

Maximizing Your Insurance Coverage

# Insurance Recovery for Franchisors

Presented by

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# Overview

- Identify unique risks franchisors face
- Review policies in depth to determine appropriate coverage
- Procurement, negotiation of terms, and renewals of coverage
- Review insurance requirements in franchise agreements for compliance
- Include appropriate additional insured requirements in franchise agreements
- Consider all potential coverage for a particular claim, including lost or missing policies
- Avoid common pitfalls throughout claims process





# **Insurance Analysis**

## **Helping Clients to Avoid Disputes**

# Consider Specific Risk and Coverage Options

- Franchisors face unique and inherent risks (e.g., healthcare risks, injuries to customers or third parties for slip and falls or sales of products and services by franchisees, automobile accidents by employees, and loss of personal data)
  - Vicarious liability
  - Joint employer
  - Cyber security
  - Automobile
- Common policies to consider include:
  - Commercial general liability (CGL)
  - Commercial property
  - Commercial auto
  - Excess/Umbrella
  - E&O/Professional liability
  - Employment practices
  - Cyber liability
  - Directors & Officers (D&O)



# Insurance Policy Reviews

- **Conduct comprehensive analysis for common industry and franchise-specific risks**
- **Procurement and Renewals**
  - Look for more than just minimum requirements; seek the best possible coverage
  - Negotiate specific policy terms and endorsements to add
  - Can often easily extend renewal deadlines to allow sufficient time for review
- **Considerations with system-wide insurance program for franchise**
  - Be mindful of potential gaps in insurance coverage, or unnecessary or excessive coverage
  - Consider appropriate coverage for franchise and minimum required coverage under franchise agreement
  - Evaluate particular risks specific to franchisees that may create liability for franchisor

# Use An Approved Insurance Supplier?

- **Pros**

- Franchisor can use buying power of franchise network to negotiate better rates
- Ensures consistency in coverage/limits across the system
- Helps align the interests of the franchisor, franchisee and insurer in litigation
- Increased efficiency in program-wide changes and in tracking compliance with insurance requirements

- **Cons**

- Vicarious liability risk through increased oversight and control
- Potential insolvency concern

- **Factors to Consider in Selecting an Insurer include:**

- Competitiveness of premiums
- Experience in servicing other franchise systems/services offered
- Insurer's reputation/claims handling experience





# Getting the Most From Others' Insurance

## Indemnity and Insurance Provisions in Third-Party and Franchisee Agreements



# Independent Franchisee Indemnity Provisions

- Insurance alone may be insufficient to indemnify a franchisor after a loss
- Indemnity and hold harmless provisions in a franchise agreement help protect franchisors against vicarious liability claims
- Indemnity provisions – which should be broadly written and separate from insurance requirements – work with insurance provisions to ensure the franchisor is protected from third-party claims that arise from the acts and conduct of a franchisee
- Important in instances where the franchisee has failed to properly identify the franchisor as an “additional insured” under its policy

# Getting the Most from Others' Insurance

- **Contract for additional insured status**
  - Typical to require that all franchisees include franchisor as “additional insured” on liability coverage
  - Separate and distinct from indemnification requirement
  - Review franchise agreements for adequate language—often the coverage is only as broad as required by the contract
  - Review franchisee policies for proper endorsement
- **Benefits of additional insured status**
  - Gives franchisor direct rights against insurance company
  - Defense obligation for both named and additional insured
  - Added protection when combined with contractual indemnification
  - Typically includes a waiver of subrogation between insureds
  - Saves franchisor’s own policy limits and protects claim experience



# Selecting the Broadest Additional Insured Endorsement

- **Obtain AI coverage beyond vicarious liability, if possible:**
  - Additional Insured—Grantor of Franchise (CG 20 29 04 13)
    - amends the definition of “Who Is An Insured” to include the franchisor “but only with to their liability as a grantor of a franchise to you.”
  - Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization.” (ISO CG 20 10)
    - covers bodily injury, property damage, and personal and advertising injury “caused, in whole or in part,” by the acts or omissions of the named insured (the franchisee)
- **Verify franchise agreement does not inadvertently limit coverage**
  - Additional insured endorsements often limit coverage to only “that required in the franchise agreement,” rather than policy limits
  - Draft franchise agreement to require a “minimum of” specified limits





# Verify Additional Insured Status

- Problem: many franchise agreements only require a certificate of insurance as proof of additional insured status and/or do not require annual updates
- COIs do not bind the insurer and provide no actual coverage—usually prepared by broker or agent, not insurer.
- Courts have upheld distinction between additional insured on policy vs. COI
- Always get the policy, or at least the additional insured endorsement
- Require updated COIs/endorsements for each annual renewal

# COVID-19 Insurance Claims

# Third Party Coverage

- **CGL**
  - Bodily injury due to exposure to COVID-19
  - Negligent policies or procedures resulting in exposure
- **WC/Employer Liability**
  - Employee injured in the scope of employment vs. not work-related?
  - Claims for additional damages (other than medical bills and lost wages)
- **D&O**
  - Shareholder claims
  - Inadequate preparation or response
  - Inaccurate financial statements



# First Party Coverage

## Property and Business Interruption

- **Property Damage** (direct physical loss or damage to property)
- **Business Income and Extra Expense** (loss of business income and extra expense due to suspension of operations)
- **Contingent Business Interruption** (loss of business income and extra expense due to interruption of the supply chain)
- **Civil Authority** (loss of business income and extra expense due to an order restricting access to insured locations)
- **Leader Property** (loss of business income due to damage to a nearby property that attracts business to covered location)



# First-Party Coverage: Coverage Issues

- **Direct Physical Loss or Damage to Property**
  - Is physical alteration required?
  - Does physical loss include loss of use?
  - Burden of proof is on the policyholder
- **Pollution and Virus Exclusions**
  - Is COVID-19 a “pollutant”?
  - Virus exclusion “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”
- **Total Suspension of Operations**



# Insurance Claims Top Mistakes Made by Franchisors



# 1. Overlooking Potentially Covered Allegations in the Complaint

- **Dissect the complaint**
  - Identify all possible claims and damages
  - Covered allegations are sometimes obscure
  - Franchisor only needs one potentially covered claim to trigger defense obligation
- **Closely study each paragraph – do not skim**
- **Do not rely on headings**
- **Assume only necessary bad elements**
- **Resolve all doubts in favor of coverage**



# Coverage-Triggering Allegations

1947-28 1999 13180 78 THOMPSON COBURN LLP 6214 502 760 TO 8037661187226 P.02-48

12-8-17-11

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

STATE ex rel. JEREMIAH W. (JAY) NIXON, and the MISSOURI CLEAN WATER COMMISSION, )  
 Plaintiffs, )  
 ) Case No. )  
 v. )  
 PREMIUM STANDARD FARMS, INC., )  
 Defendant. )

1523 Main, Suite 1100  
 Kansas City, MO 64111

**PETITION FOR PRELIMINARY INJUNCTION,  
 PERMANENT INJUNCTION, AND CIVIL PENALTIES**

COMES NOW, Plaintiff, State of Missouri, on behalf of the Missouri Clean Water Commission, and for its petition against defendant, Premium Standard Farms, Inc., alleges and states that:

I, Jeremiah W. (Jay) Nixon is the duly elected, qualified, and acting Attorney General of the State of Missouri.

DE-HEIN 61-17-15  
 11/10/17  
 11/10/17

## MAY NOT BE COVERED:

“PETITION FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND CIVIL PENALTIES”

## BUT WHAT ABOUT:

“... is liable for costs ...”

“... has caused damages ...”

“... and grant such further relief as the court deems just and proper.”

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8 Attorneys for Plaintiff,  
 TYRONE LAROSE, An Individual,  
 9 LEMAY HUNTZINGER, An Individual,

10 **SUPERIOR COURT STATE OF CALIFORNIA**  
 COUNTY OF ORANGE

11 **CASE NO. 38-2899-0028045**  
**SECOND AMENDED COMPLAINT**  
**FOR DAMAGES**  
**[JURY TRIAL DEMANDED]**

12 TYRONE LAROSE, An Individual,  
 13 LEMAY HUNTZINGER, An Individual,  
 14 Plaintiffs,  
 15 MAX MUSCLE a.k.a. MAX MUSCLE  
 MARKETING, INC., a California  
 16 Corporation; PEAK FRANCHISING, a  
 California Corporation; NUTRI SHOP, Inc., a  
 17 California Corporation; AMERICAN  
 CELLULAR LABS, aka AMERG-CELL LABS,  
 18 AMERG-CELL LABS, A Corporation; SELF-  
 MADE, INC., a California Corporation,  
 19 DAMON CALDWELL, an individual, and  
 20 DOES 3 through 500, inclusive,  
 Defendants.

## MAY NOT BE COVERED:

“... fraudulent marketing scheme of the Defendants ...”

“... failed to disclose known side effects ...”

## BUT WHAT ABOUT:

“... knew or in the exercise of reasonable care should have known of the defective nature ...”

Case 2:08-cv-02220-JWL-DJW Document 28 Filed 07/11/2008 Page 1 of 16

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 1521 N. Warden Parkway, Suite 100  
 Wichita, Kansas 67206-4466  
 316-267-6371

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF KANSAS**

\_\_\_\_\_ )  
 THERMAL SOLUTIONS, INC., )  
 Plaintiff, )  
 ) Case No. 08-CV-2220-JWL/DJW  
 v. )  
 IMURA INTERNATIONAL U.S.A. INC., )  
 VITA CRAFT CORPORATION, and )  
 MAMORU IMURA, an individual, )  
 Defendants. ) JURY TRIAL REQUESTED

**FIRST AMENDED COMPLAINT**

Plaintiff, Thermal Solutions, Inc. (“TSI”), complains against defendants Imura International U.S.A., Inc. (“Imura International”), Vita Craft Corporation (“Vita Craft”) (collectively “the Imura Entities”), and Mamoru Imura as follows:

## MAY NOT BE COVERED:

“... action seeking to declare the invalidity of a patent and to recover damages for patent infringement, misappropriation of trade secrets, and unfair competition ...”

## BUT WHAT ABOUT:

“... damage and injury by spreading false rumors ...”

## 2. Ignoring Extrinsic Evidence

- **Look outside the complaint where permitted**
  - Most jurisdictions require the insurer to consider all extrinsic evidence available which could trigger coverage
- **A “suit” is not always necessary to trigger a defense obligation**
  - Some liability policies only require the assertion of a “claim”
  - May not have to be in writing – a verbal demand or allegation of liability may suffice
  - Even where policy requires “suit,” some jurisdictions interpret “suit” broadly to prevent windfall for the insurer
- **If insurer denies, forward later documents that may trigger coverage**
  - Amended pleadings
  - Discovery responses
  - Deposition transcripts



### 3. Failing to Identify All Potentially Applicable Policies

- **Look for coverage in unlikely places**
  - Consider overlapping coverage for various allegations in one suit under different lines of coverage
  - Example, there may be allegations in a single suit that trigger both D&O and general liability policies
- **Don't forget to tender notice under all potentially applicable coverage years**
- **Find or establish missing/incomplete policies using secondary policy evidence**
  - General ledger showing premium payments, correspondence with brokers, counsel in prior suit
- **Seek coverage under others' insurance policies**





## 4. Failing to Properly Notice Claims

- **The basics**

- Notify promptly under every potentially relevant policy
- Follow any specific notice provisions in policies
- Provide basic, factual information and avoid unnecessary characterizations
- Attach demand, complaint, summons or other coverage triggering document
- Even a “soft-tender” may be sufficient—notifying of claim but not requesting action

- **Benefits of proper notice**

- Avoids “condition precedent” notice defenses under claims made policies
- Limits prejudice argument for “late notice” under occurrence policies
- Avoids additional insured issues (always notify for yourself as additional insured, even if named insured says it will do it for you)
- Avoids disputes over pre-tender defense costs

## 5. Not Preparing for the Possibility of a Declaratory Judgment

- **Some states require insurers to file a declaratory action when there is a coverage dispute or risk waiving defenses**
- **Insurers may file an action quickly to select forum favorable to carrier**
- **Get legal counsel involved early and weigh options**
  - May need to file suit upon tender of claim
  - Use “soft-tenders” if uncertain whether to pursue claims



## 6. Not Responding to Reservation of Rights and Denial Letters

- **Analyze carrier's asserted defenses to coverage and respond**
- **Specifically object to unsupported reservations and denials**
  - Can accept defense and simultaneously object using amicable tone
  - Prevents disputes down the road
- **Always object to reimbursement/recoupment of defense costs**
  - Often reserved without justification
  - Failure to object may create “implied-in-fact” contract
- **Strategically respond to information requests**
  - Need to cooperate, but reasonableness standards apply

# 7. Accepting Insurer's Selection of Counsel, Billing Guidelines and Rates

- **Know when to demand your own defense counsel**
  - When reservation creates conflict of interest
  - Excess exposure without reservation may create conflict
- **Rate caps must be specifically stated in policy**
  - Most policies provide for payment of “reasonable rates,” and rarely include rate caps
- **Raise practical considerations**
  - Continuing with long-time, highly experienced counsel with thorough understanding of franchise is often in best interest for both franchisor and insurer, even if higher rates
  - Watch for and reject billing guidelines that invade privilege or conflict with counsel's judgment



## 8. Forgetting to Engage Carriers During Settlement Opportunities

- Insurers have “duty to settle” in most states
- Inform all carriers of settlement opportunities, even where claim was denied
- Provide details affecting settlement window
- Involve defense counsel
- Document settlement demands through “hammer” letters
- Consider global mediation

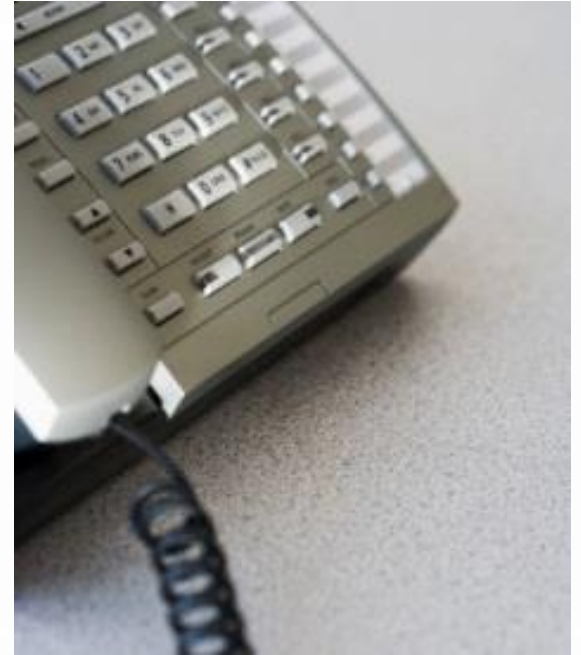


## 9. Failing to Properly Document Settlement with Insurers

- Always document in writing an insurer's agreement to pay proceeds
- Include mutual releases to avoid recoupment
- Limit scope of release of insurer only to matters resolved in settlement
- Secure release of subrogation rights where required by underlying settlement
- Expressly preserve rights to non-settled claims
- Beware settling below primary limits when excess coverage is in play

# 10. Wrongfully Assuming Communications are Privileged

- **Communications with brokers**
  - May not be privileged even if counsel involved
- **Communications with carriers**
  - May not be privileged until insurer has current duty to defend
- **Use confidentiality agreements**
- **When in doubt, pick up the phone instead**



# Questions?