

# **Hospitality Industry Insurance Litigation Update - 2009**

**The Hospitality Law Conference  
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Houston, TX**

# Presenters



- David E. Wood, Shareholder, Anderson Kill Wood & Bender, P.C.
- Devotes his practice to evaluating and enforcing business insurance claims and to handling litigation aimed at accessing insurance coverage
- Represents public and private companies
- Named one of the top 2007 Southern California lawyers by Law & Politics Magazine



- William F. "Chip" Merlin, Jr., President, Merlin Law Group
- Dedicated to always being an advocate for the policyholder
- Founder of 16-attorney firm that represents commercial, governmental, condominium, and residential policyholders
- Received an Honorable Mention in the LexisNexis Insurance Law Center Person of the Year 2008 - Policyholder Attorney of the Year

# Presenters



- James O. Eiler, partner of Kaiser, Swindells & Eiler
- Represents national and regional hotels, restaurants, resorts and other hospitality clients in operational, general liability and discrimination matters in trial
- Acts as attorney member of the Governmental and Legal Affairs Committee of the California Hotel & Lodging Association, as well as active in many hospitality law related associations
- Frequent presenter and speaker to industry organizations on hospitality law and litigation issues

# Disclaimer

The views expressed by the participants in this program are not those of the participants, employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

# First Party Claims

Is there Misrepresentation in the Application?

- *Illinois Casualty Company v. Toor's Inc.*, 2009 WL 1322873 (S.D. Ind. May 12, 2009)

# First Party Claims

## How is the Contract Interpreted?

- *Lundy Enterprises LLC v. Industrial Risk Insurers*, 2009 WL 2912420 (E.D. La. Sept. 8, 2009)
- *Iroquois on the Beach, Inc. v. General Star Indemnity Co.*, 550 F.3d 585 (6<sup>th</sup> Cir. 2008)
- *Copper Mountain Inc., v. Industrial Systems, Inc.*, 208 P.3d 692 (Colo. 2009)

# First Party Claims

Where is the venue?

- *I Santi Inc. d/b/a Luciano Ristorante Italiano v. Great American Insurance Co. of New York*, 2008 WL 4809432 (E.D. La. Oct. 31, 2008)

# First Party Claims

## Is there Bad Faith?

- *Mauna Kea Beach Hotel Corp. v. Affiliated FM Insurance Co.*, 2009 WL 1227850 (D. Hawaii May 1, 2009)
- *Cher-D, Inc. T/A Pine Knob Inn v. Great American Alliance Insurance Co.*, 2009 WL 1684690 (E.D. Pa. June 15, 2009)
- *General Electric Credit Union v. National Fire Ins. Of Hartford*, 2009 WL 3210348 (S.D. Ohio Sept. 30, 2009)



# Model Risk Manage Risk

Are there gaps between your policies?

- CGL: legal liability for BI/PD or PI/AI
- E&O: claim for economic loss
- What's in between?

# Model Risk Manage Risk

*Creative Hospitality Ventures v. U.S. Liab. Ins. Co.,*  
2009 WL 2993739 (S.D. Fla. Sept. 30, 2009) [claim  
under FACTA = PI under CGL policy]

*Nationwide Mut. Fire Ins. Co. v. Dillard Houses, Inc.,*  
2009 WL 2835203 (N.D. Ga. April 28, 2009) [insurer  
contended that most negligent acts ≠ occurrence"]

*Do risk modeling, seek advice early*


# Model Risk Manage Risk

Are there gaps within your policies?

- Know the key exclusions, such as:
  1. A&B: covered, self-insured?
  2. Bacteria & mold: foreseeable risks?

*Model risk, seek advice early*

# Model Risk Manage Risk

*Lancer Insurance Company v. Perez*, 2009 WL 3644018 (Tex. App. Nov. 4, 2009) [circulation  use]

*Nationwide v. Dillard*, 2009 WL 2835203 (N.D. Ga. April 28, 2009) [bacteria exclusion avoided]

*Union Ins. Co. v. Soleil Group Inc.*, No. 2:07-CV-3995-PMD (D. S.C. May 13, 2009) [bacteria exclusion avoided]

# Model Risk Manage Risk

*Acceptance Ind. Ins. Co. v. Yuddin*, 2009 WL 3756926 (S.D. Fla. Nov. 9, 2009) [continuing A&B]

*Clarendon American Ins. Co. v. Jai Thai Enterprises, LLC*, 625 F. Supp. 2d 1099 (W.D. Wash. June 4, 2009) [failure to comply with extra insurance provisions endangered but did not eliminate coverage]

# Model Risk Manage Risk

Is better policy language available?

- Does the policy unnecessarily restrict coverage?
- Just a few words can mean the difference between coverage and total exposure.

*Model risk, seek advice early*

# Model Risk Manage Risk

*Creative Hospitality Ventures v. U.S. Liab. Ins. Co.*,  
2009 WL 2993739 (S.D. Fla. Sept. 30, 2009) [claim  
under FACTA covered PI under CGL policy]

*BUT COMPARE:*

*Whole Enchilada, Inc. v. Travelers*, 581 F. Supp. 2d  
677 (W.D. Penn. Sept. 29, 2008) [claim under FACTA  
*not* covered PI under CGL policy]

# Model Risk Manage Risk

Watch for EPLI traps!

- Have you conducted a complete investigation of administrative claims?
- Who is really on the risk?

*Model risk, seek advice early*



# Model Risk Manage Risk

National Waste Associates, LLC v. Travelers 2008  
WL 2746021, (Conn. Super. 6/20/2008) [3 year old  
unemployment benefit hearing voided EPLI  
coverage in subsequent suit]

*Model risk, seek advice early*