

Nevada Division of Insurance
2023 Assembly Bill 398
Guidance to Insurers

The Nevada Division of Insurance (“Division”) is aware of concerns expressed by the insurance industry and many insureds regarding Assembly Bill 398, passed by the 2023 Legislature to be effective October 1, 2023. Based on its interpretation of the new law, the Division provides the following guidance and corresponding emergency regulation.

1. Applicability

For regulatory compliance, the law applies to policies of liability insurance issued by authorized insurers, as defined in NRS 679A.030, and non-risk retention group captive insurers, as defined in NRS 694C.060, that provide third-party liability coverage.

2. Meaning of Policy of Liability insurance

Liability insurance is a form of casualty insurance, defined in NRS 681A.020(1)(b) as insurance against legal liability for the death, injury or disability of any human being or for damage to property, including liability resulting from negligence in rendering expert, fiduciary or professional services. This encompasses many of the policies that are currently written with defense within limits.

3. Separate Limits for Defense

As a result of AB 398, a policy of liability insurance must now include defense costs outside of the limits of liability and defense coverage must be available, but the law does not require unlimited defense costs. For policies of liability insurance, other than liability policies which do not limit defense costs coverage (such as typically found in automobile and CGL policies), a separate limit for defense costs may be selected by the insured, including a limit of \$0.

4. Deductibles and Self-Insured Retention

AB 398 does not prohibit an insurer from issuing policies that include self-insured retentions or deductibles on liability coverage and/or defense costs.

5. Block Cancellation Requirements

NRS 687B.410 requires an insurer that intends to withdraw from providing insurance for a particular class of insureds to notify the Commissioner at least 60 days before providing the required notice of cancellation or non-renewals to insureds. Because of the timing of the effective date of AB 398, no insurer could comply with the notice requirement to the Commissioner prior to the required 60-day notice to consumers being sent.

6. Division Review and Approval of Policy Forms

The Division of Insurance has no authority to modify the effective date for the requirements contained in AB 398. We understand the challenges this creates for the industry to provide modified contract language based upon the bill's requirements. Division staff will prioritize reviewing new policy language impacted by this bill.

7. Cyber Liability Policies

Cyber liability policies include both first-party indemnity to the insured and third-party liability coverage, often under the same per occurrence and annual aggregate limits. AB 398 mandates that legal defense coverage for third-party liability insurance be offered as a separate limit from liability, however AB 398 does not preclude first-party indemnity and third-party liability from sharing the same policy coverage limit. Defense costs may not erode the per occurrence or annual aggregate limit of liability coverage.

8. Insurance Coverage Towers

Liability coverage may be written as a "tower" of coverage that includes a primary policy up to a specific limit, a following-form excess policy up to a secondary limit, another following-form excess policy up to a third limit and so on. AB 398 would apply to every layer of liability coverage, however each policy negotiated between the insurer and insured may determine the limits of defense coverage, if any, that will be included in each policy that is

part of the tower, in addition to the indemnity limits included in the policy. Individual indemnity limits may not be eroded by defense costs.

9. Policy Exclusions

AB 398 does not mandate specific coverages that must be included or may be excluded in a policy of liability insurance; it only mandates that the limits for the types of liability that are included in the contract cannot be eroded by costs of defense.

10. Can Endorsements Provide DWL on Certain Coverages?

Endorsements are considered part of the policy contract, so endorsements that add additional liability coverage must comply with the requirement that liability limits cannot include defense within those limits.

11. Applicability to Surety and Fidelity Bonds

Surety and fidelity bonds are not considered casualty insurance as defined in NRS 681A.020 and do not typically include the obligation to defend third-party liability. They would not be subject to the requirements of AB 398 unless the bond included defense in the surety contract.

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