief.....	296
14-1:6 Advantages and Disadvantages.....	297
14-2 BREACH OF CONTRACT.....	297
14-2:1 Elements	297
14-2:1.1 Duty to Defend.....	298
14-2:1.2 Duty to Indemnify	302
14-2:2 Remedies	303
14-2:2.1 Duty to Defend.....	303
14-2:2.2 Duty to Indemnify	307
14-3 INSURANCE CODE VIOLATIONS	308
14-3:1 <i>Menchaca’s</i> Rules for Extra-Contractual Claims.....	309
14-4 DECEPTIVE TRADE PRACTICES.....	314
14-5 FAILURE TO SETTLE— <i>STOWERS</i>	317
14-6 PROMPT PAYMENT OF CLAIMS.....	318
14-7 OTHER PLEADING CONSIDERATIONS.....	319
14-7:1 Notice.....	319
14-7:2 Conditions Precedent.....	320
14-8 DEFENSES	320
14-8:1 Lack of Notice	320
14-8:2 Failure to Perform Conditions Precedent.....	321
14-8:3 Waiver and Estoppel.....	321
14-8:4 Exceptions to General Liability Coverage.....	323
14-8:5 Ambiguity.....	324
14-8:6 Fraud as a Defense	324
14-8:7 Mistake and Reformation	324
14-8:8 Policy Procurement Defenses and Rescission	325
14-8:9 Fortuity	328
 Chapter 15: Litigation Planning.....	 331
15-1 TAKING INVENTORY	331
15-2 SCHEDULING ORDERS	332
15-3 BIFURCATION AND SEVERANCE	333
 Chapter 16: Fact Discovery.....	 337
16-1 DISCOVERY PLANNING	337
16-1:1 Initial Investigation.....	337

Table of Contents

16-1:2	Outline of Claim Elements	338
16-1:3	Phased Discovery and Strategic Considerations.....	338
16-2	SCOPE OF DISCOVERY	342
16-3	Formal Written Discovery	344
16-3:1	Written Disclosures.....	344
16-3:2	Interrogatories	347
16-3:3	Requests for Admission	348
16-3:4	Requests for Production	349
16-4	E-DISCOVERY.....	351
16-4:1	The E-Discovery Rules	351
16-4:2	The E-Discovery Process	355
16-4:3	Litigation Support Vendors	357
16-4:4	Predictive Coding	358
16-5	PRIVILEGE ISSUES.....	358
16-5:1	Disclosure to the Insurer.....	358
16-5:1.1	Conflicting Interests.....	359
16-5:1.2	Waiver and the “Advice-of-Counsel” Defense	361
16-6	CONFIDENTIALITY AGREEMENTS AND PROTECTIVE ORDERS	364
16-7	EXPERT WITNESSES.....	365
16-8	DEPOSITIONS.....	366
16-8:1	Taking Depositions.....	366
16-8:1.1	Preparation Is Key.....	366
16-8:1.2	To Video or Not to Video?.....	367
16-8:2	Defending Depositions	368
16-8:2.1	Avoid “Insurance-ese”	368
16-8:2.2	Clarify Confusing Questions.....	369
16-8:2.3	Review Exhibits	369
16-8:2.4	Avoid Waiving Privileges.....	369
16-8:2.5	Avoid Negative Visual Cues	370
16-8:2.6	Stay Focused.....	370
Chapter 17: Alternative Dispute Resolution.....		371
17-1	INTRODUCTION.....	371
17-2	ARBITRATION	371
17-3	JURY WAIVERS	378
17-4	SUMMARY JURY TRIAL	378
Chapter 18: Pretrial Considerations.....		381
18-1	INTRODUCTION.....	381
18-2	PRETRIAL JURY RESEARCH	381

Table of Contents

18-2:1	Jury Research Tools	382
18-2:2	Timing	382
18-2:3	Preparation	383
18-2:4	Jury Consultants	384
18-3	DEMONSTRATIVE AIDS	385
18-4	MOTION <i>IN LIMINE</i>	386
18-5	DESIGNATION OF EXHIBITS	388
18-6	USE OF TRIAL BRIEFS	388
Chapter 19: Jury Selection and Trial.....		389
19-1	JURY SELECTION	389
19-1:1	Considerations for <i>Voir Dire</i>	389
19-1:2	Jury Questionnaire	392
19-2	EVIDENCE—STRATEGIC CONSIDERATIONS	393
19-3	WITNESS PREPARATION	395
19-4	BURDENS OF PROOF	395
Chapter 20: Appellate Issues		399
20-1	INTRODUCTION	399
20-2	DEADLINES	399
20-2:1	Texas Procedure	399
20-2:2	Federal Procedure	402
20-3	PERMISSIVE INTERLOCUTORY APPEALS	404
20-4	CERTIFIED QUESTIONS	407
20-5	BRIEFS OF AMICUS CURIAE	412
20-5:1	Texas Procedure	413
20-5:2	Federal Procedure	413
Appendix A: Glossary		415
Appendix B: Texas Insurance Code, Chapters 541 and 542.....		429
Appendix C: Forms.....		511
Table of Cases.....		613
Index		639