International Franchise Association
Annual Legal Symposium
May 5-7, 2025
Grand Hyatt
Washington, DC.

Risks, Rewards, and Requirements: Insurance Essentials for Franchisors

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I. INTRODUCTION[1]

In today's evolving business landscape, insurance coverage has become a critical concern for franchise systems at both the franchisor and franchisee levels. The unique structure of franchising creates inherent risks that impact not only individual operators of franchise units but also the franchise system and brand as a whole. As the franchise model grows more complex, so do the insurance challenges that franchisors and franchisees must navigate. Advances in technology and regulations governing the use of those technologies (such as biometric data[2]), the COVID-19 pandemic, continuing natural disasters and weather events, and an increase in workplace violence are just a few examples of various issues that are driving enormous changes in the insurance industry. These changes are making it harder and more expensive to insure against risks that were fairly standard and affordable just a decade ago.

In addition, the ever-evolving regulatory and statutory landscape, whether it be violations of state pay transparency laws for the restaurant industry or allegations against hotel operators under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008[3] ("TVPRA"), mean that vicarious liability claims for franchisors continue to rise. Franchisors must ask: How can insurance requirements be structured to mitigate joint employer risks? What best practices should be implemented to protect against third-party claims? And, in an era of increasing cybersecurity breaches, is cyber insurance no longer optional but essential? If so, how can franchise systems navigate the expanding marketplace of cyber policies to ensure they are adequately protected?

Beyond these specific risks, many franchise systems struggle to develop system-wide insurance programs that fairly distribute risk between franchisors and franchisees. This paper explores how franchisors can craft and enforce insurance requirements that not only comply with evolving legal standards but also safeguard the long-term stability of their brand. By proactively reviewing, updating, and enforcing insurance policies, franchisors can strengthen their risk management strategies—ensuring better protection for themselves, their franchisees, and the future of their brand.

II. GENERAL GUIDELINES FOR DETERMINING APPROPRIATE INSURANCE COVERAGE

Before a system begins to evaluate coverage requirements for its franchisees, it is important for a franchisor to focus on obtaining its own sufficient coverage for the protection of the franchise system. The second step is determining proper coverage and limits for the franchise system's franchisees.

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[1] This paper represents the collective work of the authors. However, given the nature of the topic and its treatment, as well as the desire to analyze the topic in a unified paper, any particular views expressed herein do not necessarily represent the view of an individual author.

[2] For a summary of state enacted and proposed state legislation governing the collection and use of biometric data, see 2023 State Biometric Privacy Law Tracker | Husch Blackwell.

[3] 18 U.S.C. §§ 1591 et seq.

A. Conducting a Thorough Risk Analysis of the Industry.

Franchising is a unique business model that encompasses nearly every industry one could imagine. Therefore, a franchise system's insurance coverage needs will often be heavily driven by the industry in which its franchisees and corporate outlets operate. A franchise system must first analyze the industry in which it and its franchisees do business to thoroughly understand those exposures for which they are most at risk. It is critical that a franchisor take time to identify and understand the unique risks of the franchise system. For example:

1. Does the system work with children, like tutoring centers, daycares or schools?
2. Do employees use their automobiles or the vehicles of the company to conduct business tasks?
3. Is this a hotel brand where sexual trafficking is an unfortunate concern?
4. Does the business consist of food preparation or hiring many employees?
5. Do franchisees handle personal data from clients or patients?
6. Do franchisees go into customer's homes or provide personal services such as hair removal, massages or facials?

Insurance coverage is not a one-size-fits-all product. These are all diverse risks that can expose franchisees and, potentially the franchisor, if not insured properly. Taking this first step will also help pinpoint the franchisor's vicarious liability exposure. Moreover, identifying where franchisees have the greatest risk of claims (both in frequency and severity) is an important starting point to determining appropriate coverage for all. It is important to remember that this is not a "*set and forget*" prospect. The risk profile of a business is always evolving. Every year franchise brands should: (1) review their claims history; (2) research updated trade reports on new and common risks in their industry; and (3) remain in communications with their brokers.

B. Tailoring Coverage Requirements for the Franchisor and Franchisee.

The next step is to tailor coverage for the franchise system by improving insurance requirements to address those risks. As mentioned above, different types of policies are needed based upon the services and products provided by the franchisees. At the same point, over-insuring against any and all potential types of claims is ill-advised. Franchisees should understand and accept that the coverage required by the franchisor is necessary for the protection of their businesses and the system. Unnecessary or excessive coverage requirements can create distrust between a franchisor and its franchisees and give the appearance that the franchisor is trying to protect the system against unlikely or remote risks at the expense of the franchisee. Franchisors should attempt to find a middle ground, and they should work with an insurance broker to determine appropriate coverages and limits for the franchise system and required coverage for the franchisees.

There is no set formula for determining the coverage limits a business should carry. However, there are a variety of different criteria that a business should consider, such as (1) risk grades[4], (2) revenues, (3) number of employees, (4) minimum insurance requirements in leases, contracts, and terms and conditions, (5) fleet size, in the case of automobile coverage, and (6) strength of the balance sheet, among others. Reviewing these risk criteria, combined with the franchise risk tolerance, can help to ensure a franchise system and its franchisees are adequately protected.

A franchisee too must analyze what coverage may be needed for the franchise relationship and to comply with the franchise agreement, as well as determine generally the proper coverage necessary for the underlying business. Typically, the minimum insurance requirements in a franchise agreement are just a starting place. Additional insurance may be required or desirable to address landlord lease obligations and risk local to a geography or state. Keep in mind that not all franchise systems, especially those in the growth or emerging stage, put the time and detail into composing thoughtful and thorough insurance coverage minimums[5].

There are several general guidelines an insured should follow when evaluating an insurance policy:

1. Remember that it is unlikely that one insurance carrier will offer the same exact coverage to insure against the same risk for significantly less than a competitor. If you notice a large difference in premium quotes, then compare the coverage, policy language, deductibles, exclusions and sub-limits very closely. Be an informed consumer. You do not want to find out the franchise system or a franchisee lacks coverage after litigation or some other claim commences.

2. Read the full policy from start to finish. The policy will detail the definition of the named insured, key coverage provisions, and exclusions. For example, sometimes coverage that an insured assumes is part of the policy is actually excluded by the insurance carrier in an endorsement. Make sure that required or necessary coverage is not carved-out and excluded under the policy in a later endorsement attached to the front or back of the policy.

3. Do not be afraid to ask the insurance agent or broker questions about the policy and if you are not comfortable with the answer, then ask counsel versed in insurance matters to provide a coverage analysis.

4. Examine the definitions of "Named Insured" and/or "Covered Party" in each policy. Confirm that it includes all the necessary parties, such as independent contractors, part-time employees, temporary workers and volunteers? For

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[4] Also knowns as risk classifications or ratings classes, these are categories that insurers use to determine the premium for a policy based on the perceived risk of the policyholder or insured entity. These grades help insurers assess the likelihood and potential cost of a claim, influencing the premium rate.

[5] Gaps in minimum requirements are often found where franchisors or their counsel may simply "cut and paste" these insurance sections from competitor franchise documents or fail to properly modify and tailor a "form" used from different industries. For example, the authors have reviewed child-care franchise documents without requirements for sexual abuse or molestation, service concepts not requiring errors and omissions (professional liability), and food service franchise systems that fail to mention spoilage or contamination.

example, if your franchisees operate pre-school, does a covered party include substitute teachers, student interns and teachers aids?[6]

5. Always examine any described "business description" in the declarations page of each policy to be sure it adequately reflects the insured's operations. Often, and particularly in the case of franchise systems, it is not as comprehensive as necessary.[7]

III. DESCRIPTION OF STANDARD INSURANCE COVERAGES

A. <u>Commercial General Liability</u>

1. Coverage Description

A commercial general liability (CGL) policy provides insurance coverage for claims arising from bodily injury, property damage, personal and advertising injury, and can include coverage for products and completed operations. Virtually all franchisors and franchisees will maintain some form of CGL policy as it is the standard business coverage needed for both franchise systems and its franchisees.

Within CGL coverage, there is a wide range of additional covered perils that can be added to the policy including: *"Non-Owned Automobile".* Basic business automobile insurance typically only covers employees when the employee is driving or operating a company-owned vehicle to conduct company business. "Non-Owned Auto Liability" insurance protects a business if it is sued as a result of an auto accident involving a vehicle not owned by the business (for example, an automobile registered to an owner of the business personally or owned by an employee) if the driver was using the vehicle for company business. These situations occur where employees use their own vehicles to go the post office or bank or pick up supplies or lunch on the employer's behalf. It also could occur when an employer provides a car allowance to sales or other employees who use their personal vehicles to meet with customers or clients. Under these circumstances, the business could be held liable for damages. If an employee is involved in an auto accident while on the job and severely injures him or herself or another party, then a claim resulting from such an accident would trigger a business's non-owned auto coverage. Initially, the employee's personal automobile liability coverage would likely respond to such a claim. However, an injured party looking for deeper pockets (particularly in the case where the employee's automobile coverage has low limits), may sue the business under the theory that the employee was "on duty" at the time of the accident.

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[6] *See, e.g., Gantman v. United Pacific Ins. Co.*, 232 Cal. App. 3d 1560 (1991) (holding that individual members of a homeowners association in a planned residential development lacked standing to maintain an action against the insurance company because the policy was purchased by and issued to the homeowners association and the individual members were not insureds under the policy).

[7] *See, e.g. Westfield Ins. Co. v. Vanderberg*, 796 F. 3d 773 (7th Cir. 2015) (holding that the insurance policy only afforded coverage for construction-related business because the business designation and the general liability schedule contained in the insurance policy expressly and uniformly limited the scope of the insurance policies to construction related business, and, thus, the insurance company was not liable for damages arising from a yacht accident).

2. *General Common Exclusions*

Contrary to the name, though, "general" liability policies have many limitations of coverage. For example, almost all standard CGL policies also exclude coverage for (i) pollution; (ii) liquor liability; (iii) fraudulent and criminal acts; (iv) intellectual property infringement; and (v) "employment practices" claims such as harassment, discrimination, or wrongful termination claims. Too many franchise owners wrongly believe a CGL policy will cover any and all potential claims against their business and do not understand, until they have filed a claim, that they are not adequately covered under a standard CGL policy. Always review the exclusions to ensure coverage is not illusory. Standard exclusions may be acceptable for most businesses but not the franchise system for a particular franchisee. Most state courts interpret coverage under an insurance policy broadly to afford the greatest possible protection to the insured and interpret exclusions narrowly against the insurer.[8] However, insurance policy language is typically construed, like any other contract, according to its plain meaning, and a clear exclusion will preclude coverage in most cases.[9] Further, coverage disputes with carriers can quickly become time consuming and expensive for business owners.

3. *Coverage Disputes in Sex Trafficking Hotel Cases*

The recent proliferation of claims by victims of alleged sex trafficking rings in hotels and the corresponding potential liability to franchisee operators and the franchisor hotel brands[10] has created a large body of coverage disputes. For example, in *Starr Indemnity and Liability Company v. Choice Hotels International Inc.*[11], the United States District Court for the Southern District of New York decided that Starr Indemnity and Liability Company ("Starr") had a duty to defend franchisor, Choice Hotels International, Inc. ("Choice"), as an additional insured under one of its franchisee's policies, when it was sued for its alleged role in a human trafficking venture occurring at one of its hotel chains.

Starr issued a general commercial liability policy to a Quality Inn franchisee operating in Columbia, South Carolina. A complaint was filed against both the franchisee and Choice by a plaintiff alleging she was lured to the hotel where she was forcibly raped and then held captive for approximately three weeks. During the time she was trapped at the hotel, she was required to provide commercial sexual services by her traffickers. The plaintiff alleged that Choice violated the TVPRA, had a statutory obligation not to profit from the venture it should have known was illegal, and violated state law by facilitating sexual abuse. In support of these causes of action, the plaintiff alleged that (1) the foot traffic was "constant, voluminous and obvious", (2) her captures would book rooms for only one night, pay in cash and leave evidence of sexual

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[8] *See Waller v. Truck Ins. Exch., Inc.,* 11 Cal. 4th 1, 18 (1995); *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d (Pa. 1983); *Vill. of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d Cir.1995); *Nat'l Union Fire Ins. Co. of the State of Pa., Inc. v. Reno's Exec. Air, Inc.,* 100 Nev. 360, 365 (1984).

[9] *See Century Surety Co. v. Casino West*, 329 P. 3d 613, 616 (Sup. NV 2014); *Fisher v. State Farm Mutual Auto. Ins. Co.,*, 371 Mont. 147, 150-51 (2013) ("When interpreting an insurance contract, we accord the usual meaning to the terms and the words used, and we construe them using common sense."); *Guam Indus. Services, Inc. v. Zurich American Ins. Co.*, 787 F.3d 1001 (9th Cir. 2015) (stating that unambiguous insurance policy terms must be given their ordinary meaning).

[10] See, Davidson, Cliff, *The Trend Toward Franchisor Liability in Federal Sex Trafficking Cases*, THE FRANCHISE LAWYER, Vol. 27, No. 1 (Winter 2024).

[11] 2021 WL 2457107 (D.C. S.D. NY June 16, 2021).

activity in the rooms and (3) she was witnessed in the hotel with prominent and visible injuries. Based on the circumstances of her confinement, she argued that Choice should have known the circumstances of her confinement and acted in a willful blind way to protect its steady income stream from sex workers and traffickers.

Starr denied coverage and did not agree to participate in Choice's defense or indemnity in connection with the lawsuit based on an "Abuse and Molestation" Exclusion. The Abuse and Molestation Exclusion stated:

> *This insurance does not apply to "bodily injury," "property damage," or "personal or advertising injury" arising out of:*
>
> *1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured; or*
>
> *2. The negligent:*
>
> *a. Employment;*
>
> *b. Investigation;*
>
> *c. Supervision;*
>
> *d. Reporting to the proper authorities, or failure to report; or*
>
> *e. Retention;*
>
> *Of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.*

Starr argued that the plaintiff was in the "care" of the franchisee hotel at the time she was trafficked by "virtue of her presence on the premises [and] her status as a business invitee" and therefore, the claim fell within the Abuse and Molestation Exclusion under the policy. The court firmly rejected Starr's interpretation that the exclusion applied to any person owed a legal duty of care under the legal negligence theory calling it a "strained reading" of the exclusion. Instead, the "care, custody or control" phrase should be interpreted more narrowly to charge, supervision, management or responsibility for a person. When interpreting the word 'care' as it appears in the Abuse and Molestation Exclusion, the policy refers to "responsibility for or attention to safety and well-being" – not a general duty of care owed under negligence claims.

Starr urged the court to set a bright line rule that the exclusion should apply whenever a hotel guest suffers abuse or molestation on hotel premises. The causes of action asserted and the facts supporting the claims are similar to dozens of cases filed against hotels across the country in recent years so it is likely that Starr was hoping for a supportive coverage determination it could use in denying a duty to defend to the many hotel chains it likely underwrites insurance. However, the court thoroughly rejected the argument and concluded that Starr wrongfully disclaimed its duty to defend.

4. <u>*Coverage Disputes In Franchisee Misappropriation of Trade Secrets and Restrictive Covenant Violations*</u>

Often when a franchisee "goes rogue" or violates a franchise agreement – particularly with respect to post-termination obligations, a franchisor will be forced to sue in order to protect its goodwill, brand, and enforce its intellectual property rights. However, these can often amount to pyrrhic victories where the cost to defend the lawsuits exceeds any chance of recovery. This is especially true where insurance coverage proceeds will not be available due to common policy exclusions such as misappropriation of trade secrets, violations of confidentiality restrictions and non-competition provisions.

In the insurance coverage case of *Great American Insurance Company v. Beyond Gravity Media, Inc*[12]., Great American Insurance Company ("Great American") brought an action requesting a declaratory judgment that it had no obligation to defend or indemnify claims in an underlying lawsuit filed by a franchisor against a former franchisee. The court granted the motion and determined that Great American had no duty to defend or indemnify a former Code Ninja franchisee alleged to have misappropriated confidential information and trade secrets of the franchisor and violated restrictive covenants in the franchise agreement against competition because all of the wrongful conduct was excluded under the policy.

The insured secured a general commercial liability policy with Great American after entering into an agreement with the franchisor to open multiple Code Ninja franchise locations in California. A year later, the insured attempted to rescind the franchise agreements and Code Ninja responded by alleging that the franchisee created a competing education business under the brand "CoDojo" using its confidential and proprietary information gained through the franchisor's training program, annual conferences and other communications. The franchisor and franchisee eventually entered into a settlement agreement, but before doing so, Great American filed an action for a declaratory judgment contending that the policy does not cover the former franchisee's alleged wrongful conduct and breaches of the franchise agreement non-disclosure and restrictive covenant provisions.

First, the court determined that the franchisee's misappropriation of Code Ninja's branding to redirect students to his own competing schools and registering of an impermissible competing trademark (which it then used to advertise on social media) did constitute potential "Personal and Advertising" injury under the policy. However, the court determined that all of the following exclusions applied to the franchisee's conduct:

1. Knowing violation
2. Contractual liability
3. Infringement of intellectual property
4. Breach of contract
5. Unauthorized use
6. Access or disclosure of confidential information.

The majority of these exclusions are standard and commonly found in most general commercial liability policies. Unfortunately, this type of conduct by franchisees is not unusual after termination of a franchise relationship. Franchisors should be aware when pursuing lawsuits against franchisees that standard insurance policies are unlikely to cover these types of wrongful acts and insurance policy proceeds will not be available for any action to recover damages.

5. Exclusions Pertaining to New Biometric Protection State Laws

With new technology comes new laws to protect consumers from the misuse of those technologies. This is most recently true with respect to the collection of biometric data by businesses. Another newly evolving area of coverage disputes relates to claims for coverage for violations of state biometric data protection laws.

[12] 2021 WL 4192738 (S.D. TX Sept 15, 2021).

For example, in *American Family Mutual Insurance Company, S.I and Austin Mutual Insurance Company v. Carnagio Enterprises, Inc*.[13], a class action was brought against a McDonald's franchisee operating thirteen locations by its employees alleging violations of the Illinois Biometric Information Privacy Act ("BIPA"). According to the plaintiff, the franchisee required its employees to clock in and out of shifts using fingerprints, but did not provide any disclosures to the employees about its retention and destruction policies with respect to the biometric data it collected. The insurance carrier cited a number of exclusions in denying its duty to defend and indemnify which were systematically addressed by the court:

Employment Related Practices Exclusion

> "EPLI" exclusions cover claims of bodily injury or personal advertising injury related to a person arising out of any "1. Refusal to employ that person; 2. Termination of that person's employment; or 3. Employment related practices, policies acts or omissions, such as coercion, demotion, evaluation, reassignment, disciple, defamation, harassment, humiliation or discrimination directed at that person . . . ."

The court analyzed a split of legal authority determining whether this exclusion applies to BIPA claims. The court determined the alleged wrongful conduct did not fall within the scope of activities described in the exclusion and therefore, did not apply.

Distribution of Material in Violation of Statute

> This provision excluded "'Bodily injury", "property damage", or "personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate: (1) The Telephone Consumer Protection Act (TCPA), including any amendment or addition to such law; or (2) The CAN-SPAM [*3] Act of 2003, including any amendment of or addition to such law; or (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information."

Again, the court described a split of authority as to whether BIPA claims are similar enough to CAN-SPAM Act and TCPA claims to fall within the scope of the exclusion. Some courts previously determined the exclusion does cover BIPA claims since all of the statutes are intended to protect privacy rights. Other courts determined the BIPA is materially different since it regulates information that is given away. The court found the exclusion ambiguous and therefore, decided against the drafting insurance carrier.

Access Or Disclosure Of Confidential Or Personal Information And Data-related Liability

[13] No. 20 C 3665, 2022 BL 109861 (N.D. Ill. March 30, 2022).

> This provision excludes coverage for "(1) Damages, other than damages because of "personal and advertising injury", arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information, or any other type of nonpublic information, or (2) Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data."

The insurance carrier won its case on this exclusion. The court determined that the disclosure of the fingerprint data did clearly fall within this exclusion and the underlying class action was not covered under the policy.

B. Property

1. *Coverage Description*

Property insurance is first-party insurance that indemnifies the insured for the loss of physical property or the loss of its income-producing ability, when the damage or loss is caused by a covered peril such as a fire or explosion.[14] Commercial property insurance is designed to protect businesses from unanticipated disasters. Covered events typically include fire, windstorms, theft, or vandalism and the policies are structured to provide coverage for owned/leased buildings, appurtenances, fixtures, furniture, contents and stock including computers, furniture, inventory, equipment, signs and property in the insured's care custody and control. The declarations page will contain a "Schedule of Locations" where the insured will provide the addresses of each location insured under the policy.

Commercial Property Insurance programs are a critical coverage for any business owner, especially if the business has a lot of costly equipment. There are many different coverage options available and the structure of a program is critical in keeping costs manageable while ensuring businesses can recover from a disaster. There are two standard coverage forms that are used by most insurance companies:

> *Basic (Named Perils).* These policies cover only the incidents listed in the policy. This coverage form may be desirable where a business is in a high-risk area for a specific peril, such as a flood or an earthquake. Named perils coverage is usually less expensive because it covers only the specific events listed in the policy.

> *Special (All Risk).* These policies provide coverage for any incident unless it is specifically excluded in the policy. Typically, perils like fire, wind, smoke, theft, and vandalism are covered. This coverage protects businesses from the majority of risks they are most likely to face.

Be sure to read your policy and understand if you have a basic or special form. A franchisor should consider whether requiring "All Risk" property coverage is appropriate for its franchisee. Often franchisees are spread among various states and geographic regions. The

[14]Int'l Risk Management Inst., Inc., Glossary of Insurance and Risk Management Terms, Twelfth Ed., p. 228 (April 2012).

last decade has shown an increase in devastating weather-related losses due to snow, ice, hail, wind, drought, hurricanes and floods. If the franchise system has an approved supplier, then it should ensure that the coverage package negotiated and offered to franchisees does not erode coverage for certain weather conditions that may be prevalent in the area where a particular franchisee is located. Ideally, a commercial policy will be "all risk" and cover against the majority of all potential weather-related losses at the full value of the policy. Many policies, however, have limits for certain weather-related claims or exclude coverage altogether. For instance, insurance carriers that traditionally mandated wind and hail deductibles for coastal locations are now implementing these deductibles in policies nationwide.

Insurance companies have several possible methods of establishing the value of insured property to determine the amount the insurer will pay in the event of loss. From the franchisor's perspective using "replacement cost" is the best valuation method for assuring that the franchisee will have sufficient insurance proceeds to get the business back up and running, but it may also impose a higher premium. With replacement cost coverage, in the event of a loss, property would be based on the cost of buying the same piece of property, of similar kind or quality new. There is no deduction for depreciation.

Business Income & Extra Expense in the Property Policy (also known as Business Interruption): "BI", covers the loss of income, and other expenses, to a business should that business be forced to close, or relocate, for a period of time due to a covered loss. The intent of this coverage is to put the business back on the same financial footing as if no loss had occurred. The following are some of the expenses typically covered under a business interruption insurance policy: (i) loss of income/profits typically based upon prior year financial statements of the same time period; (ii) operating expenses such as rent, utilities and salaries; (iii) the cost to relocate to a temporary location; and (iv) "extra expenses" or those other reasonable expenses incurred by the business while the insured's property is being repaired, such as increased training costs if employees have to be trained on new equipment.

2. Common Property Exclusions

Here are some examples of commonly excluded perils:

(i) Flood;
(ii) Earthquake;
(iii) Mold;
(iv) Faulty Design/workmanship;
(v) Wear and tear; and
(vi) Pollution.

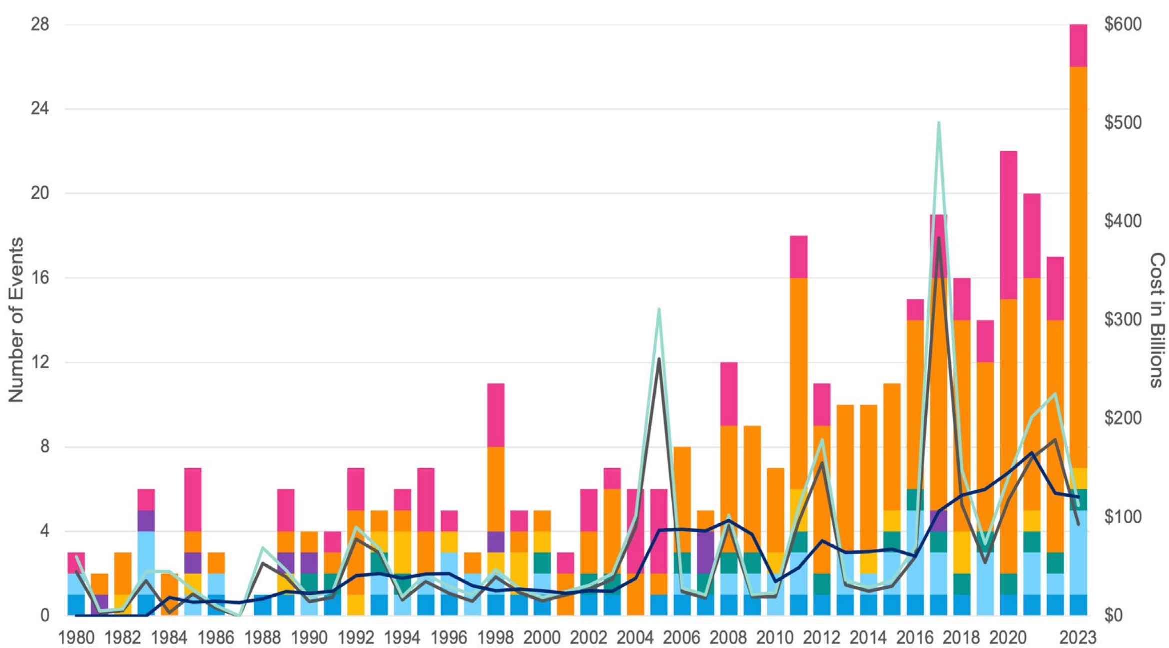
Under a property policy there must be a covered "cause of loss" causing sudden and accidental physical loss or damage in order to trigger Business Interruption/Loss of Income coverage. Typical perils, or "cause of loss" covered under a property policy include: fire, lightning, smoke, water damage (but not caused by a flood), sprinkler leakage, vandalism, falling objects, etc. Property policies typically exclude losses from virus/pandemics. During the COVID-19 pandemic for example, many businesses attempted to file loss of business income under their property policy only to find they didn't have coverage as most existing property/business interruption (BI) policies had exclusions for viruses or diseases and required physical damage to trigger coverage. A 2020 nationwide data call by state insurance regulators found that 83% of policies excluded viral contamination, virus, disease, or pandemic, and 98% required physical loss. Thus, these policies were not intended to cover COVID-19 claims. Since Covid, insurance carriers have updated policy language to include strict exclusions for any type of virus, disease and pandemic outbreak. Most likely, Property policies limit or exclude Named Storms, Flood, Earthquake, etc. Coverage for these perils, such as Flood, can often be purchased on a standalone basis as needed.

3. *<u>Market Trends in Property Insurance Coverage</u>*

The property market has just started to stabilize after six challenging and volatile years. These challenges have been driven by high-magnitude climate catastrophe losses, the enduring challenges on supply chains, fluctuations in the employment market, and rising inflation of building goods. These factors have banded together to create a perfect storm that threatens the sustainability of every property portfolio. It is not unusual to hear about franchisees operating under very thin margins in certain geographic regions getting “priced out” of property insurance coverage easily available twenty years ago.

These issues drive up the cost of owning and operating properties and significantly impact the cost of insuring them. This is due to higher reinsurance rates and a more prudent risk appetite from carriers. Commercial property rate increases have increased more than 10% per year over the past 6 years for companies with no loss experience. Those experiencing losses, or in threat zones, are experiencing higher rate increases. Insurance carriers are applying more strict named storm exclusions along with higher wind and hail deductibles across all areas of the country. The below chart highlights the number of billion dollar plus property disasters from 1980-2023. From 1980-2017 the average number of billion dollar plus weather related events averaged 7.8 per year. From 2018-2024 the average number of billion dollar weather related events is now 23.0 per year.

<u>U.S. Billion-Dollar Disaster Events 1980-2023 (CPI-Adjusted)</u>



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C. <u>Excess/Umbrella Coverage</u>

The terms "excess policy" and "umbrella policy" are often used interchangeably but there are differences. An "excess policy" is a policy "issued to provide limits in excess of an underlying liability policy which can be, and often is, an umbrella policy."[15] It is no broader than the underlying policy and its sole purpose is to provide additional limits of insurance.[16] Excess policies are "follow form" policies which means that they follow the underlying policy as to how the provision applies, including conditions and exclusions.[17] In other words, it will include and exclude the same perils as underlying policies. It will contain a standard "follow form" clause such as: "*it is agreed that this policy, except as herein stated, is subject to all conditions, agreements, and limitations of and shall follow the underlying policy*."

An umbrella policy is a type of excess policy and also provides additional coverages beyond the limits and scope of the underlying liability policy(ies).[18] However, an umbrella policy can be written over various primary liability policies, such as a general liability policy business automobile policy, watercraft and aircraft liability policies and employers' liability coverage, where an excess policy can only be applied to one underlying policy. Both excess and umbrella policies are designed to protect against catastrophic losses.[19] For example, multiple sexual molestation charges against a daycare employee or an incident that causes the death or serious injury of numerous customers. It is essential to recognize that not all coverages under a Commercial General Liability (CGL) policy are included in the Umbrella policy. Due to the specific nature of Sexual Abuse/Molestation (SAM) allegations, Umbrella policies often do not extend coverage beyond the underlying SAM limits. The exception to this occurs when the sexual abuse/molestation (SAM) coverage is issued as a standalone policy, in which case it is possible for the Umbrella policy to provide additional limits. In both scenarios, it is crucial to review your policy. Due to several high-profile sexual abuse incidents, the insurance market for this coverage has reduced significantly. With fewer insurance companies providing this coverage, it is essential for franchisees to implement stringent hiring, training, and safety protocols.

Franchisors should carefully consider what type of coverage would require an excess or umbrella policy. This is another area where the franchise agreement or operations manual may require coverage that is not possible or economical to secure or where the franchisee simply fails to secure it. For example, often franchisors will require an excess or umbrella to cover <u>all</u> franchisee insurance policies, however this may not be possible depending on whether a carrier will underwrite an excess or umbrella policy for cyber coverage, for example. In other cases, an umbrella or excess policy can be obtained to provide coverage for each of the required underlying policies, but the franchisee may inadvertently fail to ensure that the umbrella policy does so. It is always critical to closely examine the declarations page of an umbrella policy which contains the

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[15]Int'l Risk Management Inst., Inc., Glossary of Insurance and Risk Management Terms, Twelfth Ed., p. 113 (April 2012).

[16]*Id*.

[17]For further information on the use and interpretation of "follow form" clauses *see Coleman Co. v. California Union Ins. Co.,* 960 F.2d 1529 (10th Cir. 1992); *Commercial Union Ins. Co. v. Swiss Re Ins. Corp.*, 413 F.3d 121 (1st Cir. 2005); *Rockwell Automation, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 544 F.3d 752 (7th Cir. 2008).

[18]*Id.* at 286.

[19]*Id*.

"Schedule of Underlying Policies". If a policy is not listed on this schedule, then the umbrella policy will not provide excess limits. This is a very common area where the franchisee's coverage does not meet the franchise system's requirements or expectations, so franchisors should be extra diligent during audits or compliance checks.

D. <u>E&O/Professional Liability</u>

1. <u>Franchisee Coverage Description</u>

A standard errors and omissions or professional liability policy ("<u>E&O</u>") provides coverage against claims for alleged negligence in the performance of professional services. This form of coverage is particularly important for franchise businesses employing teachers, accountants, consultants, bookkeepers, individuals engaging in drug and alcohol testing, insurance agents, real estate brokers, engineers, physicians, technicians, travel agents and other professionals where the services, advice and work product an employee provides can cause financial harm to another party. Companies that perform professional services for others will at some time make mistakes—overlook a critical piece of information, misstate a fact, be misunderstood, forget to do something, provide improper or negligent treatments, misdiagnose, commit errors, or misplace something. They can be sued by their clients or customers over allegations such as: (i) negligence, (ii) malpractice, (iii) fraud; and (iv) violations of state and federal law (e.g., securities and right to privacy violations, etc.). These claims are not covered (and are usually expressly excluded) from a standard CGL policy. This is a common area where franchisors fail to require minimum adequate coverage for its' franchisees.

2. <u>Franchisor Coverage Description</u>

Where a franchisor operates company or affiliate owned "corporate" locations, the E&O coverage to insure against the business operations at the unit level will often mirror the franchisee's E&O coverage since both are engaged in the same line of business. However, a franchisor is engaged in the business of offering, selling, training and supporting franchisees. That is an entirely different business line. A franchisor's E&O coverage provides defense and indemnification coverage for alleged mistakes, exclusions or negligence in their professional services to their franchisees. The definition of "professional services" should state "*in performance of franchisor services*". Without clear "Franchise Services" coverage, claims by franchisees may be excluded on many different grounds. Coverage should be made as broad as possible through this definition to encompass the broad range of services, activities and areas of guidance franchisors provide to franchisees. Coverage should include:

(i) marketing and solicitation activities undertaken or engaged in by the franchisor in connection with the offer of sale of franchises pursuant to any franchise agreement or contract;

(ii) the preparation, registration, renewal and/or amendment of a franchise disclosure document ("FDD");

(iii) duties, obligations or other responsibilities of the franchisor to franchisees which render the franchisor liable to the franchisee, including a claim arising out of third-party claims against the franchisee, including, but not limited to the development of standards, specifications, and operating procedures for the franchisees prescribed by the franchisor or failure by the franchisor to monitor compliance with such standards, specifications and operating procedures;

(iv) failure to comply with any federal or state law or regulation or the terms of a franchise agreement or contract respecting the renewal or termination of the relationship of the parties to such agreement;

(v) rendering of services, training, advertising or other support to franchisees pursuant to the terms of a franchise agreement or contract or as disclosed to franchisees in an FDD; and

(vi) assistance in: (i) the selection of a franchise site; or (ii) negotiation of a lease for the premises of a franchise.

Note that underwriting standards may be higher for less mature systems that have not perfected a system support structure, implemented safeguards and administrative risk management process, and operate a proven brand. Typically, underwriters are going to review the FDD, and assess operations support and growth of the system. Recently, there has been an uptick in cases surrounding:

i. Franchise development that outpaces the franchisor's support infrastructure. The rise of franchise sales organizations ("FSO(s)") and a desire for emerging systems to look enticing to private equity investors, has created an environment where franchise systems prioritize selling a large number of units quickly to realize a liquidity event. Issues arise when the franchise system administration, operational, and training teams do not grow at the same pace. Disgruntled franchisees who fail to open on time, or at all, or are unsuccessful or unprofitable may allege a lack of sufficient support and negligence or wrongdoing on the part of the franchisor.

ii. Use of Brokers and Outsourced Sales Resources. More and more systems are outsourcing their franchise sales teams to third-party organizations, broker networks, FSOs, and consulting groups. These outside sales agents may not have the training or be subject to the same oversight as a traditional in-house sales teams. This had led to an uptick of claims in misrepresentations, fraud, or illegal financial performance representations (earnings claims).

iii. Geography and Territory Issues. Franchise systems locations do not all perform the same in the same geographic regions. If a franchisor does not take the time to conduct adequate due diligence before expanding into a new market on (1) potential increases in costs due to the local regulations or laws, shipping and availability of supplies, ingredients and products and general market costs; (2) desirability of the product and service offered within a new market; and (3) seasonality, among other factors, then it can give rise to claims when the franchisees are not successful. Further, the mapping and demographic diligence required to properly determine the most optimal territory size as to avoid cannibalization but ensure market penetration and profitability for franchisees requires time, attention, expertise and often pricey software. If a franchise system does not take the care to draw thoughtful and ideal descriptions of territory, it can create exposure for claims.

A franchisor should be cognizant of these new bases for claims, stay ahead of potential exposures and analyze in advance how a policy may address these claims.

3. *Common Exclusions in E&O Policies*

E&O policies typically contain a standard list of exclusions including (i) fraudulent and criminal acts, (ii) breach of contract or warranty, (iii) bodily injury or property damage, and (iv) liability assumed under contract. Franchisor's E&O policies also have strict directors and officers ("D&O") exclusions as these allegations should be addressed through a D&O policy.

Finally, sometimes a franchisor will receive a "demand letter" from a franchisee and agree to return the franchise fee to avoid the franchisee filing a formal complaint in arbitration or court. If the franchisor then attempts to submit the claim to its carrier, the insurer will likely deny a claim made after refund of the franchise fee or other settlement with a franchisee because an insurance policy is not going to cover business decisions. If a franchisor makes a business judgment to return franchisee fees without including the insurance carrier, then the refund or payment to the franchisee will not be a covered claim.

4. *The Impact of a "Claims Made" Policies on Coverage*

Most E&O policies are claims-made policies, not occurrence form. Claims-made policies provide coverage when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place.[20] The exception to this is that a "retroactive date" is applicable to a claims-made policy. In such instances, the wrongful act that gave rise to the claim must have taken place on or after the retroactive date. The retroactive date of a policy is typically the date that that particular underwriter began providing coverage or a negotiated specific date. A policyholder should attempt to obtain a retroactive/inception date as far back as possible. This is important as alleged wrongful acts that occur before the retroactive/inception date of the policy are not covered. Therefore, it is important for a business to get E&O coverage in place as quickly as possible, and/or negotiate a more favorable retroactive date.

Defense costs and expenses are often included in – and not in addition to - the policy limit. Since these costs can quickly erode the policy limits, a good practice is to negotiate policy terms to have defense costs outside the policy limits, when possible. E&O policies cover legal defense costs whether the claim is meritless or genuine. The cost to defend an E&O lawsuit (including attorneys' fees, filing fees, expert costs and related expenses), even a baseless lawsuit, can be extremely expensive. A business does not want to find itself in a situation where it eroded the limits of a policy on defending the lawsuit and has no remaining coverage to pay a settlement or damage award.

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[20] An occurrence policy, however, does not restrict the period during which the claim may be made. Coverage is triggered if the incident underlying the claim happens during the policy period, regardless of when the claim is actually asserted against the insured. California Practice Guide: Insurance Litigation, supra n. 4, Ch.7A, 7:38. *See A.C. Label Co. v. Transamerica Ins. Co.*, 48 Cal.App.4th 1188, 1192 (1996) (comparing "claims made" policies to "occurrence" policies); *Homestead Ins. Co. v. Amer. Empire Surplus Lines Ins. Co.*, 44 Cal.App.4th 1297, 1303 (1996) ("A 'claims made' policy is one whereby the carrier agrees to assume liability for any errors, including those made prior to the inception of the policy . . . [whereas] an 'occurrence policy' provides coverage for any acts or omissions that arise during the policy period[.]" (internal alterations and citations omitted)).

5. *The Insured vs. Insured Conundrum in E&O Policies*

The "insured vs. insured" exclusion in an errors and omissions (E&O) policy is a provision that typically excludes coverage for claims made by one insured party against another insured party under the same policy. This exclusion is designed to prevent conflicts of interest and potential fraud within the insured group.

In the context of a franchisor's E&O policy, this means that if a claim arises from a dispute between two parties who are both covered under the same policy (for example, franchisor and outside selling agent), the insurer will not provide coverage for that claim. The rationale behind this exclusion is to avoid situations where one insured might seek to benefit from the policy at the expense of another insured.

While coverage for independent contractors, outside sales brokers, area developers, and master franchisees can often be included in a well-structured franchisor E&O policy, it is crucial to understand the insured vs. insured clause, as it may exclude coverage when a claim arises. The best approach is to require all outside networks, area developers, area representatives, brokers, and master franchisors to have their own E&O insurance policies. Since E&O policies generally contain an insured vs. insured exclusion, each entity involved should maintain its own coverage. Finally, if a franchisor is using outside franchise development resources, then be sure to scrutinize all obligations regarding insurance and all indemnity and hold harmless provisions.

In the case of a franchisee providing professional services, adding the franchisor as Additional Insured on the Professional Liability does not constitute an insured versus insured scenario. Including the franchisor as an Additional Insured on the franchisee's Professional Liability policy extends coverage to the franchisor, allowing them to be defended against claims that arise from the franchisee's operations in which the franchisor is also named. In this case, a customer or third-party claim against both the franchisee and its franchisor as a properly added Additional Insured should both be covered under the franchisee's E&O policy. However, keep in mind that the franchisee's E&O policy would not then cover the franchisee if the franchisor asserts a separate claim against the franchisee for breaching the franchise agreement, causing lost profits, damage to the brand or goodwill or similar direct claims. That would trigger the insured vs. insured exclusion because it would be two parties covered under the same policy.

E. **Employment Practices Liability Insurance**

1. *Coverage Description*

Employment Practices Liability Insurance Coverage ("EPLI") provides protection for claims made by employees, applicants for employment and/or past employees against an employer for employment related matters. EPLI coverage is written to protect a business against damages for events relating to its workforce, including but not limited to; wrongful terminations, harassment, discrimination, defamation and unfair hiring/firing practices, among others. EPLI provide defense costs associated with responding to employment related lawsuits. Coverage is also structured to provide claims made by third parties (non-employees) for claims of harassment or discrimination. Both the franchisor and each franchisee should maintain adequate EPLI coverage if they employ any staff. EPLI policies can be modified to include a sublimit of coverage for specific risk areas, such as joint-employer claims and workplace violence.

We recommend franchisors require franchisees to include a $100,000 coverage sublimit for co-defense language for the franchisor in relation to any joint-employer claims. Workplace violence is a new coverage option that can be added as a sublimit to an EPLI policy, offering post-event expense coverage for services such as crisis counseling, legal defense, reputation management, and business interruption. However, there are limitations to the coverage provided under an EPLI policy as explained below.

2. *Exclusions*

Often these policies do not provide coverage for failing to comply with various statutes such as: (i) Workers' Compensation; (ii) Social Security; (iii) Unemployment Insurance; (iv) Disability Benefits; (v) National Labors Relations Act[21]; (vi) Fair Labor Standards Act[22] ("FLSA") (except the Equal Pay Act); (vii) Occupational Safety and Health Act ("OSHA")[23] or (viii) Consolidated Omnibus Budget Reconciliation Act ("COBRA")[24] Most EPLI policies exclude any coverage for such statutory claims. Typically, neither the franchisee nor the franchisor can insure against this risk. Insurance carriers today are not able to adequately cover this exposure. Claims under the FLSA and similar state laws (wage and hour claims) are becoming increasingly more common, especially in the hospitality industry. Some policies may provide a defense sublimit, typically in the range of $100,000, but there is no indemnity protection if the plaintiff prevails. A franchisor should carefully review a franchisee's EPLI coverage and insist upon a sublimit of wage and hour defense coverage, when possible. Some underwriters are providing defense and indemnity for wage and hour claims, but the retention (deductible) is often too large to warrant application in most cases. Other standard exclusions to EPLI policies include (i) punitive or exemplary damages; (ii) intentional conduct; (iii) fines or penalties imposed by law; and (iv) liability assumed under contract, among others.

F. Cyber Liability

1. *Coverage Description*

"Cyber liability" is a form of coverage that was developed with the proliferation of identity theft and data breaches. Unfortunately, as technology advances, criminals continue to create new ways to steal identities and information. Cyber liability coverage can protect both losses suffered by the franchisor and its franchisees, as well as losses suffered by customers or other third parties. Without sufficient coverage to protect against these potential losses, the costs to remedy a serious data breach, including hiring forensic advisors to determine the extent of a breach, notifying all possible affected customers under state law, and possible damage claims could put a franchisee out of business. There is not one single federal law that governs the collection, storage, use and disclosure of PII and the remediation obligations of a business in the event of a data breach. Instead, there is a patchwork of federal regulations that mandate certain practices depending on industry and the type of data collected. For franchisors, especially ones that operate in different states, it becomes critical to be aware of the laws they need to comply with based on their location and the location of customers they may provide services to. Factors

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[21] National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151-169 (2011).

[22] Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (2011).

[23] Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 et seq. (2011).

[24] Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §§ 1161-1168 (2011).

such as the types data they are collecting and how states govern the protection of data become important. There are currently 19 states with separate privacy laws and this number is likely to grow[25].

A franchisor's first question is typically whether the system needs cyber insurance coverage. The next question is whether cyber coverage should be a requirement for franchisees. The answer to both questions is typically yes. Each franchise system's data collection practices are unique. Often a franchisor will require a common Point-of-Sale system at the franchisee level that collects data at each individual unit location which is then accessible by the franchisor. This structure exposes both the franchisor and each franchisee to potential data breaches. Insurance coverage at both the franchisor and franchisee level is critical in protecting a franchise system.

A class action against Wendy's highlights the exposure a franchise system faces when multiple locations experience a breach.[26] In the *Wendy's* case, the plaintiffs allege that the franchisor failed to secure customers' credit card data and PII and did not provide timely notice to affected customers whose data was stolen.[27] The plaintiffs assert that Wendy's could have prevented the breach if it had implemented new technology and adopted stronger measures to protect the data. Wendy's is not the first franchise system that plaintiffs have tried to hold liable for the data breaches of one or more franchisees. In *Patterson v. Denny's Corp.*[28], a customer sued both a Denny's franchisee and national franchisor, Denny's, alleging that the franchisee printed the expiration date of his credit card on his receipt in violation of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA").[29] The court denied Denny's motion to dismiss, finding that the plaintiff's allegation that Denny's exercised actual control over the franchise operations was enough to state a vicarious liability claim under FACTA.[30]

Similarly, a franchisee's potential exposure to data breaches makes cyber liability coverage a necessary requirement. There are very few franchise systems where the franchisees do not collect at least some confidential information about customers, clients, business partners or employees.

There are two main components of a cyber-liability policy:

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[25] The following is a link to a US Privacy legislation Tracker: https://iapp.org/resources/article/us-state-privacy-legislation-tracker/

[26] *Torres v. The Wendy's Company*, Class Action Complaint, Case No. 6:16-cv-210-Orl-18DAB, 2016 WL 692741 (M.D. Fla. Feb. 8, 2016)(case currently pending).

[27] *Id.*

[28] Case No. 07-1161, 2008 WL 250552 (W.D. Pa. Jan. 30, 2008).

[29] 15 U.S.C. §§ 1681, et. seq.

[30] *Patterson v. Denny's Corp*, supra n. 37, at *2. *See also Keith v. Backyard Burgers of Nebraska, Inc.,* Case No. 8:11CV135, 2012 WL 1252965 * 2 (D. Ct. Neb. April 13, 2012)(denying the franchisor's, Backyard Burger's, motion for judgment on the pleadings, finding that the franchisor could be vicariously liable under FACTA if the franchisor exercised actual control over the business operations of the franchisee "particularly with respect to those involving point of sale processes, policies and procedures.").

THIRD PARTY LIABILITY: Third party coverage insures against claims by customers or other parties affected by a data breach.

FIRST PARTY EXPENSES: First party coverage includes a business's costs for: forensic investigations, notification requirements under state law, credit monitoring for those affected by a data breach, business interruption costs related to a data breach and consulting costs for crisis management and public relations.

Like with all coverages, the first step is always to assess what coverage is critical by evaluating the likely threats. For example, if a franchisor's franchisees collect a considerable quantity of credit card data, then coverage for PCI Fines and Penalties is critical. If data collected by franchisees is backed up and held by the franchisor, then significant data restoration coverage may not be necessary. Coverage requirements for franchisees should be carefully evaluated. While there is no one-size-fits-all when it comes to cyber minimums and coverage requirements for franchisees, form guidelines to be tailored to a franchise system are included and located in Appendix A.

Some cyber policies require an insured to utilize service providers from its own pre-approved list of vendors. This typically includes legal counsel and public relations firms. These approved service providers are often well-equipped in responding to data breaches, but it can come as a surprise to some franchise systems who are more comfortable with their trusted advisors.

2. *Exclusions*

Like all insurance policies, it is critical to carefully scrutinize all exclusions but there are a number of exclusions that merit particular evaluation. Many policies contain broad and open-ended exclusions for "failing to follow minimum required practices." This exclusion can eviscerate coverage. For example, in a case involving, CNA Financial Corp., the carrier sought a judicial ruling that it was not obligated to pay a $4.1 million settlement to a health care system because the insured failed to adhere to the "minimum required practices" it claimed it followed in its insurance application.[31] The complaint was eventually dismissed based on an arbitration clause but it is an indication of an insurance carrier's defenses to providing coverage to an insured under a cyber policy.[32] An insured should always attempt to get this exclusion removed or narrowly tailored.

A second common exclusion that an insured should attempt to negotiate is the exclusion for "War, Invasion or Insurrection." A covered party should request the underwriter carve-out "cyber-terrorism" from the typical blanket general exclusion for war, invasion or insurrection.

G. Workers' Compensation

Workers' compensation insurance is a type of insurance policy that provides financial and medical benefits to employees who are injured or become ill as a direct result of their job. It is designed to protect both employees and employers by covering costs related to workplace

[31] *Columbia Casualty Co v. Cottage Health System*, 2:15-cv-03432, 2015 WL 4497730 (C.D. Cal. July 17, 2015).

[32] Cyber-insurance: latest developments, Mendes & Mount LLP (Nov. 10, 2015) available at http://www.lexology.com/library/detail.aspx?g=693d7ffa-3258-4c0a-84bc-ed8518ff6f0b.

injuries, while also limiting the liability of employers by offering a form of immunity from most injury-related lawsuits. Workers' compensation policies typically provide coverage for: (1) medical expenses; (2) lost wages; (3) disability benefits; (4) vocational rehabilitation; and (5) death benefits. Franchisees can obtain this insurance through traditional private insurance carriers or state-funded insurance programs (where available in certain states). When a potential covered claim arises, the employee must report the injury or illness to their employer within a specified timeframe, usually a few days to a few weeks, depending on the state. The Franchisee is responsible for filing a workers' comp claim with their insurance provider, detailing the incident and supporting documentation. The employee may be required to undergo a medical evaluation by a doctor approved by the insurer. Once the injury and its work-related nature are confirmed, benefits are approved and disbursed. Then, depending on the injury, the employee may return to work in their original or a modified role, or receive ongoing support and benefits.

Each state has its own laws regarding: (1) whether coverage is required and (2) who must be covered. Franchisees must stay compliant with state-specific workers' compensation laws to avoid fines, lawsuits, or forced policy purchases by the state so it is imperative that any insurance requirements in a franchise agreement require compliance with applicable state laws. Additionally, accurate classification of employees is crucial. Independent contractors, freelancers, and interns may not be covered under workers' comp policies. Misclassification can result in denied claims or legal liability.

Franchisees operating in high-risk industries (for example, construction or manufacturing) typically face higher premiums. Strategies to control costs include regular safety training, updated equipment, and ergonomic assessments. Further, implementing structured return-to-work (RTW) programs can help reduce claim duration and costs. RTW programs provide transitional duties for injured workers, helping them remain productive and mentally engaged while recovering. A franchisee can help to prevent costs associated with fraud by having video surveillance in high-risk areas (where permitted) and internal audits and training.

There are some emerging trends in the market regarding workers' compensation insurance. For example:

1. <u>*Remote Work Risks*</u>: As remote and hybrid work continues to be more common in the marketplace, determining whether an injury occurred "on the job" has become more complicated.

2. <u>*Mental Health Claims*</u>: Some states now allow workers' comp claims for mental health conditions like PTSD, especially for first responders. Franchisees may need to expand their understanding of covered injuries.

3. <u>*COVID-19 Impacts*</u>: The pandemic brought increased focus on illness-related claims and created uncertainty around compensability for contagious diseases acquired in the workplace.

4. <u>*Technology Integration*</u>: Many insurers now offer digital claims management tools, wearables, and telehealth to improve injury reporting, treatment, and return-to-work tracking.

H. **Directors & Officers**

Directors and Officers ("D&O") insurance coverage is designed to protect the personal assets of corporate directors and officers as well as the organization itself against legal claims brought for alleged wrongful acts in their capacity as leaders of the company. These claims may stem from shareholders, employees, customers, vendors, competitors, or regulators, and can arise in both public and private organizations as well as nonprofit entities. D&O coverage typically covers claims arising from (1) breach of fiduciary duty; (2) mismanagement of company resources; (3) misrepresentation of company assets; (4) failure to comply with regulations or laws; and (5) shareholder lawsuits alleging misstatements or omissions. Like EPLI and E&O, these policies are most often claims-made. Coverage usually includes legal defense costs, settlements, and judgments, but may not cover fines, penalties, or cases involving fraud or intentional criminal conduct.

Franchise systems rarely require franchisees to carry D&O coverage, but it is commonly carried by franchise systems as an essential part of risk management, particularly as stakeholders increasingly hold executives accountable for the decisions they make on behalf of the franchisor. Usually, however, franchisee claims are excluded under the typical D&O form. When a claim by a franchisee does arise, a franchisor's broker can tender the claim to both D&O and E&O insurance carriers and await a coverage determination by the carrier to determine if the D&O policy excludes professional liability claims.

I. **Fiduciary**

Fiduciary liability insurance provides protection for claims made by plan participants (employees), the government, the Department of Labor, and similar parties for allegations relating to a franchisor's or franchisee's employee benefit plans subject to ERISA, such as improper advice or counsel, imprudent investment of assets or lack of investment diversity, imprudent choice of third party administrator, etc. Coverage is also provided for administrative errors relating to the plans. A fiduciary who breaches any of the responsibilities, obligations or duties imposed by ERISA may be personally liable to compensate the plan for any resulting losses.

J. **Active Assailant**

An active assailant insurance policy is a specialized form of insurance designed to cover financial losses and bodily injury resulting from a malicious physical attack, or threat thereof, by an armed individual or group, encompassing various weapons and scenarios. The policies are written to include coverage for:

- Property damage, business interruption, and extra expense coverage
- Crisis response
- Legal liability coverage
- Hostage crisis
- Loss of attraction and denial of access coverage
- Reimbursement for costs for public relations, medical services, counseling and/or psychiatric care, hiring of additional staff, and added security

Due to the unfortunate rising number of violent incidents at companies, the insurance industry has responded with standalone Active Assailant coverage offering coverage for property damage, business interruption, legal liability, and crisis response expenses.

K. Crime

Crime coverage protects a business against a broad range of fraud losses, including employee theft (i.e. embezzlement), as well as acts committed by individuals outside the organization, including forgery, funds transfer fraud and credit card fraud. Coverage can also be structured to provide coverage for claims resulting from your organization's employees stealing from a client or other third party (also known as Third Party Crime). This coverage is necessary if your franchisees are working at client locations or handling valuables. Third Party Crime Coverage can also alleviate the need for a Fidelity Bond as Crime Coverage is less restrictive than a bond.

L. Product Recall

Product recall insurance coverage is a type of insurance designed to protect businesses from the financial losses associated with recalling a product from the market. This coverage typically includes expenses related to the recall process, such as:

1. **Notification Costs**: Expenses incurred in notifying customers, retailers, and distributors about the recall.
2. **Return and Disposal Costs**: Costs associated with retrieving the recalled products from the market and disposing of them safely.
3. **Replacement Costs**: Expenses for replacing the recalled products with new or safe alternatives.
4. **Loss of Income**: Coverage for lost revenue due to the interruption of business operations caused by the recall.
5. **Legal Fees**: Costs related to legal defense or settlements arising from claims related to the recalled product.
6. **Public Relations Expenses**: Costs for managing public relations efforts to mitigate damage to the brand's reputation.

Product recall insurance is particularly important for manufacturers, distributors, and retailers of consumer goods, food products, pharmaceuticals, and other items where safety and compliance are critical. It helps businesses manage the financial impact of a recall, which can be significant and potentially devastating without proper coverage.

IV. ADDRESSING VICARIOUS LIABILITY AND JOINT EMPLOYER ISSUES

A. The Impact of Vicarious Liability and Joint-Employer Claims

There is little doubt that as franchising continues to expand and plaintiffs continue to hunt for deeper pockets, there is, and will continue to be, an increasing number of vicarious liability lawsuits against franchisors. Plaintiffs' attorneys are attempting to hold franchisors jointly responsible for claims arising at franchisee locations. Additionally, franchisors are being pulled into claims and lawsuits due to a franchisee's services and from joint-employer issues, through the acts of the franchisee's employees. Franchisors should be aware of vicarious liability claims, both common law claims, like negligence, and claims based on statutory violations.

B. Vicarious Liability Issues Facing Franchisors Today

Whether a franchisor can be found vicariously liable for the negligence or other wrong of a franchisee or franchisee employee is a fact-specific inquiry that hinges on whether the franchisor exerts sufficient authority and control over the franchisee to create an agency relationship. Paradoxically, this puts franchisors in a challenging position because they must exert enough control to protect the trademark and goodwill of the franchise while simultaneously ensuring they are not overstepping the boundary to subject themselves up to vicarious liability claims based on an agency theory.[33]

It is extremely difficult to predict the result of such an analysis. For example, the California Supreme Court addressed this issue in *Patterson v. Domino's Pizza LLC*.[34] In *Patterson*, plaintiff, a teenage girl and former Domino's employee, sued the franchisee and franchisor, claiming the franchisor was vicariously liable for her franchisee manager's alleged sexual abuse. The Court held that the franchisor was not vicariously liable for the wrongful sexual abuse by the franchisee employee because the franchisor did not retain sufficient control over the day-to-day operations of employment at the franchise. The Court stated: a franchisor "becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."[35]

However, in another more recent case also involving Domino's Pizza and the issue of vicarious liability in the franchise model, the court ruled against the franchisor[36]. In January of this year, the Pennsylvania Superior Court upheld a jury verdict that found Domino's Pizza vicariously liable for the negligence of a franchisee's delivery driver. The case arose out of an auto accident involving the plaintiff and a delivery driver of the franchisee. The court closely analyzed the degree of control that Domino's exercised over its franchisee, Robizza, Inc. Under Pennsylvania law, a franchisor may be held vicariously liable if it exerts a sufficient level of day-to-day control over a franchisee's operations. Domino's argued it was not subject to vicarious liability claims based on the actions of the franchisee's driver. Domino's specifically argued there was no evidence it had the right to control or exercised control over the day-to-day operations of the store. In support of this, Domino's argued that its personnel were only at the store three to five times per year, for an hour at a time and that its franchisee was solely responsible for all (1) employee hiring, training, and supervision; (2) overall store supervision; (3) payment of all bills, expenses, and taxes; and (4) setting of prices. Despite these facts, the court found, based on the totality of the evidence, Domino's mandates extended far beyond brand protection and quality assurance, effectively controlling essential aspects of store operations and employee management. Among the factors influencing the court's decision were Domino's extensive operational mandates, which included: (i) the intervals of store cleaning and acceptable location supplies; (ii) payment methods, lease terms, and store hours; (iii) computer processing speeds and financial record keeping; (iv) detailed employee regulations, such as facial hair length, jewelry restrictions, and training topics; (v) specific requirements for safe usage, vehicle conditions, and

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[33]*See, e.g.*, *Licari v. Best Western Int'l, Inc.*, Case No. 2:11-cv-603, 2013 WL 3716523 (D. Utah July 12, 2013) (denying summary judgment in favor of franchisor due to question over right to control where franchisor had right to inspect and issued detailed regulations to franchisee); *Braucher ex rel. Braucher v. Swagat Group, L.L.C.*, 702 F. Supp. 2d 1032 (C.D. Ill. 2010) (granting summary judgment in favor of hotel franchisor on apparent agency claim, in part, because the disclaimer on the plaque in the hotel lobby stated that the hotel was independently owned and operated, as did the hotel website).

[34]*Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 563 (2014).

[35]*Id*. at 497-98.

[36] *Coryell v. Morris,* 1977 EDA 202, 2023 WL 7381479 (Pa. Super. Ct. Nov. 8, 2023).

handling of customer complaints; (vi) strict control over promotional campaigns and discount offers; and (vii) requirements for uniforms, nametags, and employee behavior. The court emphasized that these and other mandates left the franchisee with "practically no discretion" in its day-to-day operations, thereby creating an agency relationship that justified imposing vicarious liability on Domino's. While Domino's did permit some level of autonomy to the franchisee, any such autonomy was required to be within the bounds of the specific mandates of Domino's.

A franchisor can also potentially be held vicariously liable for the statutory violations of a franchisee. For example, vicarious liability lawsuits can arise where there are violations of the ADA, the FLSA and other statutes prohibiting discrimination. Franchisors should also be aware of potential liability for violations of environmental statutes such as CERCLA and consumer protection statutes such as the Fair and Accurate Credit Transactions Act.[37]

Notably, a franchisor may not be vicariously liable for the franchisee's wrongful acts simply because the franchisor required the franchisee to maintain certain insurance. In *Hayman v. Ramada Inn, Inc.*,[38] the court rejected a plaintiff's claim that the franchisor was liable for her injury that occurred at the franchisee's location simply by virtue of the fact the franchisor required the franchisee to maintain insurance and name the franchisor as an additional insured on the policy. "We summarily reject plaintiff's further contention that by requiring Turnpike to maintain liability insurance naming defendant as an additional insured, and to indemnify defendant for this type of claim, defendant implicitly accepted responsibility and acknowledged liability for injuries on the premises. This type of indemnity contract concerns only the two parties thereto, is not germane to plaintiff's cause of action, and may not be used to establish defendant's liability."[39]

Vicarious liability claims against franchisors can and do extend to virtually every area of the franchise system operations, including:

- Auto & driving exposure of the franchisee and their employees[40]
- Bodily injury to a franchisee's customer, such as a slip and fall[41]
- Foodborne illness[42]

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[37]*See Keith v. Back Yard Burgers of Neb., Inc.*, Case No. 8:11CV135, 2012 WL 1252965 (D. Neb. Apr. 13, 2012) (denying franchisor's motion for judgment on the pleadings on Fair and Accurate Credit Transactions Act claim due to allegation that franchisor exercised control, particularly with respect to franchisee's point of sale processes); *Freidman v. Massage Envy Franchising, LLC*, Case No. 3:12-cv-02962-L-RBB, 2013 WL 3026641, at *4 (S.D. Cal. June 13, 2013) (granting franchisor's motion to dismiss plaintiffs' claims that franchisor was liable for franchisee's alleged Telephone Consumer Protection Act (TCPA) violations by sending out spam advertisements via text messages because plaintiffs had not sufficiently pled an agency relationship).

[38]*Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 279-80 (1987).

[39]*Id*. at 279-80.

[40] *Fant v. Beamteam, Inc.,* No. 2023-CA-0280-MR, 2024 WL 387729 (Ky. Ct. App. Feb. 2, 2024)(granting franchisor's motion for summary judgment where claimant alleging franchisor should be vicariously liable for injuries from a car accident). See also: Kelly v. Prohaska, No. CA 23-00529, 2024 WL 394410 (Sup. Ct. N.Y. Feb. 2, 2024); ***Durham v. Domino's Pizza, LLC,*** No. 2022-CA-1155-MR, 2024 WL 1122350 (Ky. Ct. App. Mar. 15, 2024).

[41] *Bellard v. ABC Insurance Co.,* No. 24-38, 2024 WL 3167456 (La. Ct. App. June 26, 2024)(granting trampoline park franchisor's motion for summary judgment in vicarious liability case for injuries sustained by customer).

[42] *Sentinel Insurance Co. v. VLM Foods, Inc.,* No. 19-cv-1395, 2021 WL 4513595 (E.D. Va. Oct. 1, 2021).

- Product liability, product recall
- Sexual Abuse/Molestation allegations[43]
- Data privacy/ransomware
- Customer policies[44]

The most recent string of cases involve the potential vicarious liability of hotel brands under the TVPRA where sex trafficking victims attempt to hold both the franchisor and hotel location liable.[45] The scope of vicarious liability claims is so broad that determining ways to reduce the risk is a key component of any franchisor's risk mitigation plan.

C. Risk Mitigation Methods of Protecting against Vicarious Liability Claims

There are a variety of methods franchisors may use to protect against vicarious liability claims or to reduce exposure when a claim is asserted. The following are recommend strategies to help reduce a franchisor's vicarious liability exposure from an insurance perspective.

1. *Write Proper Insurance Requirements*. Many Franchise Disclosure Documents (FDDs) lack clear insurance requirements for the system, often only stating that franchisees must obtain insurance acceptable to the franchisor. The FDD and Operations Manual should include specific, detailed, and tailored language regarding necessary coverages. Without this clarity, both franchisees and franchisors may face unnecessary risks.

2. *Track and Manage Compliance to these Requirements*. Clearly defined insurance requirements are essential, but maintaining compliance is equally important for both franchisors and franchisees.

3. *Manage the Insurance Program Centrally*. Engaging a specialized insurance broker with franchise industry expertise is as crucial as having a strategic supplier for other critical solutions. This centralized approach streamlines certificate management, ensures consistent coverage and communication, enhances market leverage, and provides competitive pricing tailored to the brand. Additionally, it improves claims handling and helps identify key trends, allowing for the development of solutions to mitigate future risks and claims.

D. Securing Insurance Coverage for Vicarious Liability Claims

Franchisors are significantly exposed to vicarious liability, and most insurance carriers typically do not cover this risk under standard Commercial General Liability policies due to its

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[43] *Massage Heights Franchising, LLC v. Hagman,* No. 12-22-00160-CV, 2023 WL 7029384 (Tex. Ct. App. 14th Dist. Oct. 26, 2023)(allocating 15% liability to Massage Heights Franchising in a vicarious liability case involving the sexual assault by a masseuse at a franchised location).

[44] *Brittian v. Extended Stay America,* No. 3:22-cv-663-MOC, 2024 WL 1841600 (W.D. N.C. April 26, 2024).

[45] *T.E. v. Wyndham Hotels & Resorts, Inc.*, No. 2:22-cv-3185, 2023 WL 5531441 (S.D. Ohio, August 28, 2023); *K.M. v. CPA Hotels of Atlanta, LLC,* No. 1:23-CV-190-TWT, 2023 WL 5747490 (N.D. Ga. Aug. 30, 2023); *B.D.G. v. Choice Hotels International, Inc*., 2:22-cv-3202, 2023 WL 5935646 (S.D. Ohio September 12, 2023); *B.J. v. G6 Hospitality,* 22-cv-03765-MMC, 2023 WL 6120682, (N.D. Cal. September 18, 2023).

unpredictability and lack of control. This leaves many franchisors vulnerable and without coverage. However, collaborating with an experienced franchise insurance broker and carrier can provide options for effectively structuring this coverage. We recommend the following tips:

1. *<u>Ensure the franchisor's insurance coverage is as broad as possible</u>*. Check your CGL policy for the following:

   - Designated premises endorsement: this limits coverage to only locations scheduled on the policy (i.e.: preventing Vicarious Liability at franchisee owned locations)
   - Thoroughly check the language on any EXCLUSION–DESIGNATED ACTIVITY, SERVICE OR WORK endorsement, the carrier could very well use this form to list "Operations of the franchisor" to exclude Vicarious Liability.
   - Be sure all entities used in the franchising operations are specifically listed on the policy.

2. *<u>Confirm the franchise system is added as an additional insured under the franchisee's policies where permitted by the insurance carriers</u>*. In the insurance context, many of the standard scenarios where vicarious liability may arise are CGL[46] claims and, thus, would be addressed through Additional Insured language in the franchisee's CGL policy. Additional Insured status will provide defense and indemnification coverage to the franchisor through the limits of the franchisee's CGL policy.

   Vicarious liability claims against a franchisor can also arise from services performed by franchisees. As mentioned above, the services performed by a franchisee can create E&O (professional liability) exposure. If, for example, the franchisee fails to perform those services adequately the client may also sue the franchisor for failing to monitor the franchisee and/or because the franchisee followed the franchisor's system. In this scenario, Additional Insured status will not provide defense and indemnity for the franchisor because the franchisor cannot be listed as an Additional Insured under a franchisee's E&O policy. This is a result of the standard "insured vs. insured" exclusion contained in a professional liability (E&O) policy.[47] This highlights the need for franchisors to require and monitor that franchisees are carrying adequate E&O insurance when they perform a professional service and to also indemnify the franchisor for these claims. If not, the burden of this exposure could fall on the franchisor.

3. *<u>Consider specific insurance for vicarious liability claims</u>*. Franchisor policies can also provide coverage for vicarious liability types claims in the third-party coverage policies and franchisors should consider obtaining

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[46] These include the typical slip and falls, auto accidents, foodborne illness and products liability.

[47] "The "insured vs. insured" exclusion (sometimes called the "interinsured suit" exclusion) eliminates coverage for suits brought by one insured against another, including the corporation, with the exception of shareholder derivative actions if commenced without the assistance or solicitation of any insured." California Practice Guide: Insurance Litigation, supra n. 4, Ch. 7F-C, 7:1684.

their own policies for this coverage. Some carriers will provide a small vicarious liability sub-limit under a franchisor E&O policy but subject to a sub-limit that typically will not exceed $250,000.[48] "But 'third party' claims involve one or more third persons seeking damages from the insured; and coverage analysis usually focuses on the insured's tort liability to the party seeking damages and whether that liability is covered under the policy in question."[49] Types of third party liability coverages include, among others, directors and officers liability, employment liability, professional liability (E&O) and workers' compensation liability. [50] These various types of third-party liability coverage may overlap with CGL insurance, but can help ensure there are no gaps in coverage.

E. <u>How to Address Risk and Insurance Structure in a Potentially Joint Employer World</u>

Vicarious liability claims are prevalent in the joint employer context as well.[51] The risks that come from the potential joint-employer exposures can affect franchisors across multiple lines of coverage. However, the biggest impact will most likely be felt in the EPLI and franchisor E&O insurance areas of coverage.

1. *<u>Franchisee EPLI and Joint Employer Liability</u>*

At the outset, it is more important than ever that franchisees carry EPLI insurance. This provides defense and indemnification coverage for employee and third-party claims for those types of allegations mentioned above. Increasingly, we recommend this coverage be listed as a necessary coverage on FDD insurance requirements, especially if the franchisees have a workforce in transition.

Bear in mind that "additional insured" status for the franchisor is not something that insurance carriers are adding to franchisee EPLI insurance policies. Doing so could expose the insurer to claims by franchisor employees under the franchisee's EPLI policy. As such, there is a potential coverage gap for the franchisor should the franchisor be named as a defendant in a franchisee's employment practices claim. Many carriers will, however, provide a defense sublimit on their policy for the franchisor should they be brought into a franchisee's EPLI claim. This is a very good starting point and one thing that should be added to a franchisee's insurance requirements. Historically, this defense sublimit was sufficient to remove the franchisor from the claim since the employee was not a franchisor employee, but whether this remains the case under the potentially expanded joint employer test remains to be seen.

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[48] FranchisorSuite,® Franchisor Malpractice Liability & Vicarious Liability Coverage Part (Form 00 MPL0104 00 09 15) providing coverage for losses arising out of any actions of a franchisee subject to a $250,000 sub-limit.

[49] California Practice Guide: Insurance Litigation, supra n. 4, ¶ 7:2.

[50] *Id*. at ¶ 7:3.

[51] *See, e.g*., *Myers v. Garfield & Johnson Enterprises, Inc*., 679 F. Supp. 2d 598, 607, (E.D. Pa. 2010) (denying franchisor's motion to dismiss claim for vicarious liability because the franchisee's employee made sufficient allegations to state a plausible joint employment claim).

Going forward, insurance carriers are monitoring the joint employer issue carefully to determine if and how their insurance policies should change to address this exposure. Since these policies are typically designed by evaluating years of established claim data, insurers are slowly and cautiously dipping their toes into the joint-employer pool.

With that said, there are a few carriers today that will provide a sublimit of coverage for the franchisor under the franchisee's EPLI policy for joint employer issues. These policies will carry certain exceptions (such as wage and hour claims) and/or cover only specified perils. While we do see a few carriers trying to proactively address this, there is trepidation on their part for full joint-employer coverage primarily because these employees are employed by the franchisee. Again, because insurance carriers are not certain where and how this issue will eventually settle, most are entering this arena cautiously because their potential exposure is large and there is no equitable way to price for it today. Those carriers that do provide some coverage for joint employer issues limit their exposure by offering a sub-limit of coverage under the franchisee's policy.

<u>For franchisors that mandate franchisees to obtain EPLI insurance, we highly recommend that the franchisee's EPLI policy includes a sub-limit of defense coverage, usually set at $100,000, specifically for the franchisor in relation to any joint employer claims.</u>

2. *<u>Franchisor EPLI and Joint Employer Liability</u>*

In most cases, franchisors should carry their own EPLI coverage as well. While franchisors will be arguing they are not the employer in many joint employer theory cases, it is good standard practice to retain coverage for any employee or third-party discrimination suits the franchisor may face. Additionally, it could provide a fallback if the courts determine the franchisor to be a joint employer.

However, the potential expanded joint employer liability could also have an impact on the ability for a franchisor to secure affordable and adequate EPLI coverage. One of the factors used to calculate EPLI premiums includes the insured's number of employees. The more employees of a business, the higher the premium will be for that business. It is possible that insurance carriers will increase the premiums for franchisors due to a potential increased risk of joint employer liability faced from employees of the system's franchisees. It is important for franchisors to discuss with their insurance advisors whether an EPLI policy at the franchisor level is advisable and if one is already in place, then whether the franchisor should secure additional limits. Some carriers may consider not providing coverage to franchisors with increased franchisee exposure altogether. A franchisor should not be surprised to face increased scrutiny from its EPLI underwriter. These additional questions may include:

(i) Whether contractual indemnity exists between the franchisor and franchisee?

(ii) Whether franchisees are located and conducting business in states where employees are considered solely employees of a franchisee by statute (such as Louisiana, Texas and Tennessee)?[52]

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[52] *See* La. Rev. Stat. 23:921(F)(2) (2015); S.B. 652, 84th Leg., Reg. Sess. (Tex. 2015). The full text of Texas S.B. 652 is available at http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/ SB00652F.pdf#navpanes=0; Tenn. Code Ann. § 50-1-208(a) (2015).

(iii) Has the franchise system ever conducted an audit to determine whether the franchisor is likely to be determined a joint employer?

3. *E&O and Joint Employer Liability*

As we described in Section I, the professional services definition we recommend for a franchisor's E&O policy typically states, "*in performance of franchisor services*." That is the role of a franchisor, and the definition is broad for a reason: to cover as many of the franchisor services as possible. We see the possibility of a joint-employer liability issue arising out of the performance of franchisor services if a franchisee's employee suffers harm as a result of the franchisee or the franchisee's employee following the guidelines set forth by the franchisor. Frankly, joint-employer claims have not been addressed through E&O in the past, however, the potential exists for them to impact this coverage if the claim is incurred as a result of an employee suffering harm and it is related to services performed, or not performed, by the franchisor.

V. FRANCHISE SYSTEM PROTECTIONS

A. Using An Approved Supplier

Franchisors can and often do use preferred vendors for various products and services, including insurance providers. One of the benefits of using an approved insurance supplier is the franchisor's ability to leverage the purchasing power of the entire franchise network to obtain better rates for each of the franchisees. Making available an approved insurance supplier can also help demonstrate that the franchise network is well organized and managed and supportive of the franchisees. It can further benefit each individual franchisee by eliminating time the franchisee would otherwise have to spend searching for an insurance company educating the insurer and negotiating rates. Additional advantages to using an approved insurance provider include:

(i) ease in managing and maintaining compliance with insurance requirements;

(ii) consistency of coverage across all franchisees. As mentioned earlier not all policies are created equal and gaps in one that expose the franchisee and franchisor to potential claims;

(iii) the ability to get tailored coverage unique to that franchise system. Each franchise model has their own unique risks inherent to their products/services and an approved supplier can negotiate better coverages and terms for the insurance program;

(iv) ease in tracking certificates of insurance endorsements and additional insured status;

(v) ease in implementing system-wide insurance requirement changes; and

(vi) monitoring losses throughout the system to assess overall profitability, identify claim trends, and implement training programs aimed at reducing future claims potential of having dedicated resources and personnel assigned to that franchise system.

Advances in technology have changed the way an approved supplier broker can facilitate coverage for a franchise system. Many brokers now have sophisticated software programs that allow franchisees to secure coverage through online portals that ensure franchisee's choices meet franchisor standards. It can simply and streamline the process.

Franchisors should communicate with the franchisees about selecting an insurance provider and should get feedback from the franchisees on the various providers they utilize. Both parties have an incentive to find the best insurance providers in order to protect the franchise system and the money they have each invested.

Whether a franchisor requires an approved supplier or whether franchisees are their own insurance provider, franchisors and franchisees should consider the following when evaluating and selecting an insurance agent or producer:

(i) The types of coverage and limits offered;

(ii) The policy premium and deductible;

(iii) The process for paying claims;

(iv) The reputation of the insurance provider;

(v) Whether the insurer is a specialist or has franchise experience;

(vi) How easy it is to get in touch with a "live" person and whether you will work with the same agent or various different agents; and

(vii) The ease or difficulty of signing up for insurance coverage.

Many franchisees may shop purely based on price. It is not unusual for a franchisee to use a family member or friend that may not have the expertise needed to place the particular tailored coverage needed to sufficiently protect the franchise operations. Therefore, it is important to educate franchisees as to why using the system's approved supplier benefits all parties.

B. <u>Additional Insured Status</u>

One of the most well-known and common protections a franchise system can have is the requirement that all of the system's franchisees add the franchisor and its affiliates, subsidiaries and their respective officers, directors, partners, members, employees and other named parties as "additional insureds" under the franchisee's insurance policies. Nearly all franchise systems mandate this in their form of franchise agreement. However, this is also one of the most confusing and often misunderstood areas of insurance law for practitioners. Even the most sophisticated and mature franchise systems often fail to address this issue adequately in their form franchise agreements.

1. <u>Certificate of Insurance vs. Additional Insured Endorsement</u>

Many franchise agreements only require a "Certificate of Insurance" as evidence of a franchisor's additional insured status and to verify the franchisee has all met all of the agreed upon insurance coverage requirements. Often a franchisor does not realize until after a claim that the insurance policies purporting to cover the claim were never properly endorsed to add the franchisor as an "additional insured".[53] A Certificate of Insurance is not an insurance policy. No rights of defense or indemnity are conferred upon the certificate holder just because a Certificate of Insurance has been provided naming them on it. Certificates of Insurance are often prepared by insurance brokers, producers or agents and are never dispositive for the purpose of confirming that a franchisor is an "additional insured" and a franchisor cannot rely on it in a dispute about coverage.

Worse are those franchise agreements which do not explicitly require that the franchisee name the franchisor as an additional insured *on the policy* and instead only require the franchisor is an additional insured *on a Certificate of Insurance*. The distinction is significant as courts have ruled that requiring a party to be named an additional insured *on a Certificate of Insurance* is not the same. For example, in *West Bend Mutual Insurance Company v. Athens Construction Company,* the Illinois Appellate Court ruled that a subcontract did not require the subcontractor to name the general contractor as an additional insured on the policy because the plain-meaning of the provision is that the subcontractor was an additional insured on the Certificate of Insurance.[54] The standard form of Certificate used in the insurance industry contains the following disclaimers and limiting language:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVE AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.
>
> IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement.

Courts uphold these disclaimers and "[w]here the certificate refers to the policy and expressly disclaims any coverage other than that contained in the policy itself, the policy governs the extent and terms of coverage."[55] An additional insured must always receive an endorsement to the policy from the franchisee clearly showing the franchisor as an additional insured. A specific request must be made by the insured franchisee to the insurance underwriter to add the franchisor as an Additional Named Insured to the insurance policy. That is, the existing insurance policy must be amended by the underwriter; whereupon, the additional named insured franchisor will have the same rights and responsibilities as the party named as the insured in the policy

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[53]A franchisor will also often discover after a claim that an undisclosed exclusion precludes coverage which is why it is critical to conduct regular audits where the full policies are reviewed and approved. See Section IV(G) herein.

[54] 2015 Ill. App. (1st) 140006 (2015).

[55] *Id*. at ¶ 28.

declarations. Otherwise, there is no guaranty that the franchisor holds "additional insured" status. Once the endorsement to the policy is issued, the franchisor entity has the same rights and responsibilities as the franchisee named as the Insured in the policy Declarations. Therefore, any form of franchise agreement used by a franchisor must require the franchisee provide both a Certificate of Insurance, as well as a copy of the endorsement to the policies. Our best practice suggestion is to have the insurance company provide blanket Additional Insured status as required by contract (in this case the Franchise Agreement).

2. *Choosing the Form of Additional Insured Endorsement*

Obtaining "additional insured" status is just the first step in protecting a franchise system. A franchisor should also always make sure it is requesting the broadest "form" of additional insured endorsement from its franchisees. The form should extend to negligence, errors and omissions of the franchisor and should not be limited to vicarious liability.

A franchisor should also verify that the form of franchise agreement does not inadvertently limit coverage. Many forms of franchise agreements require a certain dollar amount of insurance coverage. For example, a franchise agreement may say that a franchisee must have $1 million in general commercial liability coverage. Many additional insured endorsements limit coverage to the lesser of (i) the amount required by the franchise agreement or (ii) the policy limits. Make sure your form of franchise agreement speaks to these dollar coverage limits as minimums. If a franchisee is required to have a $1 million CGL policy but purchases a policy with a $2 million limit, then the additional insured endorsement may limit the franchisor to coverage up to the $1 million required under the franchise agreement or operations manual. By speaking to "minimum requirements" in a franchise agreement or operations manual, a franchisor can attempt to avoid losing access to the higher policy limit.

An Additional Insured, added by endorsement to a liability insurance policy, is considered an insured under that policy and therefore can enjoy the benefits of that policy. Typically, the coverage only applies to claims brought against the Additional Insured for liability created by the NAMED INSURED'S (in this case, the franchisee) act or failure to act. This means that the additional insured endorsement would not likely afford any coverage for a claim brought against the Additional Insured (franchisor) for its own act (or failure to act). In other words, negligence in granting a franchise is the franchisor's OWN ACT and would not be the coverage intention of an Additional Insured endorsement.

- CG2026: WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.
- CG2029: WHO IS AN INSURED (Section II) is amended to include as an insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability as grantor of a franchise to you.

CG2029 more clearly defines the relationship by which the Additional Insured status is awarded. These forms amend the "who is an insured" section of the insurance policy, thereby including the franchisor as an "insured" on the policy through the contractual requirement of their franchise agreement. It is typical and usual for a franchisor to be named in a bodily injury or property damage complaint resulting from a franchisee's location/operations. The CG2029 affords the franchisor Additional Insured status so that they may become an "insured" under the policy and gain indemnification through the franchisee's insurance policy because the franchisee's operations led to the franchisor receiving notice of suit and no other reason.

We suggest franchisors require franchisees to add a specific Additional Insured - Grantor of Franchise endorsement to their General Liability policy. Grantor of Franchise refers to the franchisor, the entity that grants the right to operate a business under a specific brand or system, and is added as an additional insured on the franchisee's policy, but only with respect to their liability as the franchisor. An "Additional Insured - Grantor of Franchise" endorsement modifies the Commercial General Liability (CGL) coverage to include the franchisor as an additional insured.

3. *Coverage Provided Under an Additional Insured Endorsement*

Finally, keep in mind that an additional insured endorsement is typically only available for general commercial liability coverage and automobile coverage. It is generally not available for EPLI, E&O and cyber insurance coverage. In almost all cases a franchise system will not be successful in obtaining coverage under its franchisees' EPLI, E&O and cyber policies. In cases where an underwriter is willing to add a franchisor as an additional insured, the result can be extremely cost-prohibitive for a franchisee. Therefore, it is critical that a franchise system's operations manual and franchise agreement require its franchisees to implement and have in place fulsome and current risk management policies to decrease the likelihood that a claim will arise requiring coverage in the first place.

4. *Options if Additional Insured Status Fails*

Despite a franchisor's best efforts, there are circumstances when it will discover that a franchisee failed to obtain or maintain an additional insured endorsement. In such a case, there are still options for finding coverage under a franchisee's policy. There may be defense under an "insured contract" provision of the franchisee's insurance policy. An "insured contract" provision in an insurance policy provides coverage for liability incurred when one promises to indemnify or hold harmless another[56] (i.e. a franchisee's promise to defend and indemnify the franchisor under the terms of the franchise agreement). If an insured (the franchisee) agrees to indemnify the franchisor for bodily injury or property damage, and the agreement is part of an "insured contract," then in most situations, the contractual liability insurance of the commercial liability policy will pay what the insured must pay because of the indemnity provision under the franchise agreement. Therefore, it is critical that the franchise agreement contain a separate hold harmless and indemnification provision. There are drawbacks to using the insured contract exception, so it is not a perfect substitute for a franchisor having additional insured status. First, defense costs are often treated as 'damages' under the policy and will erode limits. Second, since the franchisor is not an insured under the policy, the carrier is only obligated to provide defense – not indemnity.

5. *Additional Insured Provisions in the Franchise Agreement*

A franchise agreement's insurance section should always be drafted to include the following:

(i) A requirement that the franchisee name the franchisor and all of its affiliates and related parties as an "additional insured" under its

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[56] *Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008 (Alaska 1982).

general commercial liability and automobile policies, and where commercially reasonable, the franchisee's other insurance policies.

(ii) A requirement that the franchisee maintain such additional insured status for the franchisor throughout the entire term of the franchise agreement.

(iii) A separate indemnification and hold harmless provision.

C. A.M. Best Ratings

A.M. Best Ratings refer to the financial strength and size, including reserves, of the insurance carrier. If a franchisor allows a franchisee to shop its own policies, then it will almost always require the franchisee's coverage to be underwritten by an insurance carrier that is financially stable. Requiring that a franchisee's carrier maintain a high A.M. Best Rating is the easiest way to ensure that the underwriter will be able to pay losses incurred under a policy if and when the time comes.

The rating scale is between A+++ down to E. The letter signifies the financial strength of the company based upon a balance sheet and operational review and the second symbol is numeric and indicates the size of the insurance carrier. A suggested best practice is to primarily work with carriers with A.M. Best rating of A- or higher. A- rated carriers are considered to have an excellent ability to meet their ongoing insurance obligations.[57] Many franchisors will require a A+ or A++ rating concluding that an underwriter has a stronger financial rating, and the additional financial strength of the underwriter is an added advantage. However, keep in mind that higher rated carriers may charge higher premiums. If there is not much more of a risk for an A- rated carrier as there is for an A++ rated carrier but the premium is much higher, then allowing an A- carrier to underwrite a franchisee's policy should satisfy both the franchisor and franchisee.

D. No Waiver of Franchisee's Indemnity Obligations

Many franchise agreements contain an indemnification provision which requires the franchisee to defend and indemnify the franchisor for any of its wrongful acts including errors, omissions, and negligence in the franchisee's operations. The franchisor may consider seeking a broad indemnity from the franchisee that specifically encompasses items that may not be covered by insurance, such as attempting to address joint employer liability by seeking indemnity for claims arising out of or related to employees hired by the franchisee or claims asserting joint-employer liability.

The indemnity provision is often separate and apart from a provision requiring minimum franchisee insurance requirements. Franchisors should be careful to include a writing to the effect that the franchisee's obligation to obtain and maintain particular insurance coverage does not in any way limit or relieve the franchisee of liability under the separate indemnity provision. The franchisee's insurance procurement obligations are independent of, and separate from, any of the franchisee's indemnity obligations.

These provisions, although separate, work in tandem and ensure that the franchisee, the indemnifying party, has sufficient coverage to fulfill its separate obligation to defend and indemnify

[57] *See* http://www3.ambest.com/ratings/default.asp for an in-depth explanation of A.M. Best Credit Ratings.

the franchisor, if necessary. The franchise agreement should make clear that the franchisee's duty to acquire and maintain the specified insurance coverage does **not** relieve or limit the franchisee's separate obligation to fully defend and indemnify the franchisor under the separate indemnification provision. Below is sample non-waiver language:

> Franchisee's obligation to obtain and maintain the foregoing policy or policies in the amounts specified shall not be limited in any way by reason of any insurance that may be maintained by Franchisor, nor shall Franchisee's procurement of required insurance relieve it of liability under the indemnity provisions set forth herein. Franchisee's insurance procurement obligations under this Section are separate and independent of Franchisee's indemnity obligations.[58]

Although most franchise agreements require the franchisee to obtain commercial general liability insurance, this alone may not be sufficient to enable the franchisee to fulfill its separate duty to indemnify the franchisor. The majority of general liability policies exclude coverage for liability assumed under an agreement unless the contract is an "insured contract." In order to be able to fulfill the duty of indemnification, the franchise agreement should specify that the franchisee is required to include the franchisor as an "additional-insured" on the franchisee's insurance policy.[59]

Courts have found that these indemnification provisions are enforceable even where the agreement contains a separate provision dealing with insurance coverage.[60] This is because the provisions work together by ensuring that the franchisee's coverage is sufficient to indemnify the franchisor in the event that the need arises.[61] In *Mace*, a customer of the franchisee sued the franchisee and the franchisor after a franchisee's employee severely beat the customer with a baseball bat.[62] The Supreme Court of Pennsylvania held, under the clear terms of the franchise agreement that contained provisions requiring the franchisee to indemnify the franchisor and to maintain insurance coverage, the franchisor was not liable for the employee's actions and the

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[58]Rookes, Nierengarten, Imholte, American Bar Association, Forum on Franchising, Tort Trial and Insurance Practice Section and Center for Professional Development, *Practical Insurance Guidance For Franchisors*, (Dec. 16, 2015), http://www.americanbar.org/content/ dam/aba/multimedia/cle/materials/2015/12/ce1512pig.authcheckdam.pdf.

[59]*See Murray v. Wilbur Curtis Co.,* 189 A.D.2d 980, 980 (N.Y. App. Div. 1993) (holding franchisee had the duty to defend and indemnify the franchisor for vicarious liability claim because provision in franchise agreement required franchisee to name franchisor as an additional insured on the franchisee's general liability policy).

[60]*See, e.g.*, *Bassett v. Burger King Corp.*, Case No. 292433, 2010 WL 4259682 (Mich. Ct. App. Oct. 28, 2010) (holding franchisee breached the franchise agreement when, despite obtaining the insurance required under the agreement, it failed to defend and indemnify the franchisor as required by the "unambiguous contractual provisions" of the agreement).

[61]*See, e.g.*, *Mace v. Atlantic Refining Marketing Corp.*, 567 Pa. 71, 79-80 (2001) (upholding the "clear and unambiguous language" of the franchise agreement providing that the franchisee must defend and indemnify the franchisor "in all claims for personal injuries arising out of [the franchisee's] use, occupancy, custody or operation of [the franchise]."); *see also City and Borough of Juneau v. Alaska Elec. Light & Power Co.*, 622 P. 2d 954, 959-60 (Alaska 1981) (enforcing the indemnity provision in a franchise agreement that was "executed in good faith.").

[62]*Mace*, supra n. 84, at 75.

franchisee was responsible for paying the costs that the franchisor incurred in defending itself in the personal injury lawsuit.[63]

E. Disclaimers/Non-Waivers of Contract

A franchise agreement should always contain clauses with standard disclaimers, and these disclaimers can include insurance related items, such as:

(i) An acknowledgement by the franchisee that it understands that the franchisor is not warranting or representing that the insurance required by the franchise agreement will be sufficient;

(ii) An acknowledgment by the franchisee that the insurance requirements are for the protection of the franchisor; and

(iii) A reminder that the franchisee should consult with its own insurance producer/agent/broker and other advisors to determine the level of insurance protection it needs or desires in addition to that required by the franchisor.

A franchise agreement should also contain a provision stating that the franchisor's review and verification of certain elements of the franchisee's insurance does not in any way reduce or eliminate the franchisee's obligations to fully comply with all insurance requirements. It is the franchisee's sole obligation to fully comply with these requirements and it is the franchisee's sole obligation to confirm with its insurance providers that its policies are compliant.

General disclaimers may be enforced depending on the case and the jurisdiction, but the likelihood of enforcement greatly increases as the disclaimer is more specific and detailed. [64]

F. Franchise Agreement Drafting Tips

The insurance provisions in a franchise agreement should be thoroughly reviewed by counsel well-versed in coverage issues who understands the needs of the franchise system. Franchise systems, especially emerging growth systems, are sometimes inclined to borrow requirements from an established competitor or even cut and paste provisions from other franchise agreements. Insurance provisions are not "boilerplate" and must be sufficiently tailored to a franchise system, however, there are some general drafting tips that work for any franchise system.

Often a franchise agreement form does not provide enough flexibility to change coverage requirements. Franchise agreements should always include a provision that coverage requirements can be increased or decreased upon the franchisor's prior notice as set forth in the operations manual or other writing. Surprisingly, many franchise agreements outline detailed requirements and coverage limits but do not specifically provide that the franchisor can change

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[63] *Id.* at 77.

[64] *See, e.g., Sherman v. Ben & Jerry's Franchising, Inc.*, Case No. 1:08-CV-207, 2009 WL 2462539, *4 (D. Vt. Aug. 10, 2009) (where the franchise agreement disclaimed any representations about earnings, the court dismissed the franchisee's fraudulent inducement claim); *JM Vidal, Inc. v. Texdis USA, Inc.*, 764 F. Supp. 2d 599 (S.D.N.Y. 2011) (specific disclaimer can bar fraud claim).

these standards as it deems necessary during the franchise term. Remember that risk exposure will change over time and new products will come on the market. Insurance coverage requirements are not static.

Second, designate when the franchisee must purchase the insurance. It is within a certain time period of signing the franchise agreement, obtaining a certificate of occupancy or a certain time period before commencing business.

Third, consider what happens after the franchise term ends. A franchise agreement often requires the franchisee maintain insurance only during the term of the franchise agreement. Professional liability policies and certain other policies are typically "claims made," not "occurrence" based. To protect against claims brought after the franchise agreement terminates or expires under claims made policies, the franchise agreement should require the franchise maintain insurance during the term and for such period after as necessary to provide coverage required for events occurring during the term of the franchise agreement.

When the agreement is terminated, are there any options that can be added to existing insurance policies to extend the coverage? Generally, the answer is yes. General liability insurance policies customarily provide provisions which allow for either (a) extended reporting; or (b) tail coverage. Commonly, extended reporting is referred to as an "extended discovery period." An extended discovery period is a designated period of time after the policy has expired. The purpose is to allow the insured to report claims that are made against the policy after the expiration date. The policy limits, occurrence and aggregate limit caps remain the same. The designation "tail" gets its name because the coverage applies as the end of the policy period. Generally in the professional liability or general liability context, a claims made policy provides for the purchase of a "tail" prior to the expiration or cancellation of the policy and covers occurrences, acts or omissions committed on or after the policy expiration date. The policy itself will set forth a formula as to how a premium is calculated depending upon the length of time for which the tail is purchased.

Also, consider requiring that franchisees not just purchase additional insurance as may be required by the franchisor or landlord from time to time, but also by any other third party agreement if there are any franchisor-required vendors/suppliers or partnerships where contracts have insurance coverage requirements.

An annotated sample insurance provision is included and attached as Appendix A.

G. Proof of Insurance and Conducting Audits

Another major issue is lack of compliance by franchisees to comply with stated insurance requirements in the franchise agreement and the subsequent failure of the franchisors to detect such noncompliance. Often, a franchisee's policy will exclude particular coverage required by the franchise agreement or have much lower limits than those actually required. No matter how comprehensive and specific the insurance requirements are in a franchise agreement, they are useless if not enforced by the franchisor.

Maintaining compliance to system insurance requirements is a vital step in helping to reduce the risk and cost of vicarious liability. It will provide a level of confidence that your franchisees will have the coverage they need at time of a loss. Establishing proper risk prevention procedures to avoid claims is always the first line of defense but ensuring that both the franchise system and its franchisees maintain sufficient insurance to protect against potential losses is a critical component of any risk management plan.

All franchisors should consider conducting insurance audits as part of their other audits such as royalty or service audits, so as not to cause an undue burden, but still allow monitoring of important insurance requirements. Franchisors are in a unique position because although they do (or should) have limited control over the franchisee operations, the franchisor is still exposed to the risks coming from the various franchisee operations. With those risks in mind, the audits should ensure not only that the franchisees have the minimum amount of coverage required by the franchise agreement but also that the terms and conditions of the coverage are sufficient to protect the franchisor. A single review of a certificate of insurance, policy number, policy period, or insurance carrier is likely insufficient because it does not guarantee that the franchisee has the right amount or correct type of coverage.

Because of the high risks associated with a franchisee's non-compliance with the insurance requirements, franchisors should have the audit conducted by someone who understands insurance policies and can cross check the system's coverage with each of the franchisee's coverage for the purpose of confirming the coverage meets the system's minimum requirements. This review should focus also on the specific terms and conditions of the additional-insured policy as it relates to franchisor protection. If a franchisee is a multi-unit owner, then make sure the per unit insurance minimums are not being shared among the locations. Often, when conducting an audit, a system will discover that a multi-unit owner does maintain a CGL policy with a required $2 million limit but it is shared among multiple franchise locations. Franchisors should also pay special attention to franchisees that are making late royalty payments as this could also indicate a lapse of insurance coverage due to non-payment of the insurance premium. [65]

VI. UNDERSTANDING ALTERNATIVE INSURANCE OPTIONS

A. Unlicensed Insurers/Surplus Lines Unadmitted Carriers

Surplus lines carriers can be a solution to coverage that is difficult to find and/or unique in nature. These carriers, many of them London based, can provide pricing and coverage flexibility that standard markets sometimes cannot. There are also risks to getting insurance through the surplus lines market. They are not covered by State Property and Casualty Insurance Guaranty Association. Most states have "guaranty funds" to help pay the claims of financially impaired insurance companies. Guaranty funds are administered by a state to protect policy holders in the event that an insurance company defaults on benefit payments or becomes insolvent, however, guaranty funds only protect beneficiaries of insurance companies that are licensed to sell insurance products in that state. State laws specify the lines of insurance covered by these funds and the dollar limits payable. The result of a carrier not being licensed by a state means that if the insurer becomes insolvent then the ability to obtain indemnity and defense under the policy may diminish. The consequence is that if the insurer becomes insolvent and incapable of paying claims, the insured cannot rely on recovering any monies from the state guaranty fund.

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[65] Janice M. Dwyer, *Ensuring Good Franchise Relations*, International Franchise Association, Franchising World (June 2007), http://www.franchise.org/ensuring-good-franchise-relations.

B. Risk Purchasing Groups; Risk Retention Groups; and Captives

Franchisors and franchisees, like any business, are always searching for ways to reduce costs and expenses. There are three distinct insurance risk management vehicles that clients will often want to explore with counsel as potential alternative ways to manage and insure against risk at a reduced cost. These are: (1) Risk Retention Groups (or "RRG"); (2) Risk Purchasing Groups (or "RPG"); and (3) captives. From time to time a franchise system will approach its counsel asking whether one of these options is right for its system or its franchisees. Whether the answer is yes depends on a number of different factors.

A Risk Retention Group or "RRG" is a group self-insurance plan and an alternative risk transfer entity formed as a liability insurance company under the laws of at least one state, in which the policyholders of the RRG are also its owners,[66] thus being exposed to the same types of liability.[67] A RRG operates under the auspices of the federal Risk Retention Act of 1986[68] that authorizes the formation of group self-insurance programs but requires that membership of a RRG be limited to organizations or persons engaged in similar businesses or activities.[69] RRG's self-funded groups that take on a certain amount of the risk themselves. By retaining a level of the risk themselves often RRG's can get lower rates, broader coverage and access to reinsurance markets. Benefits of RRG's include (1) program control; (2) long-term rate stability; (3) customized loss control and risk management practices; (4) dividends for good loss experience; (5) access to reinsurance markets; and (6) generally lower premiums. Some disadvantages of RRGs include (1) that there is no state guaranty fund availability for members; (2) the contract is between the insurance carrier and the RRG instead of individual members; (3) an RRG may not be able to comply with proof of financial responsibility laws; (4) an RRG is not protected from insolvency; and (5) limits are shared and may be depleted based on quantity of claims.

A Risk Purchasing Group or "RPG" is a legal entity that allows a group of unassociated businesses with similar risk profiles to join together to take advantage of a joint insurance purchase.[70] Like an RRG, an RPG is a product of the federal Risk Retention Act of 1986 and formed in compliance with state law.[71] This usually permits the group to gather purchasing strength to buy insurance at a cost savings with broadened coverage. They are just insurance customers who "pool" together to purchase their coverage from an insurance company. Because franchisees operate the same business, they can be good candidates to form an RPG. One circumstance in which an RPG can be very beneficial is in the employee health insurance

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[66]The National Association of Insurance Commissioner's Risk Retention and Purchasing Group Handbook (2013), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjDrc7cpPjNAhUEWD4KHR6DsUQFgghMAA&url=http%3A%2F%2Fwww.naic.org%2Fdocuments%2Fprod_serv_legal_ris_bb.pdf&usg=AFQjCNGvQG_M9QqOxmrAd3igXiEPX7nX7w [PDF] is an excellent in-depth resource for practitioners desiring further information on these vehicles.

[67]Int'l Risk Management Inst., Inc., Glossary of Insurance and Risk Management Terms, Twelfth Ed. (April 2012).

[68]15 U.S.C. § 3901 et. seq.

[69]*Id*.

[70]*Supra* note 81, at 250.

[71]15 U.S.C. § 3901 et. seq.

coverage context. Franchisees can work together to form an RPG and combine risks pools to receive better rates.

The main contrast between an RRG and an RPG is that in an RPG a group of insureds engaged in similar businesses or activities purchase insurance coverage from a commercial insurer, whereas an RRG bears the group's risks rather than obtaining coverage on behalf of group members. Thus, under an RPG, individual members may have their own liability limits through a common commercial insurance carrier. In contrast, under an RRG, there are shared liability limits and the group as a whole bears the risk of liability.

Captives are similar to RRGs and are more commonly used today. A captive insurance company is a type of insurance company that's established and owned by a business or group of businesses to insure their own risks, rather than relying on traditional commercial insurance companies. A captive is a self-insurance mechanism that allows organizations to manage their own risks while retaining control over their insurance needs. Captive insurance companies are still regulated by state insurance regulators, and they must meet certain financial and solvency requirements.

There are two main types of Captives:

- **Single-Parent Captives**: These are owned by one organization and provide coverage exclusively for that organization's risks.
- **Group Captives**: These are formed by multiple organizations that come together to share risks and costs. They can provide coverage for similar risks across the group.

Benefits of implementing a captive include potential cost savings on premiums, greater flexibility in coverage options, improved cash flow management, the ability to tailor insurance programs to specific risks, and members share in any underwriting and investment profit.

Some of the risks associated with setting up a captive include the upfront capital requirement, initial setup costs, operational burden, limited risk diversification and establishing and maintaining consistent risk practices across the franchise system.

A franchisor or group of franchisees should contact a broker and counsel with experience in overseeing the formation of these vehicles. The challenge is these options often sound better on paper than they are in practice. A few of the major challenges with these types of risk insurance groups are:

(i) Risk management and reduction strategies are very important & required to keep and maintain profitability;

(ii) Getting all franchisees onboard with a structure and to agree can be extremely challenging; for example, franchisees would need to share 5 years of their individual loss runs and total premiums

(iii) Not all franchisees will follow the same risk reduction strategies and therefore could threaten the profitability and pricing for everyone else;

(iv) Coverage limits are shared and if they are exhausted by one or two big claims during that policy term then no coverage exists for other franchisees. In this case most Captives carry Excess coverage and are required to have adequate reserves should this issue occur;

(v) Determining the level of pricing to the franchisees can be difficult.

One approach for group programs or captives to function effectively is for the franchisor to invest the necessary capital and cover the costs of the group program, subsequently charging the franchisees through a "dues" system. However, this arrangement could introduce additional vicarious liability and joint-employer concerns. While these alternative risk programs are worth considering, they require considerable time and thorough due diligence before implementation.

VII. NAVIGATING AN INSURANCE CLAIM

A. Submitting a Claim

An insured's first responsibility when a claim occurs is to notify the insurance company as quickly as possible, within the first 24 hours is best. All insurance policies will provide the address and contact information for where a claim should be submitted. Make sure to submit the notice of claim to the required parties and retain evidence that notice was provided to the carrier.

Under "occurrence" polices (such as CGL policies) an insured is required to put the insurance company on notice of an "occurrence" or an offense which may result in a claim as soon as "practicable." Policies written on a "claims-made" basis require an insured to report any claims or circumstances that may give rise to a claim in a timely fashion. Although the definition of 'claim' varies between insurance companies, in general it is defined as: (a) a demand against you for money or services, or the filing of a suit, or the initiation of an arbitration proceeding naming you and seeking damages for an alleged error, omission, negligent act, or (b) an event or circumstance, an incident or unresolved fee dispute of which you have knowledge that may result in a claim as described in (a). If a claim is turned in so late that it compromises the insurance company's rights to settle the case or prejudices the carrier in some way, then an insurer may assert defenses based on a breach by the insured of a condition of the policy. States varies on the standard of when a carrier is considered "prejudiced." For example, in California an insurer may assert defenses based on a breach by the insured of a condition of the policy but the breach cannot be a valid defense unless the insurer is "substantially prejudiced."[72] In addition, in California the burden of proving that any breach of the policy conditions by the insured resulted in prejudice is on the insurer and there is no presumption of prejudice.[73] However, each state's standards may be different and a franchisor or franchisee do not want to be disputing whether it provided proper notice.[74]

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[72] *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303 (1963).

[73] *Id*. California Practice Guide: Insurance Litigation, supra n. 4, 6:37 ("to show 'substantial prejudice,' the insurer would presumably have to show that the delayed notice and proof of loss impaired its ability to investigate and settle the claim.").

[74] Note that California's "notice prejudice rule" is not absolute and only applies in cases where a late claim would otherwise meet the elements of coverage. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009). In

Claims get more expensive the longer you wait to report the incident. Carriers will not punish you for reporting incidents that close with no, or very little, payout, however, you can face denial of coverage if you wait too long to report a claim. You should report the claim directly to the insurance company and notify your broker than you have done so. It is then the responsibility of the Insurance Claims Adjuster to start the process, connect with the injured parties and investigate the claim. As the client you should stay in contact with the Adjuster to make sure you are aware of their findings and can provide feedback through the process.

Claim Reporting Process:

The standard claim reporting requirement in an insurance policy typically includes several key elements that policyholders must adhere to when reporting a claim. While specific requirements can vary by policy and insurer, the following components are commonly found in most insurance policies:

1. *Timeliness*: Policyholders are generally required to report claims promptly after the occurrence of a loss or damage. The policy may specify a certain timeframe (e.g., within 30 days) for reporting claims to ensure timely processing.

2. *Notification*: The policy will outline the method of notification, which may include contacting the insurer directly via phone, email, or an online claims portal. It may also specify the need to provide written notice of the claim.

3. *Details of the Claim*: When reporting a claim, policyholders are usually required to provide specific information, including:

    - A description of the incident or loss.
    - The date and time of the occurrence.
    - The location of the incident.
    - Any parties involved, including witnesses.
    - Supporting documentation, such as photographs, police reports, or receipts.

4. *Cooperation*: Policyholders are often required to cooperate with the insurer during the claims investigation process. This may include providing

V*enoco*, the court did not apply the "notice prejudice rule" where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement.

additional information, attending interviews, or allowing inspections of the damaged property.

5. *Claim Form*: Some policies may require the completion of a specific claim form, which must be submitted along with the necessary documentation to initiate the claims process.

The role of a broker or agent through the claims process is to act as the insureds advocate with the insurance carrier. A business's insurance broker should always proactively advocate on the insured's behalf to appropriately get the claim settled favorably.

B. Insurance Carrier Responses

Once the carrier receives notice of a claim filing they will assign a claims adjuster to the file. The claims adjuster must investigate the claim and make a determination of coverage based upon the policy terms and details of the loss. This is another reason why reading and adjusting policy terms before coverage is in place is important. The claims adjuster will also reach out to the insured to discuss the loss and the timeframe for covering the claim. The large percentage of time claims are handled quickly, smoothly and are settled so that the business and/or injured party can be made whole. In those cases, however, where more information is needed, the insurance carrier will often send out a Reservation of Rights letter.

Reservations of Rights Letters (ROR) letters are used in many claim situations when the insurer doesn't have enough information to make a coverage determination and/or sees the potential that some allegations may not be covered. Often claims are submitted with little or unsubstantiated facts that need to be investigated in order to determine coverage. A ROR letter is not a denial letter; it merely says the insurer is continuing its investigation and is reserving the right to later deny or accept coverage when additional facts are known. Sometimes an ROR states the carrier is defending the claim however; certain allegations will not be covered. A ROR letter typically outlines the insurance carrier's rationale for believing that a claim or certain portions of a claim may not be covered. To be effective and valid, a ROR letter must meet a "fairly inform" requirement adequately explaining to the insured the carrier's position.[75] The safest thing to do after receiving a ROR letter is to provide a copy to counsel to determine whether a response is recommended. Experienced counsel will know the best way to protect the insureds interest when communicating with the insurance carrier. Also keep in mind that an insurance carrier is required to provide an ROR letter to both the named insured under the policy and any Additional Insured parties.[76]

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[75] *See Advantage Builders & Exteriors, Inc. v. Mid-Continent Cas. Co*., 449 S.W.2d 16, 23 (Mo. Ct. App. 2014)(holding that an insurer was estopped from denying coverage because the ROR letter was ineffective); *Hoover v. Maxum Indem. Co.,* 730 S.E.2d 413, 417 (S. Ct. Ga. 2012)(holding that a ROR letter was insufficient because it "did not unambiguously inform [the insured] that [the carrier] intended to pursue a defense based on untimely notice of claim).

[76] See *Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co*., 132 A.D.3d 434 (N.Y. App. Div. 1st Dep't 2015)(holding that an insurer's disclaimer of liability for coverage for its named insured did not constitute notice to the additional insured); *Erie Ins. Exchange v. Lobenthal*, 114 A.3d 832 (Pa. Super. Ct. 2015)(holding that the insurer did not satisfy its obligation to provide timely notice to the additional insured when it only sent a ROR letter to the named insured).

C. Franchisor and Franchisee Response to Denial or Reservation of Rights Letters

Both insurers and insureds have a variety of options in the event there is a disagreement regarding the existence, extent, or amount of coverage on a given insurance policy. One such option is to file a declaratory relief action at the onset to have a court determine the rights and obligations of the insurer. In some states, such as Illinois, a carrier can be statutorily liable for wrongly denying coverage and forcing the insured to file suit instead.[77] For this reason, a carrier may immediately initiate a declaratory relief action seeking a judicial ruling as to its rights and obligations under the insurance policy. For example, in *AMCO Insurance Co. v. Carpet Direct Co.*, an insurer sued its insured-franchisor seeking a declaration that it did not owe a duty to defend the franchisor in the franchisees' underlying action against the franchisor.[78]

Similarly, if a franchisor or franchisee receives a coverage denial or reservation of rights letter from its carrier, it can file a declaratory relief lawsuit to seek a judicial ruling as to the insurer's rights and obligations under the policy. For example, in *West Coast Pizza Company, Inc. v. United National Insurance Co.*, a franchisee brought a declaratory judgment action against its insurer to determine the scope and extent of the insurer's responsibility to defend another pizza franchise that was a separate entity in an underlying personal injury lawsuit.[79] The court held the insurer did not have a duty to defend the separate pizza franchise because the insurance policy language clearly indicated that West Coast Pizza was the only named insured.[80]

To avoid the need for a declaratory relief action to begin with, franchisors and franchisees should be very careful about the selection of an insurance provider and carefully review the terms, conditions and exclusions contained in the insurance policy. The franchisor should ensure the terms of the franchise agreement contain detailed insurance requirements for the franchisee. In addition, the terms and conditions of the actual insurance agreement should be specific and clear. This is another place where a regular insurance audit could benefit the franchisor by catching any problems before it is too late. Prior to filing an action for declaratory relief, the insured should try and obtain as much detail as possible from the insurer regarding the reasons for denial of coverage and contest the denial. Ultimately, if the insurer denies a claim incorrectly and in bad faith, the insurer can be liable for various damages such as economic damages, emotional distress damages, punitive damages, and attorneys' fees.[81]

VIII. CONCLUSION

Choosing the right insurance for a franchise system requires a thoughtful assessment of the unique risks facing both the franchisor and franchisees. With evolving threats like

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[77]215 ILCS 5/155 (allows an insured to recover damages from the insurer if the insurer's refusal or delay to provide coverage was "unreasonable and vexatious."); *see Buckner v. Causey*, 311 Ill. App. 3d 139 (Ill. App. Ct. 1999) (imposing sanctions against the insurer under section 155 for insurer's "vexatious and unreasonable refusal" to pay a claim under the policy).

[78]*AMCO Insurance Co. v. Carpet Direct Co.*, Case No. 1:15-cv-00247-REB-NYW, 2016 WL 284827 *5 (D. Colo. Jan. 22, 2016) (holding no duty to defend based on plain language of policy).

[79]*West Coast Pizza Co., Inc. v. United Nat'l Ins. Co*., 166 Wash.App.33 (2011).

[80]*Id.* at 37, 39.

[81] *Major v. Western Home Ins. Co*. 169 Cal.App. 4th 1197, 1203 (2009).

cybersecurity breaches and vicarious liability, standard general liability insurance is no longer enough. A strategic approach—balancing comprehensive coverage, cost considerations, and risk management tools like indemnity—is essential. Partnering with an experienced insurance advisor can help identify the most effective coverage options and establish clear standards for franchisees. Equally important is ensuring that the required insurance is not only obtained but also sufficient to protect the business. Proactive planning and oversight are key to safeguarding the entire franchise system.

Appendix A
Sample Franchise Agreement Insurance Provision

Below is a sample insurance provision that is intended to be used as an example of the various types of issues that are addressed in a franchise agreement with respect to insurance. Not all insurances will be applicable to every franchise concept and not all protections and provisions will be necessary depending upon the system.

Insurance

A. Utilizing an Approved Supplier or insurance producer and carrier acceptable to us[82], you shall acquire and maintain insurance coverage of the type and amount that meets or exceeds: (1) our minimum standards for franchisees as set forth in the Operations Manual; (2) the requirements set forth in the lease for the franchise location and any other contractual requirements with your vendors, suppliers or business partners; and (3) any requirements under applicable law[83].

B. You must have the required minimum insurance in place before [commencing operations of the franchise][attending initial training][84], and before beginning construction or building out the franchise if you are developing the location, Restaurant for business. You must maintain such coverage in full force and effect throughout the Term.

C. As of the Effective Date of this Agreement our minimum insurance requirements are as follows[85]:

 (i) comprehensive general liability insurance and comprehensive product liability insurance with blanket contractual products and completed operations liability, against claims for bodily and personal injury, death, and property damage caused by or occurring in conjunction with the operation of the Franchise or your conduct of business pursuant to this Agreement with a primary and excess limit of not less than $1,000,000 per occurrence and aggregate of not less than $[*][86];

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[82] Reserving the right to require use of an approved supplier is advisable.

[83] Typically, a lease will require minimum insurance coverage and you may want to call it out here. Additionally, state laws often dictate minimum workers' compensation insurance so reference to compliance with applicable law is recommended as well.

[84] The franchise agreement should specify when insurance must be secured. Depending upon the timeline for opening, this may be prior to training, prior to construction, upon signing of the lease for the location, before commencing operations, or before requesting franchisor consent to commence operations.

[85] Many franchise systems do not list the specific requirements in the franchise agreement and instead list in the operations manual for ease of updating/changes. However, we have outlined some of the standard list of coverages.

[86] This section should be tailored to address specific risks of the industry (for example, corporal punishment, sexual abuse and molestation liability for childcare, tutoring, personal fitness or massage systems).

(ii) business automobile liability insurance on all owned and/or leased vehicles, including non-owned and hired auto liability with a combination of primary and excess limits of not less than $1,000,000;

(iii) all risk property insurance covering the premises, all improvements and fixtures and tangible property for the full replacement cost, including flood and earthquake protection and plate glass coverage (including business interruption coverage with an indemnity period of at least 12 months) [including broad form boiler and machinery insurance covering all equipment][87];

(iv) professional liability insurance (errors and omissions) covering all services provided by your franchise and its employees, personnel, independent contractors and staff;

(v) Cyber liability insurance (including media liability and if you have a biometric reader, biometric coverage) in an amount not less than $1 million;

(vi) Employment Practices Liability in an amount not less than $1 million per claim and $1 million in the aggregate[88];

(vii) Comprehensive Employee Dishonesty and Employee Theft coverage which includes a Client's Property Endorsement in the amount of not less than $5,000 per occurrence and money and securities coverage of not less than $5,000[89];

(viii) Workers' Compensation or other employer's liability insurance as well as such other insurance as may be required by law;

(ix) An umbrella liability policy within a minimum limit of $2 million for the insurance covered under [*] – [*] above; and

(x) Such other insurance and in such amounts as may be required by the franchisor for its own protection and the protection of the System.

We may designate limits of any deductibles or self-insured retentions under any policies. We may change these insurance requirements, upon written notice to you, to conform to reasonable business practices. We do not represent or warrant that any insurance that you are required to purchase, or which we procure on your behalf, will provide adequate coverage for you. If you believe that you should not be required to carry an identified type of insurance or otherwise comply with our minimum insurance requirements, you must submit a written waiver request and obtain a waiver from us. Until such time as we notify

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[87] This requirement may be expanded to include a builder's risk/installation insurance covering the cost of any franchise construction or renovation.

[88] This is recommended for any concept that has employees, especially in industries where wrongful termination, harassment, retaliation and similar claims are prevalent.

[89] This is recommended for service-based concepts where employees or personnel enter the homes of customers or businesses such as custodian/cleaning services and home health care.

you in writing of our approval, you are obligated to comply with all minimum insurance requirements. All insurance must be placed and maintained All insurance maintained with insurers with a minimum A. M. Best A(X) rating or Standard & Poor's Rating of A with insurance companies with ratings that meet or exceed our Standards.

D. The standards and specifications for insurance coverage as set forth in the Operations Manual are intended as "minimum" standards and you must review your insurance coverage and policies, and you should consult with your insurance agents, brokers, attorneys or other insurance advisors, to determine if additional coverage is necessary, desired or appropriate for your Franchise in addition to the coverage and limits required by us.

E. If you fail to obtain or maintain the required insurance coverage, we may purchase it for you and charge you the premium, plus our costs, and require you to pay to us an administrative fee equal to twenty percent (20%) of the insurance policy premium for doing so. Each insurance policy required under the Operations Manual must contain a provision that the policy cannot be cancelled, amended, renewed or expired without at least thirty (30) days' prior written notice to us. The insurance must be primary coverage without the right of contribution from any of our insurance. The requirements of insurance specified in this Agreement and in the Operations Manual are for our protection. The policies must also contain a waiver of subrogation.

F. Each insurance policy required under this Agreement and/or the Operations Manual must contain an endorsement approved in writing by us naming us as additional insureds and an additional insured endorsement approved in writing by us naming us, our affiliates and our respective officers, directors, managers, partners, members, affiliates, subsidiaries and employees as additional insureds. Additional insured status shall include, without limitation, coverage for ongoing and completed operations. The additional insured endorsement form shall be ISO CG 20-29 or any other form approved in writing by us that provides comparable coverage. You shall maintain such additional insured status for us and the additional insureds outlined above on your general liability policies continuously during the Term.

G. Your obligation to obtain and maintain the insurance policies in the amounts specified in the Operations Manual shall not be limited in any way due to any insurance that may be maintained by us, nor shall your procurement of required insurance relieve you of liability under the indemnification provisions set forth in this Agreement. Your insurance procurement obligations under this Section [*] and as specified in the Operations Manual are separate and independent of your indemnification obligations under this Agreement.

H. Prior to the time any insurance is required to be carried by you, and thereafter prior to the renewal of any such policy, you must submit to us a copy of the certification of insurance evidencing such coverages that are required by this Section [*] and the Operations Manual. Within 5 days after the policy is issued, you shall provide the declarations page for each of the required coverages, all additional insured endorsements and evidence of premium payment. Certificates of insurance alone are not acceptable. Our review and verification of certain elements of your insurance does not in any way reduce or eliminate your obligations to fully comply with all of the insurance requirements set forth in this Agreement and/or in the Operations Manual. It is your sole obligation to fully comply with these insurance requirements and it is your sole obligation to confirm with your insurance providers that your policies are in compliance.

Biographies

Eleanor Vaida Gerhards

Eleanor Vaida Gerhards, CFE is a partner at the national law firm of Fox Rothschild LLP where she concentrates her practice on commercial transactions and regulatory compliance matters. As Co-Chair of the firm's Franchising, as a unique business model, and Distribution Practice Group, she routinely serves as outside general corporate and franchise legal counsel to startup, emerging and established regional, national and international franchise clients.

Elle is a former member of the IFA Legal Symposium Task Force, current Co-Chair of the IFA Philadelphia Women's Franchise Network, and multiple past presenter at the IFA Legal Symposium and ABA Forum on Franchising, as a unique business model, Annual Meeting, including participating on the panel for the 2023 IFA Legal Symposium Judicial Update and presenting the plenary ABA Annual Developments 2024. She is a prolific writer on franchise legal issues and her articles have appeared in the ABA Franchise Law Journal and ABA Forum's Franchise Lawyer. She is the co-author of Annual Franchise and Distribution Law Developments 2024 and authored chapters in the ABA book Exemptions and Exclusions under Federal and State Franchise Registration and Disclosure Laws and the ABA Franchise Deskbook Selected State Laws, Commentary and Annotations, Third Edition.

Elle has been recognized by Chambers USA as a leading national franchise attorney, named to the Franchise Times "Legal Eagle" Hall of Fame, a "Rising Star" by Superlawyers, a Pennsylvania "Lawyer on the Fast Track" by the Legal Intelligencer as well as recognized by Who's Who Legal Franchising, as a unique business model, and named among Philadelphia's Business Journal's 40 under 40.

Doug Imholte

Doug Imholte leads Marsh McLennan Agency (MMA)'s Franchise Programs Practice Group. In this capacity, he collaborates with franchise systems to mitigate brand risk, enhance insurance compliance, organize the franchisor's insurance coverage, and establish effective insurance programs for franchisees. Doug and his team focus solely on the unique needs and risks of the franchise industry and are the preferred insurance partner for multiple franchise brands.

Prior to joining MMA, Doug was a multi-unit franchise owner of a cellular retail brand in the early 2000's. He grew his franchise business to seven stores before selling in 2008 and taking on the role with MMA to grow their Franchise Practice Group.

Doug is an active member of the International Franchise Association (IFA) and has presented at many panel discussions regarding a variety of franchise insurance topics, including at the ABA Forum on Franchising, as a unique business model, Annual Meeting and IFA Legal Symposium.