



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

LIABILITY INSURANCE FOR YOUNG ATTORNEYS

What's Not in the Hornbook nor Taught in School

September 13, 2017

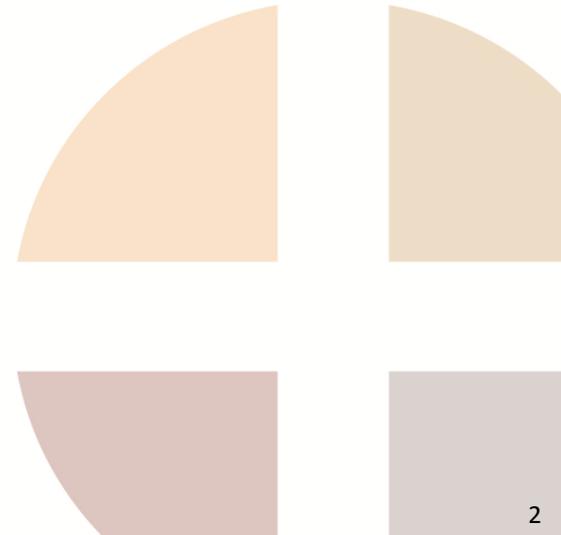
Presented by PLUS Diamond Sponsors





The information and opinions expressed by our panelists today are their own, and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice.

A copy of the presentation slides will be available following this webinar, on the PLUS website at: www.plusweb.org



Louie Castoria

Co-Managing Partner - San Francisco Office

Kaufman Dolowich Voluck, LLP



Frederick Fisher

President & CEO

Fisher Consulting Group, Inc. and Excess Liability Managers Insurance Services, Inc.



The Language of How Insurance is Purchased



Jane S. Crow, a real estate appraiser, meets with a local insurance broker to buy insurance for her business. The **[retail insurance broker]** gathers information and has Jane fill out various forms.

The retail broker **[shops the risk]**, presenting Jane's business information to insurance carriers with whom he has a **[direct appointment]**. The retail broker also takes that risk and shops it to various **[wholesale]** and **[surplus lines]** brokers and **[MGA/MGU's]**. The retail broker is looking for the best coverage for Jane, whether it comes from an insurer that is **[admitted or non-admitted]**.

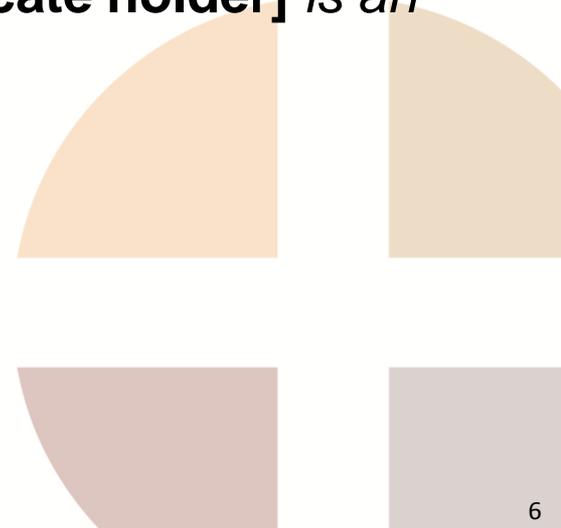
The **[underwriters]** at each insurance company review Jane's applications and reply to the brokers with their **[quotes]** for coverage. Among the insurance policies that are offered to Jane are **[general liability]** insurance, which has **[expense outside of limits]**, and **[professional liability]**, which has **[expense within limits]**.



For the **[workers compensation]** insurance, the broker obtains a **[quote]** from a **[Self Insured Group (SIG)]**.

Based on all of the quotes and the retail broker's advice, Jane makes her selections and the retail broker **[binds]** the three coverages.

Later, Jane signs a contract with a bank that makes loans for real estate purchases. The bank requires that Jane name the bank as an **[additional insured]**. Jane calls the retail broker and he sends over a **[Certificate of Insurance]** that says that the **[certificate holder]** *is an additional insured*



- Deals directly with the consumer
- Is licensed by each state in which he or she has clients, and can obtain insurance from insurers that are “admitted” in the state where the client is based.
- Is it a business model?

- **Lots of different Insurance Companies compete for the same business. Why would a broker contact more than one company? Aren't they all the same except for price?**
- **Some differentiators between companies:**
 - **Policy terms—narrowness or breadth**
 - **Financial strength**
 - **Experience in the specific market**
 - **Claims handling practices**

Agent? Broker? Both?

- Brokers represent consumers in insurance transactions.
- Agents represent the insurers that directly appoint them.
- The same person can be both an agent and a broker.
- Some people and court decisions use the words interchangeably.

PLUS “Admitted or Non-admitted”

- Insurers are “admitted” by each state, meaning approved to issue policies to consumers in that state.
- The state insurance authorities (Commissioner, Superintendent, etc.) must also approve policy forms before they are used.
- Some policies issued by admitted companies are backed, in part, by state Insurance Guaranty Funds, if the insurer becomes insolvent.
- So, do you want to be regulated or not? (Hint: you will be, anyway.)

Why would a broker place a policy with a non-admitted insurer?

- Some riskier kinds of coverage are written almost exclusively in the non-admitted market.
- Wholesale brokers, who don't deal directly with the consumer, have detailed knowledge about non-admitted insurers and can help find the best fit.
- “Surplus line” brokers can place coverage with non-admitted carriers. Retail brokers who don't also have surplus line licenses can't.
- How surplus line insurance placements work.

- **Lloyd’s Coffee Shop: where is all began.**
- **The insurance company’s underwriters decide whether to bind coverage, on what terms, and at what premium.**
- **In complex insurance placements, the bargaining between the brokers and the underwriters can be extensive. The consumer’s risk manager of general counsel may also become involved.**



- **Coverage is not bound until the broker notifies the underwriter that the consumer accepts the insurer’s “quote,” including premiums to be charged and terms of coverage.**
- **Did the broker recommend a policy that meets the consumer’s stated needs and other needs that the broker saw? Is the policy the best available coverage at the best available price?**
- **Did the broker explain to the consumer any insurance needs that could not be met by buying this policy?**

- **Rescission:** because of material concealment or misrepresentation in the insurance application, the policy is void.
- **Reformation:** the policy is modified to reflect what the parties mutually intended, and wasn't made clear in the contract.
- **Declaratory Relief:** the parties disagree about how the policy should apply, and ask a court to decide.



PLUS “Expense Outside of Limits”

\$1 million “expense outside” policy limit

Defense (paying counsel, experts, court costs, etc.)	Indemnity (paying the other side: settlement, verdict)
Unlimited, whatever it takes	\$1 million cap

- **Advantage: lots of defense dollars**
- **But there are limits ... and dangers ...**
- **Should you turn a blind eye?**

\$1 million “expense within” policy limit

Defense (paying counsel, experts, court costs, etc.)

Indemnity (paying the other side: settlement, verdict)

\$1 million cap on all payments by the insurer

- **Advantage: usually costs less, and some kinds of policies unlimited defense coverage is not available (professional liability, employment practices, directors & officers)**
- **Disadvantage: less money, IF ANY, at the end of the case to pay for settlement or judgment**



“Expense Within Limits”

Kinds of expenses that can quickly deplete an “expense within limits” policy:

- Defense attorney’s fees (note incentive to keep them reasonable).
- Experts’ fees and costs.
- Electronic discovery (“e-discovery”).
- Court costs, deposition reporters’ fees.
- Fees and indemnity payments in other cases covered in the same policy year.
- And what if the case is appealed?
- A word to the wise: consider settlement early
- What about the Excess Insurer ?



“Self Insured Group (SIG)”

- **Kind’a Like Insurance..... And maybe so**
- **Workers Comp MUST be approved by the Department of Insurance in most States**
- **Self-Insurance is like a Large Deductible**
- **Is different than forming sharing or renting a Captive Insurance Company**

- **Gives the consumer’s other contracting party (landlord, employer, customer) a direct right to make a claim to money under the policy, same as the actual insured.**
- **Limited to the scope of the Named Insured’s activities: “They messed up ... pay me.”**
- **Be careful what you ask for: the “Insured versus Insured” trap.**
- **Comparison with contractually assumed liability coverage for the Named Insured.**

When is it real?

- Is a “Certificate of Insurance” enough?
- Has an amended “Declarations Page” been issued?
- Has a policy endorsement been issued?

Is the certificate holder also an additional insured?

POLICY NUMBER: PNG0002 COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

Any person or organization to which you are obligated by virtue of written contract to provide insurance such as is afforded by this policy, but only with respect to (1) occurrences taking place after such written contract has been executed and (2) occurrences resulting from work performed by you during the policy period, or occurrences resulting from the conduct of your business during the policy period.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

Coverage provided by this policy to the Additional Insured(s) shown in the Schedule shall be primary insurance and any other insurance maintained by the Additional Insured(s) shall be excess and non-contributory, but only as respects any claim or liability determined to be the result of the sole negligence or responsibility of the Named Insured and only if required of the Named Insured by written contract.

CG 20 10 11 85 Copyright, Insurance Services Office, Inc., 1984 Page 1 of 1

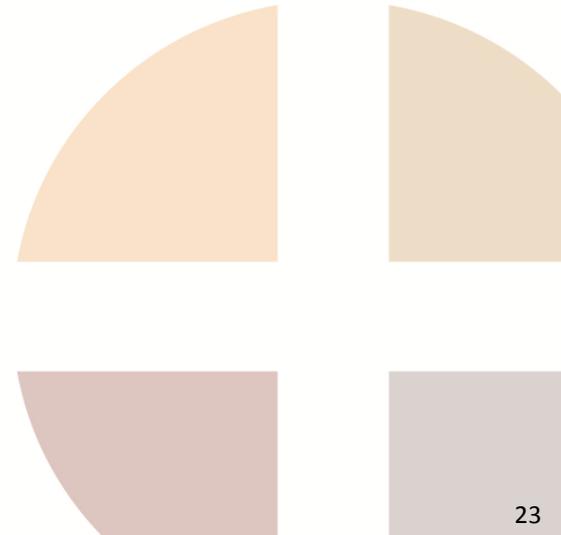
When does liability insurance policy have a duty to defend?

- Covered persons: insureds.
- Covered acts: within the scope of the policy.
- Covered timing: “occurrence” vs. “claims made (and reported).”
- Covered notice: immediately, as soon as practicable, within the policy period; grace periods.

- **Closing the File and having a good “loss Ratio”... Huh ??**
- **All insurers are required to post Loss Reserves and routinely adjust them. Expense Reserves are not mandatory but are recommended.**
- **Reserves REDUCE Capital Surplus.**
- **Loss ratios are affected by Reserves as are Expense to Loss Ratios.**
- **Reserve Recapture is rarely recorded or tracked.**
- **Loss Runs tell the profit, or loss, but not the story or if it could have been different.**

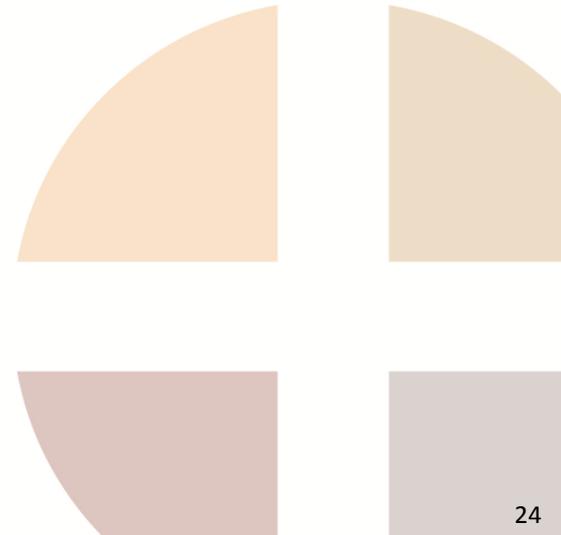
Where the rubber meets the road: Claims Handling

- The implied duties of good faith and fair dealing.
- Effect of State “Fair Claims Practices Acts and Regulations.
- What is “bad faith,” and what are its possible consequences?



Questions

Please submit using the question tool on user dashboard



Louie Castoria

Co-Managing Partner - San Francisco Office

Kaufman Dolowich Voluck, LLP

Frederick Fisher

President & CEO

Fisher Consulting Group, Inc. and
Excess Liability Managers Insurance Services, Inc.



Presented by PLUS Diamond Sponsors



Thank you for your time.

**A replay of this webinar will be
available to PLUS Members at:**

www.plusweb.org

