

Not Knowing Insurance Is Risky Business

Presented by:

Allen R. Wolff
Partner – New York
Olshan

Albert L. Sica
Managing Principal
The ALS Group



UIC, INC.
INSURANCE
CONSULTANTS

"Independent Insurance & Risk Management Advisors"

Preliminary Guidelines

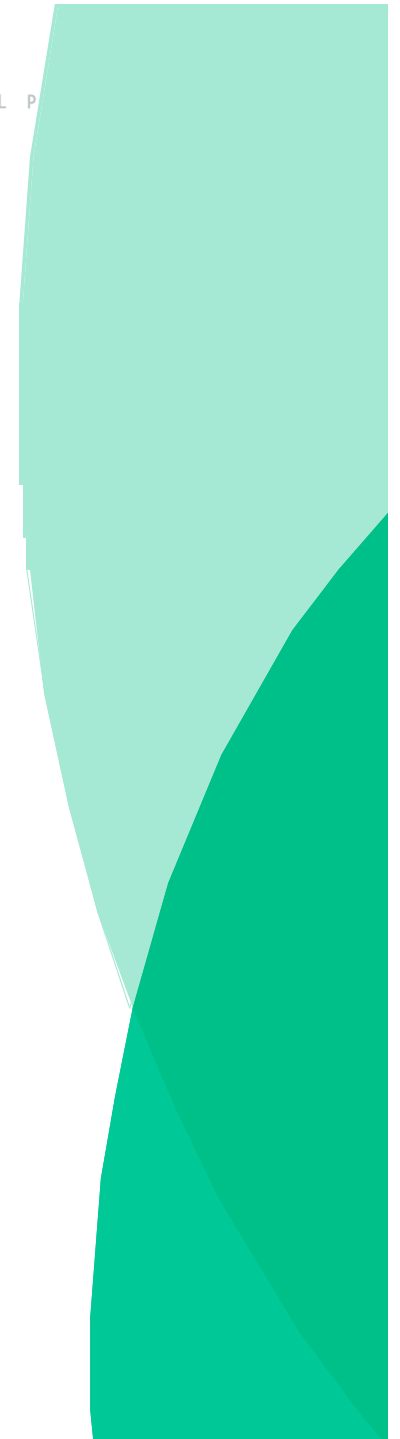
You are being recorded!

Please turn off cell phone ringers and keep blackberries away from the equipment.

Questions will be repeated for recording purposes— please remind the speaker!

We all know about Risky Business

**Things that look right at first can
take an unexpected turn**



Introduction - Why approach subject of Risk & Insurance?

- Clients expect their lawyers not only to provide legal support, but also to understand the risk of a proposed course of action and to evaluate strategies for dealing with that risk
- Sometimes the approach is to rearrange the structure or terms of a deal
- Sometimes the approach is to change a litigation strategy
- Sometimes the approach is to outsource the risk
 - If you are a transactional lawyer, you can make it part of the deal
 - If you are a litigation lawyer, you can tender the claim

Why get involved?

- Where does uninsured risk – Self-retained expense (on the P&L)
- How much “disposable income” do your clients have for unknown risks that land on their P&L?
- What would be the value to think about Risk in a more 3-dimensional way?
- Making Executives more accountable for management of the Financial Impact of Risk
- More sophisticated view on Mitigation Strategies – NOT JUST BUYING INSURANCE

Goals for Today's Discussion

1. Understand “risk” better & how you can engage in conversations to surface issues material to your Clients
2. What questions to ask & how to probe the issues
3. A “cheat sheet” of *normal* coverage that you will see most often
4. Understand how to make the most of resources to answer questions or vet issues

Overview of Insurance

What is RISK?

Risk is the potential adverse effect on an organization's values. Financially, it may manifest itself in reduction of assets or income, or an increase in liabilities or expenses. Risk may also impact non-financial values such as reputation, good will, customer or vendor relationships, employee morale, and other values not readily associated with financial loss.

First Party Insurance or Third Party Insurance

Who gets paid?

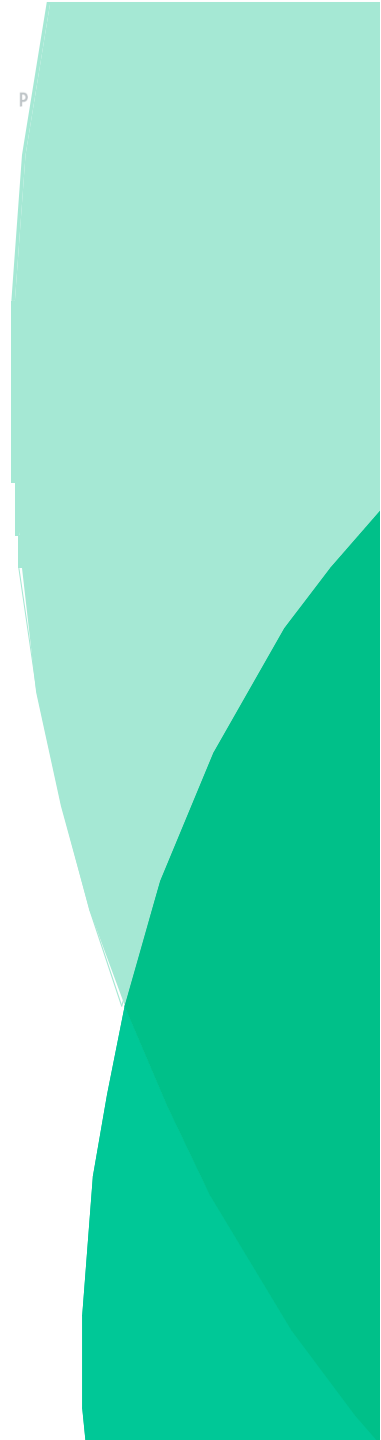
First Party

Property Insurance

- a. Fire
- b. All Risk / Builder's Risk
- c. Floods, Famines, Locusts , Leeches

Additional Insured / Loss Payee

- a. Lender
- b. Landlord



First Party Insurance or Third Party Insurance

Who gets paid?

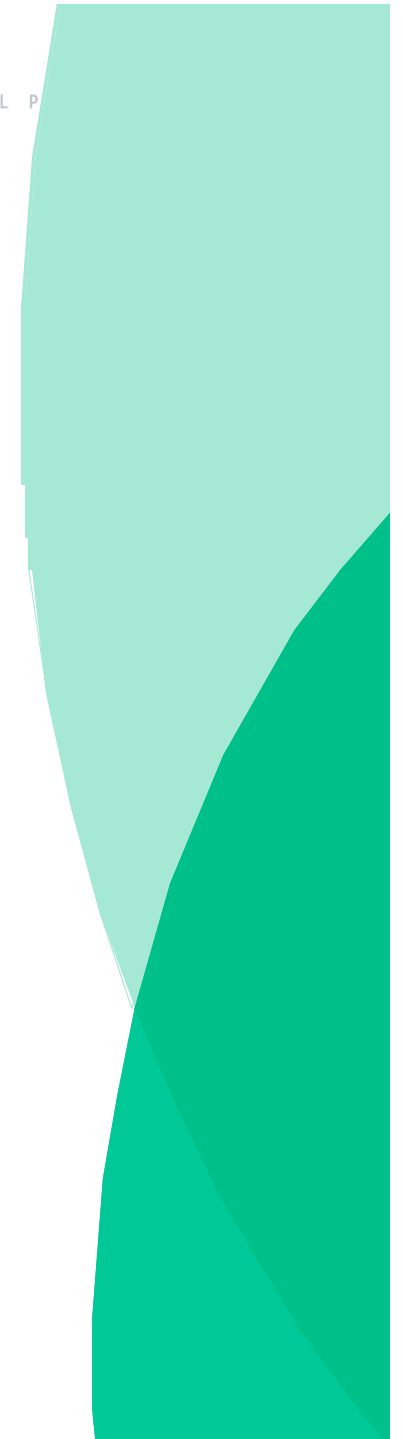
Third Party Insurance

Liability Insurance

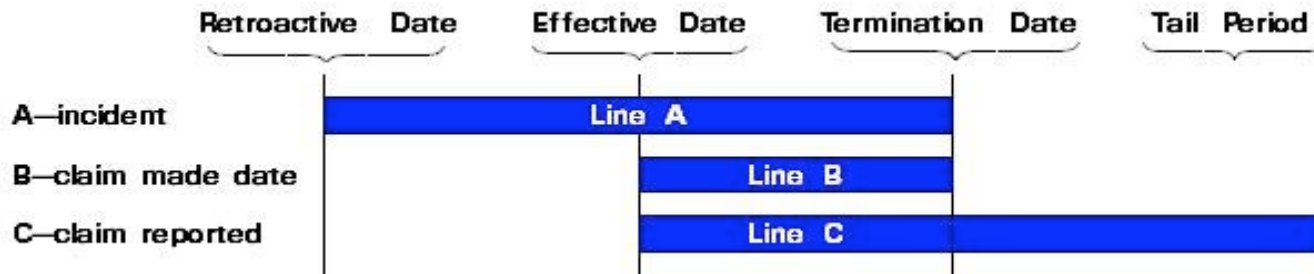
- a. Commercial General Liability – ISO CG 00 01 – Bodily Injury or Property Damage
- b. D&O Liability (EPLI “bolt-on”)
- c. Plan Fiduciary Liability
- d. Professional Liability

Additional Insured

- a. Owner
- b. General Contractor
- c. Condo/Co-op



Claims Made or Occurrence Based



1. Definition of a Claim

- a. Written demand for monetary or nonmonetary relief
- b. Charges, Investigation

2. Definition of an Occurrence

- a. Fortuity Underlies the Concept
 - i. Accident
 - ii. Continuous or Repeated Exposure

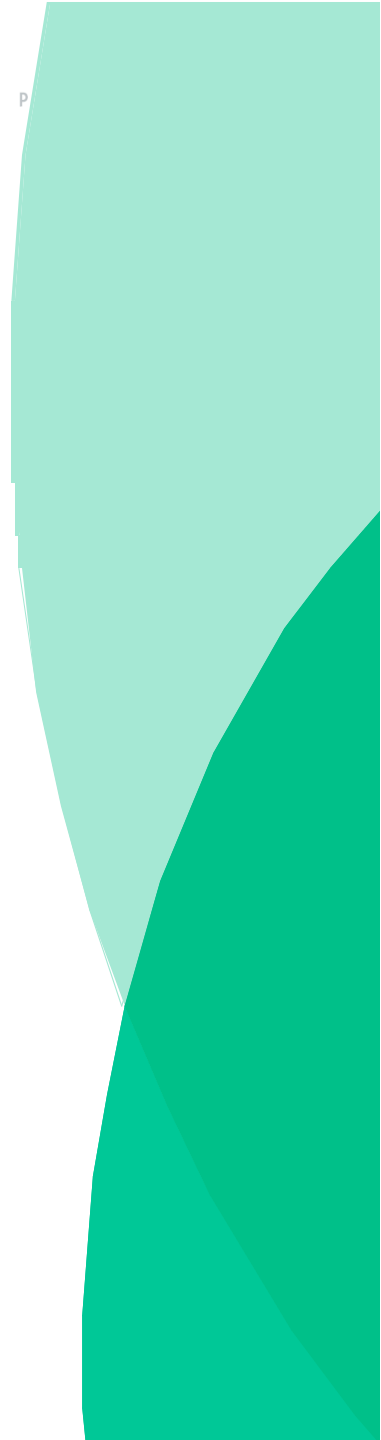
Notice

The Policy Dictates

1. Who
2. What
3. When

Pending and Prior Date

Insurance Application



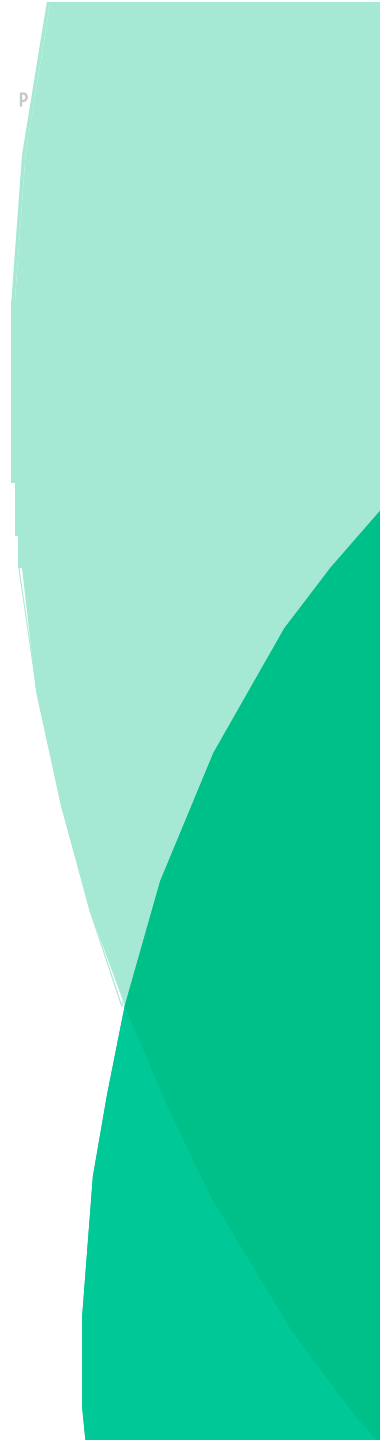
Commercial General Liability

1. Establishing Coverage

- a. Occurrence
- b. Bodily Injury or Property Damage
- c. Coverage period
- d. Coverage Territory
- e. Exclusions

2. Insured Must Establish Coverage

3. Insurer Must Establish Exclusions



Role of Deductible

Self Insured Retention (SIR) or Deductible

Careful with that Deductible, Eugene

Reservation of Rights Letter

Beware of the disclaimer “we may not pay if...”

What should you do with an ROR letter

- Ignore it...not good...
- Dispute the reservation
- Press for specifics
- Recognize what new doors and options this opens –
Cumis counsel?

Directors and Officer Insurance

Insures corporate directors and officers against claims, most often by stockholders and employees, alleging financial loss arising from mismanagement. The policies contain two “main” coverages:

Side B - the first reimburses the insured organization when it is legally obligated (typically by corporate charter or state statute) to indemnify corporate directors and officers for their acts;

Side A - the second provides direct coverage to directors and officers when the organization is not legally obligated to indemnify them.

Side C – Entity Coverage - In addition, a third type of coverage, known as entity liability insurance is usually available on an optional basis, for additional premium an. Such coverage insures the corporate organization in connection with the liability “allocated” to “the Entity”.

Directors and Officer Insurance (cont'd)

D&O forms are written on a claims-made basis, generally contain no explicit duty to defend the insureds, and typically exclude intentional/dishonest acts and bodily injury and property damage. Six types of suits can be brought against directors and officers:

1. **Direct action suits** brought by shareholders on their own behalf.
2. **Derivative action suits** brought by shareholders on behalf of the corporation. In certain circumstances, unsuccessful defense of derivative litigation establishes violation of federal security acts. If the corporation is bankrupt, bankruptcy laws may prevent indemnification by the employer corporation.
3. **Class action suits** may be brought by a representative shareholder on behalf of all shareholders.
4. **Suits brought by the corporation** typically against former directors or officers who breached a fiduciary duty owed to the corporation and/or its shareholders. For example, if a director took advantage of an opportunity from which the corporation could have benefited, the corporation may seek to recover from that director.
5. **Suits brought by employees of the corporation.** Suits for discrimination, wrongful termination and other employment-related matters frequently name corporate officers as defendants.
6. **Third-party actions** brought by individuals outside the corporation, such as government officials, previous owners, creditors, or even competitors.

Typical exclusions applicable to all parts of the policy are:

1. **Prior Notice or Prior Litigation - Incidents reported in prior policy periods – need to establish full continuity .**
2. **Claims arising out of or attributable to bodily injury, property damage, libel, slander, emotional distress or other personal injury perils (e.g., false arrest).**
3. **Liability in connection with pension and welfare plans under ERISA. This risk may be covered under a fiduciary liability policy.**
4. **Liability arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, including any request, direction or order to monitor, clean up, remove or treat pollutants.**
5. **Personal Conduct Exclusions – a) Personal profit to which the director or officer is not legally entitled. b) Return of illegal remuneration not approved by stockholders.**
6. **Return of short-swing profits from purchase or sale of company securities in violation of Section 16(b) of the Securities Exchange Act of 1934.**

Typical exclusions applicable to all parts of the policy are: (*cont'd*)

7. **Deliberately fraudulent, criminal or dishonest acts.**
8. **Failure to maintain proper insurance;** but this exclusion can be — and almost always should be — removed to provide coverage in case of unintentional error. Some policies contain an exclusion applicable to losses arising out of any breach of professional duty. Such wording can cause problems of interpretation at the time of a loss and should be clarified or eliminated.
9. **Punitive damages and multiplied damages.** Because these damages are designed to punish defendants, allowing defendants to insure this exposure is considered against public policy. Consequently, many state statutes bar or restrict the extent to which they can be covered. Some policy forms provide limited punitive damages coverage, excluding it where barred by applicable state law. Corporations with multi-state operations should request a "most favorable jurisdiction" provision.
10. **Insured v Insured Exclusion – Pay close attention to Real Estate Property Management Firms**
11. **Bankruptcy or Insolvency - Brought or maintained on behalf of a bankruptcy or insolvency receiver, trustee, conservator, liquidator or rehabilitator for an insured.** If the insured files for bankruptcy, the D&O policy proceeds ideally should be available to reimburse innocent individual directors and officers subject to litigation. This exclusion protects the intent of the policy in this regard.

Employment Related Practices

A form of liability insurance covering wrongful acts arising from the employment process. The most frequent types of claims alleged under such policies include: wrongful termination, discrimination, and sexual harassment. The forms are written on a claims-made basis and generally exclude coverage for wage based claims. In addition to being written as a stand-alone coverage, EPLI is frequently available as an endorsement to directors and officers liability policies.

EPLI Exclusions

Common exclusions are for claims arising out of:

- Bodily injury (other than mental anguish, emotional distress or humiliation), sickness, disease or death of any person, or any damage to or destruction of any tangible property including loss of use thereof.
- Any workers compensation, unemployment insurance, Social Security, disability benefits or any similar federal, state or local statutory or common law.
- Any actual or alleged violation of the *Employee Retirement Income Securities Act of 1974*, the *Fair Labor Standards Act* (except the *Equal Pay Act*), the *Worker Adjustment and Retraining Notification Act*, the *Consolidated Omnibus Budget Reconciliation Act of 1985*, the *Occupational Safety and Health Act*, rules or regulations promulgated thereunder, or similar provisions of any federal, state or local law.
- Any actual or alleged violation of the *National Labor Relations Act* or rules or regulations promulgated thereunder, or similar provisions of any federal, state or local law.

Employment Related Practices (cont'd)

- Breach of an express written employment contract.
- Costs associated with accommodation under the *ADA* or the *CRA of 1964* or similar federal, state or local law.
- Benefits due, or the equivalent value of such benefits, except where the claim is for wrongful termination.
- Compensation earned by the claimant in the course of employment but not paid by the insured.
- Costs to comply with an order or agreement to provide non-monetary relief.
- Wage and hour law violations.

Where an insured is managing the defense of a claim, how a settlement may be structured will impact whether coverage applies. For example, if a settlement stipulates the claimant will be paid a specified amount as severance, or to replace benefits due, this payout may be excluded under the policy. Therefore, policy wording should be reviewed prior to reaching final settlement of a claim.

Risk Management

- What can be done to minimize (mitigate) loss?
- Proactive guidance and advisory from legal counsel
 - What can go wrong?
 - How Bad can it get get?
 - What can we do about it?
 - Is the solution sustainable?

Bankruptcy

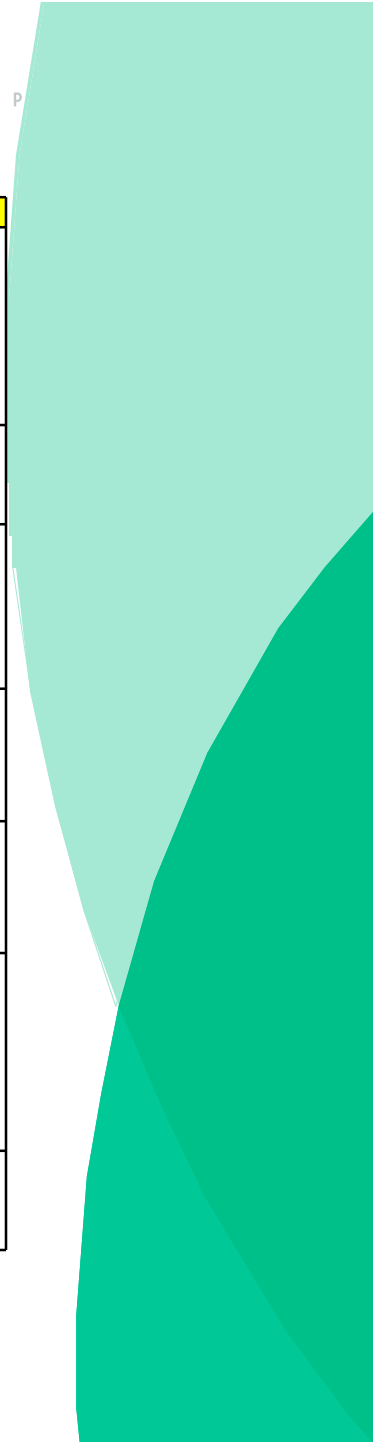
- Provisions that send coverage into automatic run-off
- Insured v Insured exception for Receivership claims
- Put it in your contract

WHAT QUESTIONS DO I ASK MY CLIENT?

- 1. Do you have copies of your insurance policies and do you retain [forever]?**
- 2. When was the last time you had an Independent review of your insurance [and risk management] program?**
- 3. If you had a Claim today, what is your confidence level that you understand the coverage purchased and you would be covered?**
- 4. Who reviews contracts from an insurance and indemnity perspective – will your coverage respond to what you have contractually agreed to?**
- 5. Has your broker sat with you and explained your coverage, exclusions and any warranties or conditions in your insurance contracts?**
- 6. How do the Carriers Rate? AM Best Rating Chart – Admitted, Licensed – Excess and Surplus – what are the dangers here?**
- 7. What is Risk and how can I anticipate the Financial Impact?**
- 8. When was the last time you had someone look at your insurance and risk management program? Read the Coverage?**

Insurance Coverage – What’s Normal & How Does it Work? – The “Cliff Note” version...

Coverage	Summary of Common Terms
Property · Real & Personal Property · Business Income & Extra Expense Usually rated as a rate per \$100 of insured values (\$30M values at .12/\$100=\$36,000)	<ol style="list-style-type: none"> 1. Replacement Cost indemnity for declared assets that suffer physical loss from a “peril” not otherwise excluded (i.e. EQ/Flood/Code Rebuilding, etc) 2. Net Income and continuing expenses resulting from a cause of loss.
General Liability (and Umbrella) Can be rated on sales, payroll, area (RE Risks)	<ol style="list-style-type: none"> 1. Protects Company against Bodily Injury or Damage to tangible property – covered unless excluded & triggered by “legal liability” (negligence) 2. Provides for Advertising Injury and Personal Injury
Automobile Usually rated on # of power units	<ol style="list-style-type: none"> 1. Provides coverage for anyone who incurs liability from the negligent operation of a covered auto (declared and scheduled) 2. Provides for the indemnity from physical damaged to declared autos 3. Provides protection (usually just liability) for the Company when someone “hires” a car or uses their car “non-owned” resulting in liability to the Company
Workers Compensation Rated on remuneration and subject to limitations and job classifications	<ol style="list-style-type: none"> 1. Rated on Payroll by Code – each code has rate per \$100 of remuneration 2. Experience Modification – Debit or Credit (NJ, PA, DE, CA, MI, NY(?)) – Intrastate NCCI governs other states and pools experience 3. State Specific rates
Crime & Fidelity	<ol style="list-style-type: none"> 1. Employee steals money or product – Losses happen over time – watch limits! 2. Loss of Money by burglary or robbery (inside or outside) – watch limits! 3. Computer Fraud 4. ERISA Coverage for Qualified Plan – must be named!
Employment Related Practices (EPLI) (Directors & Officers Liability) CLAIMS-MADE COVERAGE	<ol style="list-style-type: none"> 1. When Company is accused of Sexual Harassment, Discrimination or Wrongful Termination 2. Can be expanded to cover third party discrimination or harassment *D&O coverage protects the Directors & Officers from the financial impact to 3 rd parties of a “mistake” in their execution of duties as a D&O of the Company. It is often combined with EPLI Coverage for privately held companies.
Errors and Omissions Coverage (E&O) CLAIMS-MADE COVERAGE	This coverage is appropriate when a “mistake” can cause financial harm (not bodily injury or property damage) to a 3 rd party – DON’T only think Lawyers, Accountants, Architects – applies to a wide range of industries that provide “advice” for a fee.



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