



CONTINUING LEGAL EDUCATION (“CLE”) SEMINAR

New York, *free of charge*, by Zoom Webinar

Defense Association of New York (“DANY”) has been granted CLE accreditation by the New York Office of Court Administration, and will provide the following program:

Bigger Cases Mean More Insurance Issues for Defense Attorneys: Claims & Coverage Trends, Emerging Issues & Updates

Appropriate for both experienced and newly admitted attorneys.

Monday, April 12, 2021

5:00 p.m. - 6:00 p.m.

Presented by **Julian D. Ehrlich, Esq.:**

- Past President, Defense Association of New York
- Senior Vice President Claims - Construction Services Group, Aon

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One CLE Credit will be granted in Professional Practice to New York attorneys who attend the entire presentation and state the announced course code(s) in an affirmation (see link below) submitted by e-mail to danyexecdir@gmail.com. http://ww2.nycourts.gov/attorneys/cle/affirmation_sample.pdf,

Bigger Cases Mean More Insurance Issues for Defense Attorneys:

**Claims & Coverage Trends, Emerging Issues &
Updates**

April 12, 2021

Julian D. Ehrlich, Esq.

SVP Claims

Aon Construction Service Group



Coverage Trends, Emerging Issues & Updates



Updates

- **Coverage & COVID 19**
- **Coverage for judgment interest**
- **Recoupment of attorney's fees**
- **When does exposure end? Statute of Repose**
- **Additional insured coverage**



“Everyone Has A Plan...”

Claim trends

Emerging Issues

Coverage Updates



Coverage Trends, Emerging Issues & Updates



Claim Trends

BLS Loss Data

National Construction Fatalities Up 6%

=

53 more deaths YOY in 2019

2011 Fatality Rate 9.1%

2019 Fatality Rate 9.7%



Workforce Trends

“Opioid Use Hits Construction Industry as Overdoses Soar”

Wall Street Journal, 1/5/2021

- 20% of all overdoses by construction workers
- \$4700 average annual employer health costs for workers with substance abuse disorders - National Safety Council
 - construction workers are 4% of workforce but 25% of opioid overdoses in Mass.



Workforce Trends

“Union workforce declined dramatically to 12.8%”

Bureau of Labor Statistics 12/19/20

- Impact on training?
- Union and non-union groups have publicly traded accusations as to who works safer



Who is Getting Injured?

BLS Loss Data

Age 55+

+8% fatalities in 2019 among all workers
= 38% of workplace fatalities
= up from 20% in 1992

Latino workers

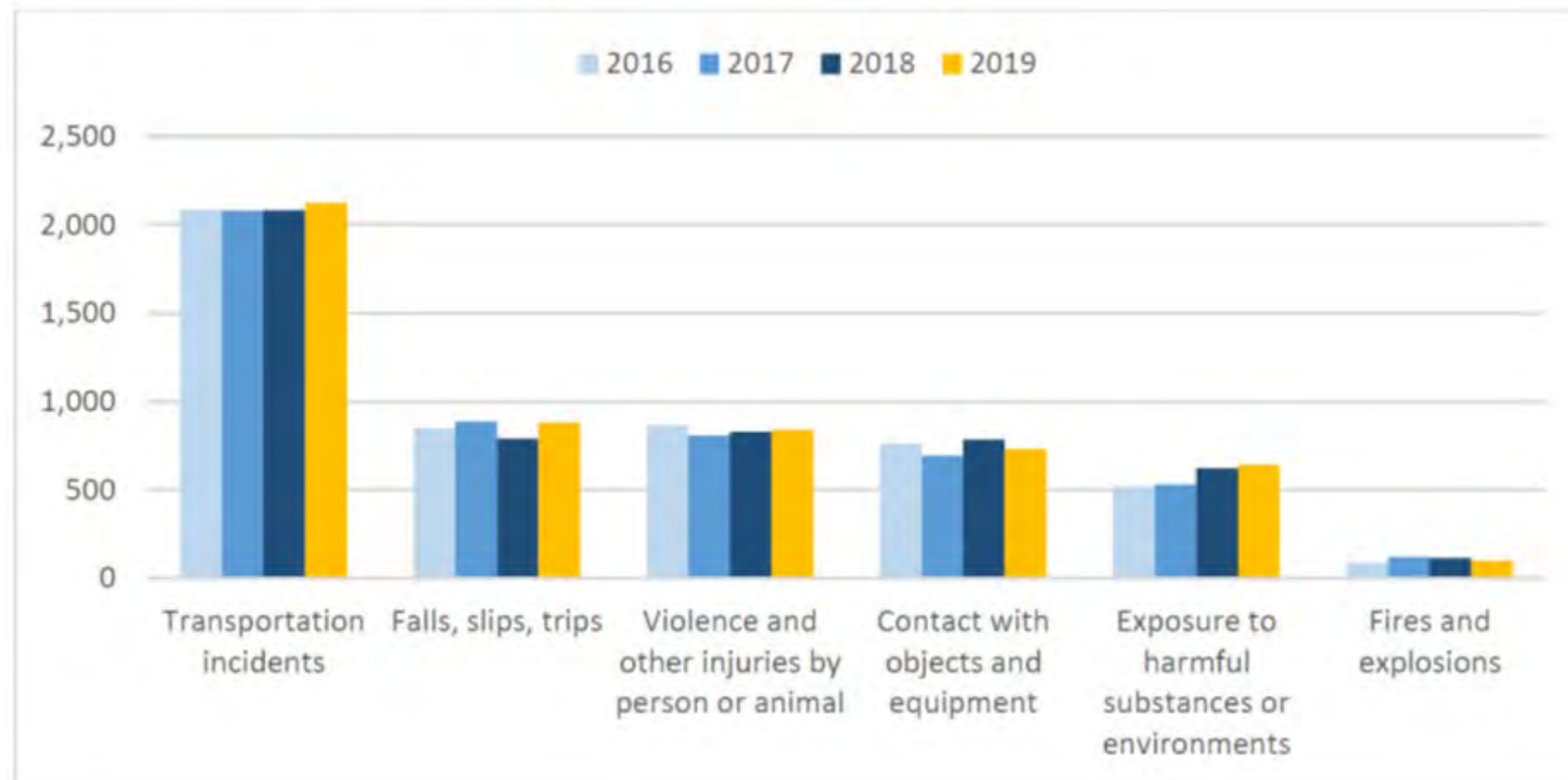
fatalities rose 15% in 2019
= 20% of workplace deaths in 2019,
= up from 9% in 1992



How are Losses Occuring?

BLS Loss Data

Chart 3. Fatal work injuries by major event or exposure, 2016-19



How are Losses Occuring?

“Car-Crash Death Rate Surged in 2020”

Wall Street Journal, 1/8/2021 Nat, Highway Traffic Safety Admin.

- 18% increased fatality rate from 2019 to 2020
- Deaths per mile travelers rose from 1.25 per 100 million motor vehicle miles in 2020 from 1.06 in 2019
- Drivers traveled less and at higher speeds in 2020 lockdowns but then did not slow down after traffic volume returned to near normal levels



Claim Value Trends

\$10M+ verdicts + 300% in last 3 yrs **

\$20M+ verdicts + 300% in last 10 years*

Top 50 bodily injury claims → median cost up from \$28M in 2014 to \$54M in 2018**

3 verdicts in NYC alone \$100M for single BI claims in 2019

*“The Specter of Social Inflation Haunts Insurers” WSJ, 12/27/19

***Financial Times* 11/21/2019



Labor Law Claim Value Trends



Multi-level Fusion Example

Abreu-DePena v. Weber, 190 A.D.3d 512 (1st Dept. 1/14/21)

- \$300K S/Bronx verdict → additur to **\$3M**

Register v. SAS Morrison LLC, 189 A.D.3d 591(1st Dept. 12/17/20)

- \$7M S/Bronx verdict → reduced to **\$3M**



Claim Value Trends

2020-21 Judicial Hellhole Rankings*

- # 5 – Louisiana
- # 4 – South Carolina
- # 3 – California
- # 2 – New York City
- # 1 - Philadelphia



* American Tort Reform Foundation

Claim Value Drivers

Are plaintiffs' attorneys more effective??

- Anchoring
- Reptile Tactics
- Social inflation
- Nuclear verdicts
- National advertising
- More litigation funding & loans against lawsuits



Anchoring

Hedges v. Planned Sec. Serv. Inc., 190 A.D.3d 485 (1st Dept. 2021)

“The Court **declines the invitation** of the amici to announce a new rule prohibiting the practice of anchoring.”



Reptile Tactics

Raul Lopez v. City of New York – 3/30/21 (1st Dept. 2021)

- \$10M+ verdict

“This Court has found, in some circumstances, that implorations to juries to **“send a message”** are improper.

However, as the remarks were isolated comments made in the context of a six-day trial and lengthy summation, they **could not have affected the outcome.**”

Social Inflation

Generally, refers to appeals to populism, income inequality, Occupy Wall St., metoo#, anti-corporate sentiments etc.

“The tort environment has deteriorated beyond our expectations” Alan Schnitzer, Travelers CEO*

* “The Specter of Social Inflation Haunts Insurers” WSJ 12/27/19

Audience Poll #1

When jury trials fully resume, claim values will go ...

1) go up?

2) go down?

3) stay same?



Impact on Insurance

“The Construction Insurance Market Faces Rising Uncertainty”

PropertyCasualty360.com 10/12/20

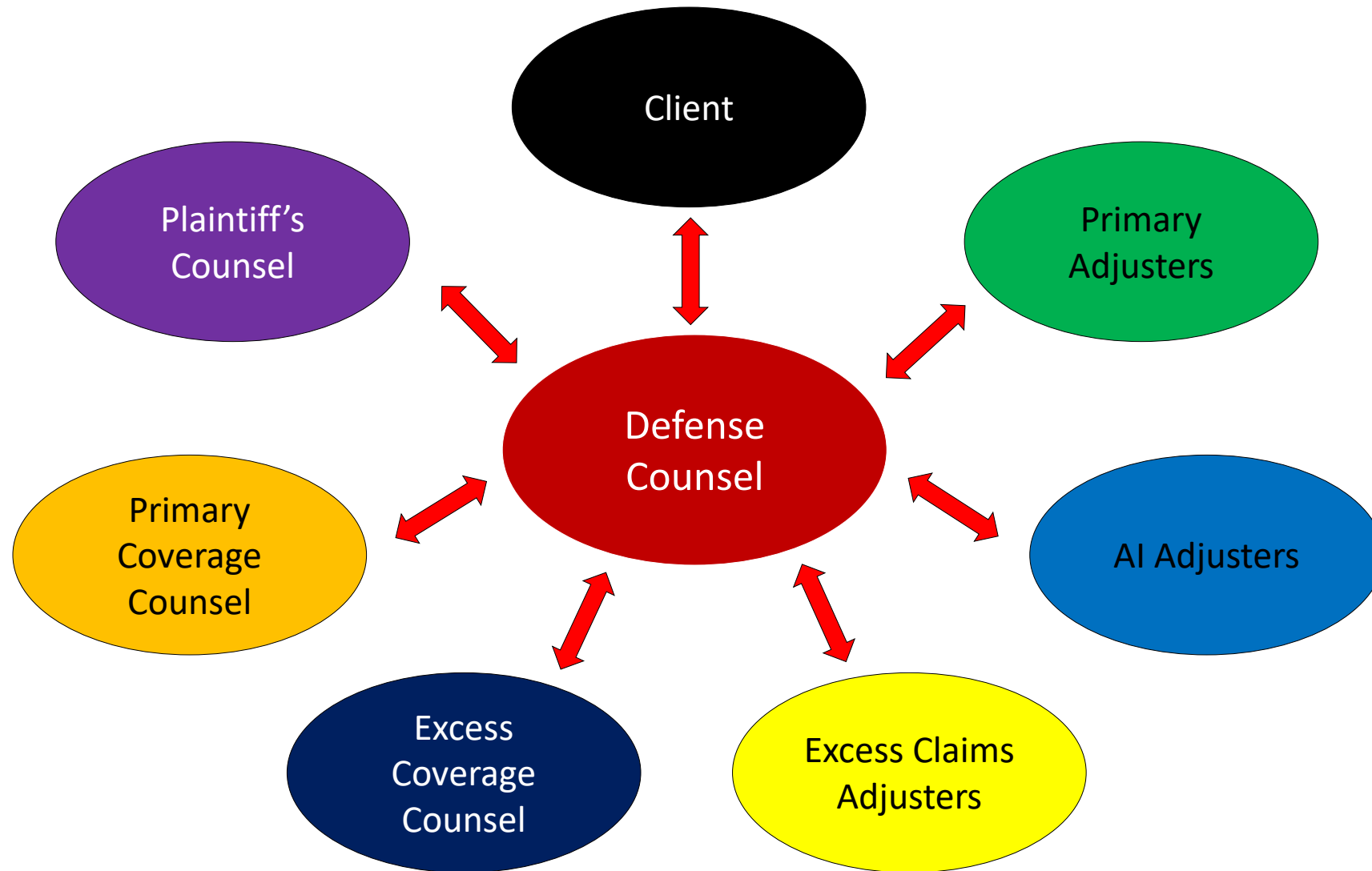
“Navigating a Hardening Insurance Market in Construction” Business Insurance

11/13/19

“Underwriters Get Picky” Insurance Journal 6/17/19



The Insurance Defense Attorney



YEAH WELL, THAT'S JUST YOUR OPINION, MAN



1) Are SIR's insurance?

2) Excess policies "the right but not the duty to defend"



SHAYA B. PAC, LLC v. WEMED

- 38 A.D.3d 24 (2d Dept. 2006)
- Underlying Labor Law § 240 claim w/ **\$6.5M** judgment

But then → Legal malpractice case v. defense counsel

Theory: failure ID & notify excess insurance

- AD held defendant's motion to dismiss properly denied
- Cited 200+ times



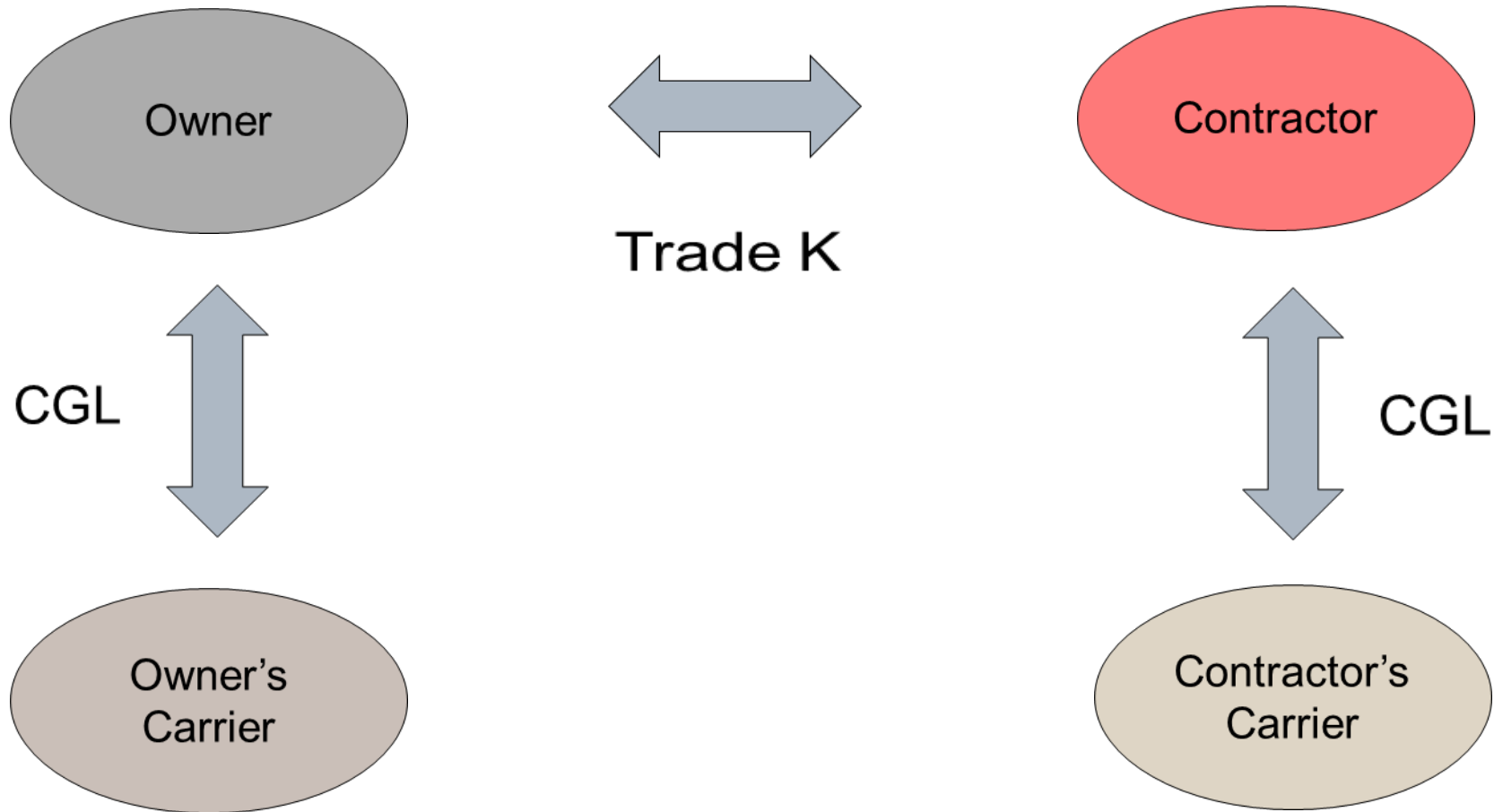
Maximize Coverage



The Broker



Basic Risk Transfer Construct



Audience Poll #2

- 1) I represent upstream parties more often?
- 2) I represent downstream parties more often?



Updates

- **Coverage & COVID 19**
- **Coverage for judgment interest**
- **Recoupment of attorney's fees**
- **When does exposure end? Statute of Repose**
- **Additional insured**



COVERAGE & COVID 19

- **National litigation trackers**
 - 10,000 +/- nationally**
 - 1500 +/- in NY & CA each**
 - 1700 +/- insurance**
- **Perspective: 3M civil cases filed in NYS in 2019**
- **Business interruption**



Judgment Interest Coverage

- *Jin Ming Chen v. Ins. Co. of the State of Pa.*, 36 N.Y.3d 133 (2020)
- Construction site injury
- Issue: coverage for pre & post-judgment interest
- Mind gap between primary and excess

ISO “SUPPLEMENTARY PAYMENTS - COVERAGES A and B” paragraph 1) g) wording including coverage for pre- and post- judgment interest – **All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court the part of the judgment that is in the applicable limits.**



Reservations of Rights

The duty to defend is greater than the duty to indemnify

In NY ...

- 1) allegations determine duty to defend whether true or not
- 2) extraneous evidence beyond pleadings can expand but not restrict coverage



Reservations of Rights

Allied World Assurance v. Aspen Specialty Inc., 3/9/21 (1st Dept.)

The fact that the **allegations** against the subcontractors were **debatable and later dismissed** by directed verdict is **irrelevant to whether the duty to defend arose at the time the complaint was tendered.**



Recoupment of Defense Costs

“Take back your insurance, baby nothing is guaranteed.”



Certain Underwriters at Lloyds v. Advance Transit Co., 188 A.D.3d 523 (1st Dept. 2020)

American Western Home Ins. Co. v. Gjonaj Realty Mgt. Co.,

192 A.D.3d 28 (2d Dept. 2020)



Statute of Repose?

- Bar causes of action from date of substantial completion
- Provides greater protection to contractors & designers than statutes of limitation
- Range from 4-14 years
- NY has none
- **A01706/S04127** introduced 1/21
- 10 year statute of repose



Statute of Repose?

“A Man’s Got to Know His Limitations”



AI v. CRT – Which is Better?

1) General Obligations Law – NY anti-indemnity statute

- “to the fullest extent permitted by law” *Brooks v. Judlau Contracting Inc.*, 11 N.Y.3d 204 (2008)
- attorneys fees

2) Swiss cheese downstream AI policy exclusions

- Total employee
- Labor Law/height

Horizontal exhaustion



Houston Cas. Co v. Prosight Specialty Ins. Co.

462 F. Supp. 3d 433 (USDC SD NY July 28, 2020)

- an insureds' right to DJ attorney fees effectively springs from the policy's coverage grant because ...
- an insurers' **duty to defend** extends to *any action* arising out of the occurrence including a defense against the insurer's coverage suit
- the **fortuity of who starts the DJ should not matter** for fee recovery if the litigated issue is the insurer's duty defend an insured in an underlying tort case.



Burlington

- interprets ISO 04 13 “caused by acts or omissions”
- named insured must have proximate caused the loss
- putative additional insured can be covered for up to 99% negligence
- cited 300 times in cases & commentary



Audience Poll #3

- 1) I have issued a response to an AI tender letter?
- 2) I have never issued a response to an AI tender letter?



COVERAGE

YOU KEEP USING THAT WORD

I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS

quickmeme.com



MORE INSURANCE ISSUES

Kinney claims

Horizontal exhaustion & priority of coverage

Subrogation, anti-subrogation & waiver of subrogation

Completed ops coverage

Certificates

Swiss cheese AI exclusions

Insurance procurement provisions

Client lack of cooperation

WC lien waivers

GL protective policies OCP's, SHP, RRP

Construction Defect

Cumis counsel



EVEN MORE INSURANCE ISSUES

Insurance Law 3420(d)

- Late notice & prejudice 2 years +
- Late disclaimer

Notice by AI

Priority and “other insurance” provisions

AI restricted to breadth and limits required by contract

Business risk exclusions j,k,l,m

Subcontractor exception to your work exclusion

CGL coverage grant “we will pay those sums the insured becomes legally obligated to pay because of BI & PD”

& consequential damages

Insured contract coverage



Audience Poll #4

I expect to be involved in ...

1) more coverage issues

2) less coverage issues

3) don't care, my legal malpractice is paid up



CHEERS



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Responsibilities

Julian is part of the Aon National Claims Leadership and has direct responsibility for the claims practice for the Greater New York Metro Region. His team of professionals advocate for clients on issues ranging from accurate reserving, proper resolution strategies, best practices, an expanded carrier view of coverage, to making clients better insureds and providing superior service throughout the claims and litigation processes.

Experience

Prior to joining Aon in September 2008, Julian was Claims Counsel for AIG's Construction Risk Division, after serving as a member of their in-house defense firm and in private practice for more than 16 years.

He is known for his "4Cs" approach to claims management – client service, communication, competency and compliance. He is also recognized for his unparalleled expertise in scaffold statute litigation having authored the Labor Law § 240 section in the New York State Bar Association treatise "Construction Site Personal Injury Litigation."

Julian has written for the *New York Law Journal's* Outside Counsel and Expert Commentary columns regularly for over 20 years. He has authored over 50 articles on insurance, coverage, tort liability trends and emerging issues in numerous trade, industry and law journals. He has been quoted in *Crain's New York Business*, *Claims Journal*, *ENR (Engineering News-Record)*, and *Business Insurance*.

Julian has presented at programs for the American Bar Association, New York State Bar Association, IRMI (International Risk Management Risk Institute), the Defense Research Institute (DRI), the Defense Association of New York (DANY), the Alpha Construction Conference, New York RIMS and for other many bar and trade associations.

He served as President the Defense Association of New York (DANY) from 2010 to 2011 for which he received the Defense Research Institute (DRI) Exceptional Performance Citation Award. He has also served on numerous committees of DRI.

Expertise

Julian brings key constituencies together to work towards successful resolutions. He is adept at negotiating claims disputes and developing proactive preemptive solutions leveraging internal resources. He is the author of numerous published opinions and articles, and is a frequent lecturer at legal and industry conferences.

Education

Julian graduated from Pace University School of Law and is licensed to practice in State and Federal Court, New York and Connecticut.

Last Updated [04.21]