

FUNDAMENTALS OF INSURANCE COVERAGE

In All 50 States

Second Edition

The Perfect Insurance Coverage Resource For Claims Handlers, Liability Adjusters, and Insurance Defense Counsel.



"When I have coverage issues in my practice, this is the first resource I look to. It is complete, concise, and easy to understand."

- Donald G. Moore, Esq., Deisch, Marion & Klaus, P.C.

"Matthiesen, Wickert & Lehrer has done it again! This book is a must-have for all claims professionals who deal with insurance coverage issues, especially those with multi-state responsibilities. It's definitely a one-of-a-kind and no one in this line of business should be without it."

- John Macomber, Zurich North America

BY

BRADLEY W. MATTHIESEN

GARY L. WICKERT

DOUGLAS W. LEHRER

"Subrogation professionals necessarily become involved in coverage issues, and this book is the quickest and most complete reference on the subject to be found anywhere."

- Jon Coscia, CEO, Latitude Subrogation Services

"From bad faith to the extent of risks and coverages to policy defenses and environmental issues; this book has it all, and amazingly, covers the law in every state!"

- Kathy Stanke, Sentry Claims Services

C. Assignment and Transfer of Policies of Insurance

1. Transfer of Insured Property

There are no Texas cases discussing the effect of a transfer of property without a concurrent assignment of the policy.

2. Assignability of Policy

An insurance policy may be assigned by the insured to a third person. *East Tex. Fire Ins. Co. v. Laffey*, 20 Tex. 287 (1856). As a general rule, contract is assignable. *East Texas Ins. Co. v. Laffey*, 20 Tex. 287 (1856). *Appl. Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

3. Transfer of the Insured

There are no Texas decisions regarding the necessity of the insured's consent to an assignment of a policy. *Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

4. Assignments to Consent Requirement

An insured may waive the insured's obligation to secure the insured's consent to an assignment from issuing a valid assignment. *Consolidated Ins. Co. v. Cigala & Sons*, 111 Cal. 2d 107, 36 Cal. Rptr. 2d 107 (1963).

5. Waiver

The term "waiver" has been defined as the intentional relinquishment or abandonment of a known right or privilege. *Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

6. Duty of Insured

In addition to the insured's duty to pay the premium, the insured has a duty to disclose material facts to the insurer. *Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

B. PROCEDURAL CONSIDERATIONS

A. Law Governing the Insurance Policy

The parties to a contract of insurance may designate the law to be applied in the event of a dispute. *California Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

B. Subrogation

The parties to a contract of insurance may designate the law to be applied in the event of a dispute. *California Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

C. Assignment and Transfer of Policies of Insurance

There are no Texas cases discussing the effect of a transfer of property without a concurrent assignment of the policy.

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An insurance policy may be assigned by the insured to a third person. *East Tex. Fire Ins. Co. v. Laffey*, 20 Tex. 287 (1856). As a general rule, contract is assignable. *East Texas Ins. Co. v. Laffey*, 20 Tex. 287 (1856). *Appl. Insurance* (1975). Under the policy requires, an assignment of an insurance policy is not required to be in writing and stated delivery of the assignment is necessary. *Prager v. New York Life Ins. Co.*, 15 N.Y. 382 (1848).

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Fundamentals of Insurance Coverage – In All 50 States-2nd Edition

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About the Authors:

The three authors of this treatise form the nucleus of one of the most respected insurance litigation firms in the world. Together, they bring a total of more than 75 years of litigation experience to bear on their clients' insurance defense and coverage needs.

Bradley W. Matthiesen is a Senior Partner with the law firm of Matthiesen, Wickert & Lehrer, S.C., where he has been an insurance defense trial attorney for the past 12 years. He has litigated and tried numerous personal injury, insurance coverage, toxic tort, lemon-law and Magnuson-Moss warranty cases for individual insureds, insurance companies and numerous automobile dealerships throughout Wisconsin. In addition, Mr. Matthiesen has strived to provide legal services in all matters relating to a general practice law firm. He has particularly strong ties to the insurance industry, especially insurance defense litigation. Mr. Matthiesen worked in the insurance industry for many years, and earned his C.P.C.U. and C.L.U. designations. He is also a past C.C.I.C. Arbitration Committee Vice Chairman and an Instructor at the American Institute of Paralegal Studies.

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Wickert is double board-certified in both personal injury law and civil trial law by the Texas Board of Legal Specialization. He is also certified as a Civil Trial Advocate by the National Board of Trial Advocacy, for whom he has both written and graded the product liability questions contained on the NBTA national certification exam taken by trial lawyers around the country. For nearly 25 years, Mr. Wickert has served as an expert witness and insurance consultant on subrogation and insurance related issues and has been consulted by insurance carriers, lawyers, and legislative bodies from several states. He is a licensed arbitrator and has attended more than 1,000 mediations in more than 30 different states.

Douglas W. Lehrer is a Senior Partner with the law firm of Matthiesen, Wickert & Lehrer, S.C. Mr. Lehrer's insurance defense practice spans the spectrum of insurance related issues, including defending insureds and their insurers in response to claims of personal injury, property damage and wrongful death. His experience includes the handling of countless lawsuits arising out of automobile collisions, slip and falls, product liability claims, toxic tort claims and construction and work site accidents. He has a long history of representing insurance companies on all types of insurance coverage disputes, as well as defending insurers in response to claims of bad faith. Mr. Lehrer oversees a substantial number of the firm's complicated and significant coverage dispute cases, and has handled the trial of such insurance coverage matters as well as subsequent appeals.

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PRaise FOR

"Fundamentals of Insurance Coverage"

"From breaking down an insurance contract to policy defenses to environmental coverage issues, this book covers the law in all 50 states in a clear and understandable way."

- William J. Evans, Esq., West Bend Mutual Insurance Company

"This book is a necessity whenever coverage issues surface in your files. It covers this complex area of law in a comprehensible manner and is worthy of a novice or experienced professional."

- Timothy J. Irish, State Auto Insurance Companies

"Badger Mutual Insurance Company has used the services of the attorneys of Matthiesen, Wickert & Lehrer for years and their advice has been invaluable. The information contained in this book will be very helpful as our company expands into different areas of the country."

- Kathryn P. Heyer, Esq., Badger Mutual Insurance Company

About the Book:

Fundamentals Of Insurance Coverage – In All 50 States -2nd Edition is a unique compendium and overview of all aspects of insurance coverage law, in every state. The treatise utilizes and cites state and federal statutes, insurance regulations, and case law from every state as a framework for an unique and unprecedented treatment of this confusing and varied body of law. The book is designed specifically for insurance claims handlers and supervisors who have responsibility for or occasion to deal with coverage issues relating to third-party defense litigation, first-party claims litigation, and/or reservation of rights scenarios. In the past decade, the number of disputes between insurers and insureds over policy coverage, especially involving environmental pollution and exclusions, has increased exponentially. More and more insurance companies, faced with astronomical claims in these areas, have had to resort to meticulously enforcing coverage exceptions and exclusions in order to maintain profitability. The result has been a dramatic rise in coverage litigation. Millions of dollars have been spent by corporate America and the insurance industry to contest and litigate the obligation of insurers to defend or indemnify insureds held liable to other parties, the state or the federal government for environmental impairment or other insurance obligations.

The purpose of this book is to compile all of the relevant law, regulations and case decisions in these areas from all 50 states into one easy to understand and easy to use reference book – which should be the first place a company should turn when coverage matters rear their ugly heads. While the book intentionally omits reference to federal statutes, regulations or holdings based purely upon federal law, except insofar as they may be necessary to clarify issues of state law, it is a comprehensive treatment of all other aspects of coverage issues which the average claims handler or supervisor might be expected to run across in any given situation.

The integrity of the insurance industry and its commitment to honoring legitimate claims for which it is contractually or legally responsible is offset by the industry's concomitant desire to avoid payment for claims and damages for which it is not contractually obligated and for which there is no insurance coverage. This primer on coverage law is perfect for the insurance professional whose responsibilities are not only spread across various lines of insurance, but across the whole of our continent as well. From the introduction of common issues and common rules to a discussion of coverage triggers, equitable relief, economic loss, property damage and a variety of policy exclusions, the book is intended to be the legal companion of anybody whose responsibilities take them, however frequently or infrequently, down the uncertain path of coverage denial and coverage litigation.

This one-of-a-kind treatise covers the following issues in all 50 jurisdictions:

- Understanding the Contract of Insurance
- Law Governing the Insurance Policy
- Tackling Ambiguity and Interpretation of Policies
- General Contract Rules for Interpretation
- Rights and Obligations of All Parties to the Insurance Contract
- Limitations of the “Construed Against the Drafter” Rule in All States
- The Extent of Risks and Coverages
- Good Faith and Fair Dealing – Bad Faith
- Basic Policy Defenses
- Cooperation of the Insured
- Failure to Pay Premiums
- Environmental Issues and Related Insurance Law

In addition to being an excellent and easy to understand primer on coverage issues and the basic insurance contract, the book is suitable for both the inexperienced claims professional and the seasoned veteran. It is also the perfect “starting point” for any research or litigation briefing by trial lawyers, defense counsel, or in-house insurance counsel. It is a must for anyone with multi-state responsibilities.

The following issues and topics are covered in detail for each of the 50 states:

- I. The Contract of Insurance**
 - A. Proving the Existence and Terms of Insurance Policies
 - B. Missing Insurance Policies
 - 1. Extent of the Burden of Proof
 - 2. Proof of Contents of Missing Policies
- II. Procedural Considerations**
 - A. Law Governing the Insurance Policy
 - B. Direct Action Statutes
 - C. Statutes of Limitations
 - 1. Breach of Contract
 - 2. Tort—Bad Faith
- III. Construction and Interpretation**
 - A. What Is an Ambiguity?
 - B. General Contract Rules for Resolving Ambiguities
 - C. Rule that Ambiguities Are Resolved Against Insurer
 - D. Limits of “Constructions Against Insurer” Rule
- IV. Extent of Risks and Coverage**
 - A. Insurable Risks
 - 1. Expectations of the Parties
 - 2. Liability Created by Statute
 - B. Insurability of Punitive Damages
 - C. Assignment and Transfer of Policies of Insurance

continued >

1. Transfer of Insured Property
2. Assignability of Policy
3. Consent of the Insurer
4. Exceptions to Consent Requirement
5. Reorganizations and Acquisitions

V. Rights and Obligations of the Parties

- A. Duty of Insurer to Defend
 1. Trigger of the Duty
 2. Consequences of Failure to Defend

VI. Insurer's Duty of Good Faith and Fair Dealing

- A. Insurer's Duty to the Insured
 1. Statutory Source/Unfair Claims Settlement Practices Act (Ala. Stat. § 27)
 2. Implied Covenant of Good Faith and Fair Dealing
 3. Conflict of Interest
- B. Insurer's Duty to Third Party Claimants
 1. Implied Covenant of Good Faith and Fair Dealing
- C. Insurer's Duty to its Excess Insurer

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 1. Failure to Cooperate May Bar Coverage
- B. Notice
- C. Misrepresentation
 1. False Statements
 2. Materiality
 3. Intent
- D. Breach of Warranty
- E. Failure to Pay Premiums

VIII. Environmental Issues and Insurance Law

- A. Occurrence/Accidental Event
 1. Trigger of Coverage for Tort Claims
 2. Expected/Intended
- B. Damages Because of Bodily Injury
- C. Damages Because of Property Damage
- D. Property Damage and Economic Loss
- E. Policy Exclusions
 1. Insured's Owned Property Exclusion Clause
 2. Pollution Exclusion Clause

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