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# *Standard Operating Procedures for Indemnity Claims Management in Retail, Restaurant and Hospitality Litigation*

## I. Defining Indemnity

## II. When an Accident Occurs, Identifying the Potential for Indemnity

### A. Who, what, where, when and why

Demand for disclosure of insurance under FS 627.4137

**Disclosure of certain information required**.

(1) Each insurer which does or may provide liability insurance coverage to pay all or a portion of any claim which might be made shall provide, within 30 days of the written request of the claimant, a statement, under oath, of a corporate officer or the insurer's claims manager or superintendent setting forth the following information with regard to each know policy of insurance, including excess or umbrella insurance:

(a) The name of the insurer.

(b) The name of each insured.

(c) The limits of the liability coverage.

(d) A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.

(e) A copy of the policy.

While Florida Law is abundantly clear that a Certificate of Insurance is part of the policy when determining the applicability of the FCAA (*See East Coast Ins. Co. v. Cooper*, 415 So.2d 1323, 1325 (Fla. 3d DCA 1982)), Certificates of Insurance do not constitute an insurance contract, thus do not constitute delivery of the insurance policy. *See United States Pipe & Foundry Co. v. United States Fidelity & Guaranty Co.*, 505 F.2d 88 (5th Cir. 1975).

### B. When Litigation Ensues

When looking at the third party recovery aspect we look at four potential causes of action in most states. These are common law indemnity, contractual indemnity, breach of contract and contribution. In order to be prepared to file a claim of this type, investigative work must be done prior to submitting such a claim. This includes obtaining a complete copy of the insurance policy for the third party from whom we are seeking indemnity. The standard insurance demand letter is contained within the power point presentation. Following that we must also obtain the contract between the parties and complete a full analysis of same.

1. **Putting parties on notice**
2. **Protecting Business Relationships & Client Communication**
3. **Counterclaims & third party practice**

When making a demand to a third party it is important to keep in mind that the duty to defend is much broader than the duty to indemnify. The duty to defend stems in most states from a simple reading of the four corners of the complaint. In other states, extrinsic evidence such as the insurance policy or the contract between the parties would also be allowed to be looked at. If anyone needs a complete list of the states that allow extrinsic evidence versus those that don't please feel free to contact me at any time and I will be glad to send you such a list.

Unlike Florida (where neither the failure to timely report a claim, nor the breach of the duty to cooperate, gives rise to the automatic forfeiture of insurance benefits, **absent prejudice** to the insurer, *See State Farm Mut. Auto.l Ins. Co. v. Curran*, 83 So.3d 793 (Fla. 5th DCA 2011), **some** states (Such as Illinois) are "no prejudice" states, meaning if you do not timely provide notification of the claim, there will be no coverage regardless of whether or not there is/was prejudice. *See Montgomery Ward and Co. v. The Home Ins. Co., et al*, 324 Ill. App. 3d 441 (1st Ill. 2001) (Under Illinois law, a delay of even a few months in giving notice of a claim breaches the insurance policy of a matter of law, defeats coverage, and justifies the entry of summary judgment for the insurance company. An insurer does not have to prove that it was prejudiced by an insured's breach of the notice clause in a policy in order to be relieved of its duty of pay. Lack of prejudice to the insurer is a factor to be considered only where the insured has a good excuse for the late notice or where the delay was relatively brief).

## III. Third Party Recovery

In looking at the contract we should focus on the indemnification provisions, the insurance provisions and what duties and responsibilities lie with each party. Once we have completed an investigation of both, we would then have a complete understanding of the contractual relationship between the parties, who would have to indemnify who and under what circumstances, who has to provide insurance on behalf of the other side and for what purpose as well as knowing whether we are included on the other parties insurance policy as an additional insured. Once we have made a determination that there has been a violation of the contract we should immediately send out the demand for defense and indemnity. In sending out such a demand it is important that you place into the letter the phrase "that is an application for coverage under your policy". A portion of a defense and indemnity letter is contained within the power point presentation.

### A. Pre-Suit

1. **No duty to defend by insurance company**
2. **Obligation to defend (state by state discussion as outlined below)**
    **(i) states in which four corners of the complaint controls**

Alabama: Correll v. Fireman's Fund Ins. Co., 218 ala. 629, 505 So.2d 295 (1986).

Arkansas: Fox Hills Country Club, Inc. co. v. American Ins. Co., 264 Ark. 239, 570 S.W. 2d 275 (1978).

Colorado: Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991)

Connecticut: Missionaries of the Company of Mary, Inc. v. Aetna casualty and Surety Co., 155 Conn. 104, 110, 230 A.2d 21 (1967)

Delaware: National Union fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co., (1992)

Florida: Trizec Properties, Inc. v. Biltmore Constr. Co. Inc., 767 F. Supp. 962 (M.D. Fla. 1991).

Idaho: County of Kootenai v. Western Cas. & Sur. Co., 113 Idaho 908, 750 P. 2d 87 (1988).

Illinois: Employer Mut. Cos. Inc. Country Cos., 211 Ill. App. 3d 586, 156 Ill. Dec. 52, 570 N.E. 2d 528 (1991).

Kentucky: James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W. 2d 273 (1991).

Louisiana: Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203 (5th Cir. 1991).

Maine: Northland Ins. Companies v. Coconut Island Corp., 961 F. Supp. 20, 21 (D.Me 1997) (under Main law, duty to defend action against insured is determined solely by comparing allegations which have been asserted by complaint and associated pleadings against insured with specific language of insurance policy).

Maryland: Brohawn v. Transamerica Ins. Co. 276 Md. 396, 347 A.2d 842 (1975).

Massachusetts: Liberty Mut. Ins. Co. v. SCA Servs., Inc., 412 Mass 330, 588 N.E.2d 1346 (1992).

Montana: McAlear v. St. Paul Ins. Co., 158 Mont. 452, 493 P.2d 331 (1972).
Nebraska: Millard Warehouse, Inc. v. Hartford Fire Ins. Co., 204 Neb. 518, 283 N.W.2d 56 (1979).

New Hampshire: White Mt. Cable Constr. Corp. v. Transamerica Ins. Co., 137 N.H. 478, 631 A.2d 907 (1993).

New Mexico: American Gen. Fire & Casualty Co. v. Progressive Casualty Co., 799 P.2d 1113 (N.M. 1990).

Nevada: Bidart v. American title Ins. Co., 103 Nev. 175, 734 P.2d 732 (1987).

North Dakota: National Farmers Union Prop. & Cas. Co. v. Kovash, 452 N.W. 2d 307(1990).

Ohio: MacLellan v. Motorists Ins. Co., 1990 Ohio App. LEXIS 2506 (Ohio Ct.) App. 1990).

Oregon: Oregon Ins. Guar. Ass'n v. Thompson, 93 Or. App. 5, 760 P.2d 860, review denied, 310 Or. 70, P.2d 104 (1990).

Pennsylvania: United Servs. Auto. Ass'n v. Elitzky, 358 Pa. Super. 362, 517 A. 2d 982 (1986) (but see below also).

Rhode Isl.: Angelone v. Union Mut. Ins. Co., 319 A.2d 397 (R.I. 1968).

South Carolina: South Carolina Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 354 S.E.2d 378 (1987).

Tennessee: graves v. Liberty Mut. Fire Ins. Co., 745 S.W. 2d 282 (1987).

Texas: Nutmeg Ins. Co. v. Pro-line Corp., 836 F. Supp. 385 (N.D. Tex. 1993).

Utah: Clayson v. Farmers Ins. Group, 242 Utah Adv. Rep. 39, 877 P.2d 1255 (1994).

Vermont: American protection Ins. Co. v. Mahan, 151 Vt. 520, 562 A.2d 462 (1989).

Virginia: Parker v. Harford Fire Ins. Co., 222 Va. 33 (1981).

West Virginia: Aetna Cas. & Sur. Co. v. Pitolo, 176 W. Va. 190, 342 S.E.2d 156 (1986).

Wyoming: Fist Wyoming Bank, N.A. v. Continental Ins. Co., 860 P.2d 1094 (1993).

**(ii) States Permitting Consideration of Extrinsic Evidence:**

Alaska: Alaska Pac. Assurance Co. v. Collins, 794 P.2d 936 (Alaska 1990).

Arizona: Transamerica Ins. Co. v. ACC, 778 F. Supp. 484 (D. Ariz. 1991).

California: Coregis Ins. Co. v. Camico Mut. Ins. Co., 959 F. Supp. 1213, 1219 (C.D. Cal. 1997) (In determining whether insured has the duty to defend under California law, one must first compate the allegations of the complaint with terms of the policy; then, it should be ascertained whether facts which are not alleged in the complaint, but known to the insurer at inception of the lawsuit, reveal possibility that the claim is covered by the policy).

Georgia: Tennessee Corp. v. Hartford Accident & Indem. Co., 326 F. Supp. 520 (N.D. Ga. 1971), aff'd, 463 F.2d 548 (5th Cir. 1972).

Hawaii: Standard Oil Co. v. Hawaiian Ins., 654 P.2d 1345 (Haw. 1982).

Iowa: New Hampshire Ins. Co. v. Christy, 200 N.W. 2d 834 (Iowa 1972).

Kansas: Spivey v. Safeco, 254 Kan. 237, 865 P.2d 182 (1993).

Michigan: Illinois Employers Ins. v. Dragovich, 362 N.W. 2d 767 (Mich. Ct. App. 1984).

Minnesota: Iown Nat'l Mut. Inc. Co. v. Universal Underwriters Inc. Co. 276 Minn. 362, 150 N.W. 2d 233 (1967).

Missouri: Aetna Casualty & Sur. Co. v. General Dynamics Corp., 783 F. Supp. 1199 (E.D. Mo. 1991).

Nebraska: Allstate Ins. Co. v. Novak, 210 Neb. 184, 313 N.W.2d 636 (1981). (This decision has been criticized).

New York: Fitzpatrick v. American Honda Motor Co., Inc., 78 N.Y. 2d 61, 571 N.Y.S.2d 672, 575 N.E.2d 90 (1991).

New Jersey: SL Indus., Inc. v. American Motorists. ins. Co., 128 N.J. 188, 607 A.2d 1266 (1992).

N. Carolina: Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986).

Oklahoma: First Bank of Turley. v. Fidelity & Deposit Ins. Co., 928 P.2d 298 (1996).

Ohio: Buckeye Union Ins. Co. v. Liberty So/vents & Chem. Co., 17 Ohio App. 3d 127,477 N.E.2d 1227 (1984). (This decision has been criticized and questioned).

Oregon: Cooper v. Comn1onwealth Land Title Ins. Co., 73 Or. App. 539, 600 P.2d 1128 (1985) (still good law).

Penn: Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820 (Pa. Super. Ct. 1984).

S" Dakota: Hawkeye-Security. lns. Co. v. Clifford, 366 N.W.2d 489 (S.D. 1.985).

Washington: R.A. Hanson Co., Inc., v. Aetna Ins. Co., 26 Wash. App. 290, 612 P.2d 456 (1980).

Wisconsin: Pfeifer v. Sentry Ins., 745 f. Supp. 1434 (E.D. Wis. 1990).

**3. Hold Harmless**

Contracts of indemnification will be enforced only if they express an intent to indemnify against the indemnitee's own wrongful acts in clear and unequivocal terms. **Etiole Int'l, N.V. v. Miami Elevator Co., 573 So. 2d 921 (Fla. 3d DCA 1990);** *See also* *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So.2d 487 (Fla. 1979).

**B. Suit**

**1. Complaint**

**2. Extrinsic Evidence**

**3. Determine Duty**

The causes of action that exist following a loss where another party is at fault in whole or in part but we have been sued as defendant. The first is common law indemnity. Common law indemnity is the hardest of the causes of action to prove. In order to prove common law indemnity, we must show that we are "wholly without fault". Our liability must be derivative, technical, vicarious or constructive in nature. If we are even one percent actively negligent then common law indemnity would usually fail.

The second cause of action is for contractual indemnity. This is based upon the wording of the agreement between the parties. In most cases contractual indemnity does not cover a party for its own negligence. It covers a party for liability which would typically be vicarious to them or which has been assumed in an agreement. It does not typically cover your own negligence. However, some indemnity provisions do cover you for your own negligence. In seeing such a provision it is imperative that you look at the most common interpretation of the law in your state as it is changing constantly. Florida has just loosened the standard to allow indemnification for your own negligence when the agreement itself is clear and unequivocal.

The most important cause of action is that for breach of contract. This is because you are not required to be wholly without fault like you are in a contractual or common law indemnity claim. However, most agreements do contain an attorney's fee provision so you are protecting your client by filing this. It is very simple to go through the contract and compile a laundry list for the things that were not done by the other side. Hopefully, there will be provisions within the contract or the agreement with our partners that require them to provide us insurance or to defend, indemnify or hold us harmless. There are also specific requirements for what they are to do on the job and finding the deficits and alleging them in the complaint if key to trigger coverage.

The last cause of action is contribution. In Florida this has been virtually eliminated however, many states still allow it and there are a few exceptions to it in Florida. Contribution is simply a pro-rata distribution of fault amongst the parties. This cause of action should be included in each and every third party recovery action as should the three above claims. In addition to this there are other causes of action that could be filed depending on your state. These could include implied indemnity, subrogation and equitable subrogation.

**C. Post-Suit**

1. **Secure Release**
2. **Submit Subrogation Demand**
3. **Obtain Contracts, Vendor Agreements, Leases**
4. **Review insurance provisions, indemnity provisions, and insurance policies**
5. **Evaluate need for breach of contract vs declaratory judgment action**

**D. Coverage issues**

1. **Additional insured vs named insured**
2. **Endorsements and completed defense**

**E. How to Win**

1. **Vendors breaching agreement**
2. **Additional Insured status**
3. **PIT Insured v. Insurance**

At the end of the day it is our goal to ensure that our clients do not pay one penny more than their pro-rata share for an accident. No matter how big the claim, or how small the claim, it is rare that any accident is caused solely by one party. If you take the position from the outset of your investigation that your main focus on the issue of liability will be to ensure that each party pays their own pro-rata share and that we will do anything and everything in our power to ensure that our client never pays a penny more than they are liable for, will save your clients millions of dollars over the next several years.