



# Media and Entertainment Insurance



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# Agenda

- Types of insurance
  - Media liability (E&O) policies
  - Production insurance
  - Event cancellation polices
  - CGL
  - Commercial package policies
- Selection of defense counsel
- Negotiating rates
- Settlement and allocation
- COVID-19



## Q&A

Please ask questions anytime by using the “Q&A” chat function at the bottom of your screen.



## Media and Entertainment Insurance

- Insurance policies that may provide potential coverage for the types of claims media and entertainment companies are most likely to encounter:
  - Specialty Policies:
    - Media Liability (E&O)
    - Production Insurance
    - Event Cancellation
  - General Commercial Policies:
    - Commercial General Liability (CGL)
    - Commercial Policy Package (can be bundled to include property, EPL, W/C, auto)



# Media Liability Policies (E&O)

## Media Liability (E&O) Policies

- Covers claims brought by third parties
- Typical claims covered include copyright infringement, trademark infringement, defamation, invasion of privacy, right of publicity, idea submission claims
- Triggering event is typically a “claim” made during the policy period
- Duty to defend claims that are potentially covered
- Duty to indemnify claims that are actually covered

## What is a “claim”?

- A “**claim**” is defined by **the policy language**
  - **Claim** can be defined to include:
    - Lawsuit
    - Cease and desist letter (monetary or non-monetary relief)
    - Request to toll statute of limitations
    - Subpoena

## Notifying the Insurer of a Claim

- Tender early! Avoid “late notice” argument from Insurer
  - Policies vary on when notice needs to be provided
  - Jurisdictions vary on how harsh the “late notice” penalty is
  - Insurers are generally not obligated to cover “pre-tender” defense costs (there are exceptions); get the notice in early, so any defense cost incurred after the notice are potentially covered
- Tendering is easy: a 1-3-sentence email or letter
- How you frame your loss could matter, though, so keep it general



# Media Liability Policies – Typical Exclusions

## III. EXCLUSIONS

(A) As respects all **Insured Activities**, the Company shall not be liable for **Loss** on account of any **Claim**:

ces

- (1) based upon, arising from, or in consequence of any fact, circumstance, situation, transaction, event or **Activity** that, before the Inception Date set forth in ITEM 2 of the Declarations, was the subject of any notice given under any policy of which this Policy is a direct or indirect renewal or replacement;
- (2) based upon, arising from, or in consequence of any demand, suit or other proceeding pending against, or order, decree or judgment entered for or against any **Insured**, on or prior to the Inception Date set forth in ITEM 2 of the Declarations, or the same or substantially the same fact, circumstance, situation, transaction, event or **Activity** underlying or alleged therein;
- (3) brought by or on behalf of any employee, former employee or prospective employee based on or directly or indirectly arising out of or resulting from the employment relationship or the nature, terms or conditions of employment, including but not limited to claims of discrimination, harassment, wrongful discharge, breach of contract, employment-related defamation, or workplace torts; provided however, that this Exclusion shall not apply to any **Claim** that involves a dispute over the ownership or exercise of rights in

for **bodily injury** (except mental anguish and emotional distress), sickness, disease or death of any person or **damage to, destruction of or loss of use of any tangible property**, whether or not it is damaged or destroyed; provided however, that this Exclusion shall not apply to **bodily injury or property damage** resulting from a **Claim** of negligent publication as described in subparagraph (A)(6) in the definition of **Media Activities**, except as provided in EXCLUSION (A)(16);

## Media Liability (E&O) Policies

- Typical claims covered include **copyright infringement**, trademark infringement, defamation, invasion of privacy, right of publicity, idea submission claims





# Selecting Defense Counsel

## Selecting Defense Counsel

- Option 1: Put It in Writing!
  - With some insurers, you can pay extra to have your preferred attorney specified in the policy.
  - In the event of a claim, there will be no dispute over who handles the case.
- Option 2: Negotiate
  - Particularly with complex cases, it is in the insurer's interest as well to appoint experienced counsel.
  - You may be asked to pay the difference (more on that later).



## Selecting Defense Counsel

- An insurer may try to appoint a low-cost attorney who has little or no experience with media and entertainment litigation.
- Media and entertainment cases often present complex issues that require specialized counsel with experience litigating these types of cases.
- Insurance companies have a duty to “employ competent counsel” and can be held liable for damages that result from their failure to do so. *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 882 (1973).



# Negotiating Rates



## Cal. Civ. Code § 2860 – Right to Independent Counsel

- Applies where a conflict of interest arises between insurer and insured.
- A conflict of interest may arise where an insurer agrees to defend but reserves the right to disclaim coverage on **an issue whose outcome it can control**.
- **Rates** are limited to the hourly rates it pays attorneys retained by it in the ordinary course of business in the defense of **similar actions** in the **community** where the claim arose or is being defended.

*San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 162 Cal. App. 3d 358 (1984)  
(where the term “Cumis” counsel comes from).

## Right to Independent Counsel

- **New York**: “Independent counsel is only necessary in cases where the defense attorney’s duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable. When such a conflict is apparent, the insured must be free to choose his own counsel whose reasonable fee is to be paid by the insurer.” *Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 815 n.\* (N.Y. 1981).
- **New Jersey**: Where underlying pleadings set forth mutually exclusive covered and noncovered claims, and insured has not expressly agreed to reservation of rights, a liability insurer cannot be permitted to control the defense; rather, the insurer may be obligated to finance costs of defense, subject to right of reimbursement. *Morrone v. Harleysville Mut. Ins. Co.*, 662 A.2d 562, 567 (N.J. Super. Ct. App. Div. 1995).
- **Florida**: Fla. Stat. § 627.426(2). Provides for “independent counsel which is mutually agreeable to the parties” to be retained with the “[r]easonable fees for the counsel [to be agreed upon between the parties] or, if no agreement is reached, shall be set by the court.”





# Production Policies



## Production Insurance

- Covers losses your company suffers (i.e., “first party coverage”)
- Can include coverage for:
  - Cast insurance
  - Negative film/videotape
  - Animals
  - Extra expense
  - Third-party property damage
  - Civil authority

## Cast Insurance

- Provides coverage for the increased cost or additional expenses resulting from death of, sickness of, or injury to the insured artist (actor, director)

*The New York Times* By **David M. Halbfinger**  
July 25, 2007

### *Lohan's Arrest Spells Trouble for 2 Movies*

The police said that Ms. Lohan was arrested after an alcohol-fueled pursuit of the mother of her former personal assistant on the streets of Santa Monica; she was charged with two misdemeanors as well as two felony charges of cocaine possession, after the drug was found in her pocket.



Lt. Alex Padilla of the Santa Monica police force distributed a booking mug shot of Lindsay Lohan Tuesday. Nick Ut/Associated Press

## Extra Expense

- Reimburses the out-of-pocket expenses incurred as a result of interruption, postponement, or cancellation of the production due to direct physical loss to facilities or property that is intended for use in production



## Civil Authority

- Covers the interruption, postponement, or cancellation of a production as a direct result of the action of a civil authority (e.g., police, government, fire department)







# Event Cancellation Policies

## Event Cancellation Policies

- Specialty policies that provide coverage for the cancellation, curtailment, postponement, or abandonment of the covered event(s)
- If there is coverage, calculation of loss formulas are relatively generous. You can recover lost revenue from the event
- Ideal for high-grossing events such as conventions and expos
  - E.g., one client purchased \$4.5M in coverage for an annual convention. They paid \$16,000 for 1 year of coverage (including \$1,600 extra for communicable disease endorsement)

# COVID-19 and Event Cancellation Policies: Obstacles to Recovery

- Many policies contain a baseline “communicable disease” exclusion.
  - However, before COVID-19, insurers would offer a “communicable disease” endorsement to override the exclusion.
- Relatively stringent definition of “cancellation”:
  - *“The inability of the named insured to open or commence, keep open, or otherwise maintain the Event in whole or in part for its original published duration or scope.”*
  - PR vs. insurance squeeze during COVID-19 – when do you cancel?
- Is it possible to hold an Expo virtually? How does this impact loss calculation?





# COVID-19

## COVID-19-Related Insurance Issues

- Thousands of lawsuits filed over COVID-19-related insurance denials
- Most common legal issue: business interruption coverage
- Common coverage trigger for property policies: “physical loss or damage”
  - Some cases hold that this language is broader than just structural damage
  - *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D. N.J. 2014): Insured’s property not physically altered, but ammonia release “physically transformed the air”; resulting shutdown of the facility covered
- Whether COVID-19 creates such physical loss/damage is an issue still being litigated. Many of the trial court rulings on this issue are currently on appeal.

# COVID-19-Related Insurance Issues

- CGL policies:
  - If someone brings a claim against your company alleging “bodily injury or property damage,” duty to indemnify and defend
  - “Bodily injury” trigger applies to viruses/diseases
- Production insurance:
  - Cast insurance covers cast illness
  - Civil authority where there is a government-mandated shutdown

# COVID-19-Related Insurance Issues: Going Forward

- Expect COVID-19 exclusions to be standard in any new policies
  - E.g., environmental policies, event cancellation policies
- Insurers are always looking to reassess their risk and modify policies to insulate themselves from catastrophic events
  - E.g., September 11 led to the inclusion of terrorism exclusions
  - E.g., SARS outbreak in 2003 led to SARS-specific exclusions and general “virus” exclusions



# CGL

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## Commercial General Liability Policies

- Cover claims brought by third parties
- Covers claims alleging bodily injury or property damage
- Exclusions:
  - Expected or intended injury
  - Contractual liability
  - Liquor liability
  - Workers' compensation and similar laws
  - Employer's liability
  - "Property damage" to property you own, rent, or occupy, "personal property" in your care, custody, or control



# Commercial Package Policies

## Commercial Package Policies

- Insurers advertise as “one-stop shop” policy that includes several different coverages
- Specific components vary, but the package often includes:
  - CGL
  - Property coverage (i.e., first party coverage)
  - Auto coverage
  - Worker’s compensation
  - Employment practices liability (EPL)





# Allocation and Settlement



## Insurer's Duty to Defend

An insurer must defend any suit that could potentially result in covered damages.

*Montrose I*, 6 Cal. 4th 287 (1993) (defense is excused only where “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.”).

## Insurer's Duty to Defend – Entire Lawsuit

An insurer must defend the entire lawsuit where one claim is potentially covered, since a meaningful defense must be immediate and complete.

Majority view: *Buss v. Superior Court*, 16 Cal. 4th 35, 39 (1997) (insurer owed a defense for the entire lawsuit even though 26 of the 27 claims were not covered)





## **Insurer's Duty to Accept Reasonable Settlement Demands Within Policy Limits**

When an insurer is presented with an offer to settle the claim against the insured, the “only permissible consideration in evaluating the reasonableness of the settlement offer” is whether “the ultimate judgment is likely to exceed the amount of the settlement offer.” The likelihood of coverage is not a factor in evaluating the reasonableness of the offer.

*Johansen v. Cal. State Auto. Assn. Inter-Ins. Bureau*, 15 Cal.3d 9, 16 (1975)



## Insurer's Right to Seek Reimbursement

An insurer is allowed to accept a reasonable settlement demand within policy limits, subject to the **right to seek reimbursement**, if the carrier can subsequently establish that the settled claim was not covered under the policy.

*Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal. 4th, 489 (2001)



# Insurer's Right to Control Settlement

## VI. DEFENSE AND SETTLEMENT

A. With respect to any **Claim** under any **Liability Coverage Part**, the Insurer shall have the right and duty to defend any **Claim**, unless otherwise specifically stated in a particular **Liability Coverage Part**. The Insurer shall have such right and duty to defend even if any of the allegations in such **Claim** are groundless, false or fraudulent. Any such duty to defend shall cease upon exhaustion of the applicable Limit of Liability.

B. With respect to any **Claim** under any **Liability Coverage Part**:

1. the **Insured** shall:

(a) not agree to any settlement, stipulate to any judgment, incur any **Defense Costs**, admit any liability or assume any contractual obligation, without the Insurer's prior written consent, provided that, unless otherwise stated in a particular **Liability Coverage Part**, the **Insured** may settle any **Claim**, without the Insurer's prior written consent, where the amount of such settlement, including **Defense Costs**, does not exceed the applicable Retention or Deductible;

(b) not do anything that could prejudice the Insurer's position or its potential or actual rights of recovery; and

(c) agree to provide the Insurer with all information, assistance and cooperation which the Insurer may reasonably require,

provided that the failure of any **Insured** to comply with any of the requirements in paragraphs (a) - (c) above, shall not impair the rights of any **Insured Person** under this Policy; and

2. the Insurer:

(a) may make any investigation it deems reasonably necessary and may, with the consent of the **Insureds**, make

(b) shall not be liable for any such settlement, stipulation, incurred **Defense Costs**, admission or assumed obligation to which it has not given its prior written consent, and the Insurer shall not unreasonably withhold such consent.

# Entertainment and Media Liability Claims



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