

Your Coverage Advisor

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The Uninsurable Risk

Paul A. Rose

Louis Brandeis served with great distinction on the United States Supreme Court for 23 years. Toward the end of his tenure, in 1935, he said of information, "Lack of recent information ... is responsible for more mistakes of judgment than erroneous reasoning." He made that observation in a work entitled, *The Curse of Bigness*, in which he addressed the dangers of corporations becoming too big—a moment of prescience that foreshadowed the calamity that AIG became more than seven decades later.

For acuity of insight, however, he may just as well have been addressing the perpetual plight of policyholders, one that is as problematic today as it ever has been—their information deficit. In every coverage dispute, the policyholder dauntingly faces a claim fight against an adversary that wrote the policy language, evaluates claims as an integral part of its extensive business enterprise, and retains legions of lawyers to provide counsel on claim matters—in other words, an adversary that has a pronounced information advantage. Further, none but a select few policyholders can match the financial resources, appropriately referred to as the "war chest," available to insurance companies to fund extensive, protracted coverage litigation.

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...large insurance claims, are denied with some frequency without evident or appropriate regard by insurers for their merit.

A small sampling of the common misconceptions we will address are the following:

- The myth that an insurer can reserve rights to deny a claim yet still select defense counsel and control the defense.
- The myth that punitive damages cannot be covered in Ohio as a matter of law.
- The myth that a policyholder, to prevail on a coverage dispute, must establish that its understanding of the policy language is in some sense more reasonable than the insurer's professed understanding.
- The myth that policyholders cannot recover their attorneys' fees and costs when they successfully litigate against their insurers.



The Uninsurable Risk

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Ironically, then, one risk policyholders cannot insure against is the risk of having their claims—including their valid claims—denied by insurers that have both a financial interest in denying claims and a much more refined sense than any policyholder ever will of whether the claims actually are covered. Although policyholders cannot insure against this risk, they can protect against it by closing the information gap. It is toward this end that Brouse McDowell is publishing this quarterly newsletter.

We have counseled policyholders and their brokers extensively for nearly 30 years. Our experience over this period has demonstrated that insurance claims, particularly large insurance claims, are denied with some frequency without evident or appropriate regard by insurers for their merit. We have prosecuted a great many denied claims, which insurers asserted were not covered, with a very high success rate, obtaining recoveries for policyholders ranging from the hundreds of thousands to the hundreds of millions of dollars.

In attempting to fulfill the purpose of this newsletter, which is to close the information gap for the benefit of policyholders and their brokers, we will explore various issues on which the insurance industry, in effect, has waged misinformation or selective-information campaigns.

When claims are denied, policyholders often accept denials, sometimes uncritically, sometimes begrudgingly. At times, of course, denials are appropriate. Too often, however, when denials are inappropriate, passive acceptances by policyholders reflect the types of "mistakes of judgment" Justice Brandeis warned can arise from "lack of recent information." This publication will provide recent information that policyholders and brokers alike will find useful to protect against an uninsurable risk—the risk that a more knowledgeable insurance industry, pursuing its own profit-and-loss interests, will deny claims the insurers know, but they hope policyholders will not know, should be paid. It is our sincere hope that you find it useful.

Assuring Adequate Coverage: An Insurance Broker's Role

Caroline L. Marks

When seeking to procure insurance for yourself or your business, an experienced and knowledgeable insurance broker can be an invaluable member of your team. It is, however, important to understand the differing roles played by the broker and the policyholder in the procurement of insurance. Failing to recognize the parties' respective obligations can result in the policyholder having inadequate insurance or, even worse, no insurance coverage for a particular peril or liability.

Remembering these few points can help prevent that situation:

- Although this point is obvious, the policyholder knows itself and its business better than the broker. Consequently, a policyholder needs to communicate comprehensive and accurate information about the risks to be insured to the broker.
- The onus is principally on the policyholder to determine the amount and types of insurance which may be necessary, even though the broker is there to assist the policyholder in this endeavor. Under Ohio law, a broker typically has no duty to advise the client about the amount or type of insurance needed. Instead, the broker has a duty to exercise good faith and reasonable diligence in obtaining the insurance requested by the client. Additionally, if the

broker knows that the client is relying upon his or her expertise, then the broker owes a further duty to exercise reasonable care in advising the client. Nonetheless, the policyholder must accept an active role in making these determinations and, for complex situations, may want to obtain the advice of coverage counsel.

- Finally, a policyholder **MUST** read the insurance policy promptly after receiving it. Are all of the relevant people, companies, property, activities, and locations included within the ambit of the policy? Are the limits adequate? Is the deductible or self-insured retention too high? Is anything excluded from coverage which the policyholder wants or needs to be covered? Simply put, the first time a policyholder examines its insurance policy should not be after an incident. Under Ohio law, a policyholder has a duty to examine the policy, know the extent of its coverage, and notify the broker if the coverage is inadequate.

Ultimately, the policyholder should take an active role in procuring coverage for itself or its business. In doing so, the policyholder should use the broker's expertise and resources to its best advantage.



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“I tell my clients to never take no for an answer from an insurance company. Always push back.”

– Keven Drummond Eiber

Keven Drummond Eiber is an experienced litigation attorney with a practice focused primarily in the area of insurance recovery – litigating insurance coverage disputes for business clients, negotiating insurance recoveries and advising clients on insurance coverage issues in the context of both claims and policy acquisition and renewal.

During her more than 20 years at Brouse McDowell, Keven has handled a wide range of coverage issues involving long-tail general liability claims for latent injuries and property damage, catastrophic property losses, professional liability claims, directors and officers liability claims, intellectual property, privacy and cyber law claims, and complex business interruption claims.

Keven is active in professional organizations, and is a frequent speaker and writer on insurance law topics. Among other things, she currently chairs the Insurance Law Section of the Cleveland Metropolitan Bar Association.

Keven joined Brouse McDowell in 1989 and became a partner of the firm in 1994, and has been active in firm management, chairing the Environmental Practice Group for a number of years, and currently chairing the firm’s Litigation Practice Group.

Keven is AV® Preeminent™ Peer Review Rated through Martindale-Hubbell. She has been named an Ohio Super Lawyer through a peer and achievement-based review conducted by the research team at Super Lawyers, a service of Thompson Reuters legal division from 2004-2010. Keven was also selected as a Best Lawyer in

America® from 2008-2013 through a peer-review survey.

Keven lives in Cleveland, Ohio, and rides her bike to work. She is married and has two sons, one who is working toward a Ph.D. in biomedical engineering in Sydney, Australia, and one who is working on his B.S. in Engineering at SUNY Maritime College. Keven is certified by U.S. Sailing as a race management official, and when she is not advocating on behalf of her clients, can be found on Lake Erie and elsewhere, running sailboat races or racing sailboats herself.

Coverage Conversations

Keven Drummond Eiber

Q: After I was sued, my insurer agreed to defend me, but in its letter, it listed reasons why my claim might not be covered and it says I have to pay back the defense costs later if the claim is not covered. Do I have to do that, and should I respond?

A: Some courts have held that an insurer may not obtain reimbursement of defense costs absent an express provision to that effect in the insurance policy. Other courts have determined that an insurer can have no right of reimbursement absent express consent, or an express, bilateral agreement with the policyholder that creates such a right, either in the language of the policy itself or by a separate, express agreement. Still other courts have held that an insurer can recoup defense costs if the insurer has asserted its right to recoupment, or reimbursement, in a properly worded reservation of rights letter, after which the insured has accepted the defense offered by the insurer. Even then, in order to be entitled to such reimbursement, the insurer must timely and explicitly reserve its right to recoup the costs and it must provide its policyholder with specific and adequate notice of the possibility of reimbursement. Ohio courts have not settled the question.

When presented with a reservation of rights letter, especially one that asserts a right of reimbursement:

- Always promptly respond in writing.
- Read the reservation of rights letter carefully and independently evaluate the coverage defenses that are expressed in the letter.

- Confirm the statements that you agree with, but always expressly disagree with the aspects you do not agree with.
- Always reject any attempt by an insurer to assert a right of recoupment or reimbursement of defense costs and indemnity costs absent a specific policy provision that requires it.
- Always reject any attempt by the insurer to paraphrase, re-word, recast or explain policy language.
- Reserve your own rights to pursue coverage in turn.
- The law varies greatly from jurisdiction to jurisdiction, and the law of the jurisdiction where the underlying lawsuit is pending may not be the correct law to apply. Don't rely solely upon your insurance broker's advice concerning coverage defenses asserted by the insurer. Consider retaining independent coverage counsel to evaluate your coverage rights.

The firm has experience with the following types of claims, among others:

- Environmental claims
- Asbestos claims
- Lead paint claims
- Mold claims
- Silica claims
- Intellectual property claims
- Directors and officers liability claims
- Crime coverage claims
- Product liability claims
- Construction defect claims
- Builder's risk claims
- Property claims for losses from fire and other catastrophic events
- Hurricane claims
- Employment practices liability claims
- Workers' compensation claims
- Professional services claims
- Securities claims
- Aircraft claims

Insurance Coverage Practice Group Description

Insurance coverage issues, particularly those arising in complex commercial claims, are among the most challenging in the law. Brouse has been at the forefront of these legal developments for more than 25 years. The firm's insurance coverage clients include both U.S. and foreign businesses in many industries and of all sizes, from closely held corporations to Fortune 100 Companies. For these clients, we have obtained recoveries ranging from hundreds of thousands to the hundreds of millions of dollars. Our lawyers also have taken the lead in critical amicus efforts in both federal and state courts to develop and protect the law for the benefit of policyholders.

Brouse lawyers also are versatile. They are experienced at working with clients to devise claim and litigation approaches appropriate for claims of all types, ranging from modest disputes to bet-the-company cases.

In many instances, the firm has been able to assist clients in obtaining insurance recoveries without resorting to litigation. When necessary, Brouse has litigated coverage cases to conclusion, including litigating such cases through the highest appellate levels. In short, we can assist clients in interpreting and evaluating insurance policy provisions, formulating sound coverage positions, and implementing effective coverage litigation strategies. The breadth and depth of our experience in this area, and our long record of success, place us among the leading policyholder coverage firms in the country.

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Attorney Highlights

Paul Rose was named as Akron's Best Insurance Lawyer.

Keven Eiber and **Paul Rose** were listed in the Insurance Law Section of The Best Lawyers® In America.

Keven Eiber was named chair of the Cleveland Metropolitan Bar Association Insurance Law Section for 2013-2014.

The following coverage lawyers were named as Ohio Super Lawyers in 2013: **Chris Carney**, **Keven Eiber**, and **Paul Rose**. The following coverage lawyers were named as Rising Stars in 2013: **Lucas Blower**, **Nick Capotosto**, **Kerri Keller**, **Amanda Leffler**, and **Caroline Marks**.

Amanda Leffler was named a 2013 Northeast Ohio Top 25 Under 35 Mover and Shaker by the Cleveland Professional 20/30 Club.

Kerri Keller chaired the annual Akron Bar Association Federal Court Luncheon, which was attended by numerous federal judges and their staff.

In March, **Lucas Blower**, **Keven Eiber**, **Amanda Leffler**, and **Caroline Marks** attended the American Bar Association, Section of Litigation, Insurance Coverage Litigation Committee's Annual Meeting and CLE program in Tucson, Arizona.

Kerri Keller presented "Technology Gone Wild: How the Increased Use of Technology Has Affected the Practice of Law in Summit County" at the Akron Bar Association's 2013 Federal Bench Bar Conference in March.

On April 19, **Paul Rose**, presented "Reservation of Rights and Recoupment of Defense Costs" to the Cleveland Metropolitan Bar Association.

Lucas Blower and **Amanda Leffler** co-authored "Recent Developments Affecting Professionals', Officers', and Directors' Liability," Tort Trial & Insurance Practice Law Journal, Spring 2013.

In May, **Kerri Keller** presented "Understanding Document Retention Plans and Litigation Holds" for Lorman Education Services.

On May 22, **Gabrielle Kelly** presented "How to Gain a New Perspective of Pre-Trial Practice" at the Bad Faith Insurance Claims in Ohio seminar hosted by NBI.

In June, **Keven Eiber** presented "Tri-Partite Relationship – The Great Debate" at the Akron Bar Association's 2013 Advanced Issues in Insurance Coverage.

Amanda Leffler was the course planner for the program, and **Caroline Marks** presented "Excess and Umbrella Coverage Issues."

