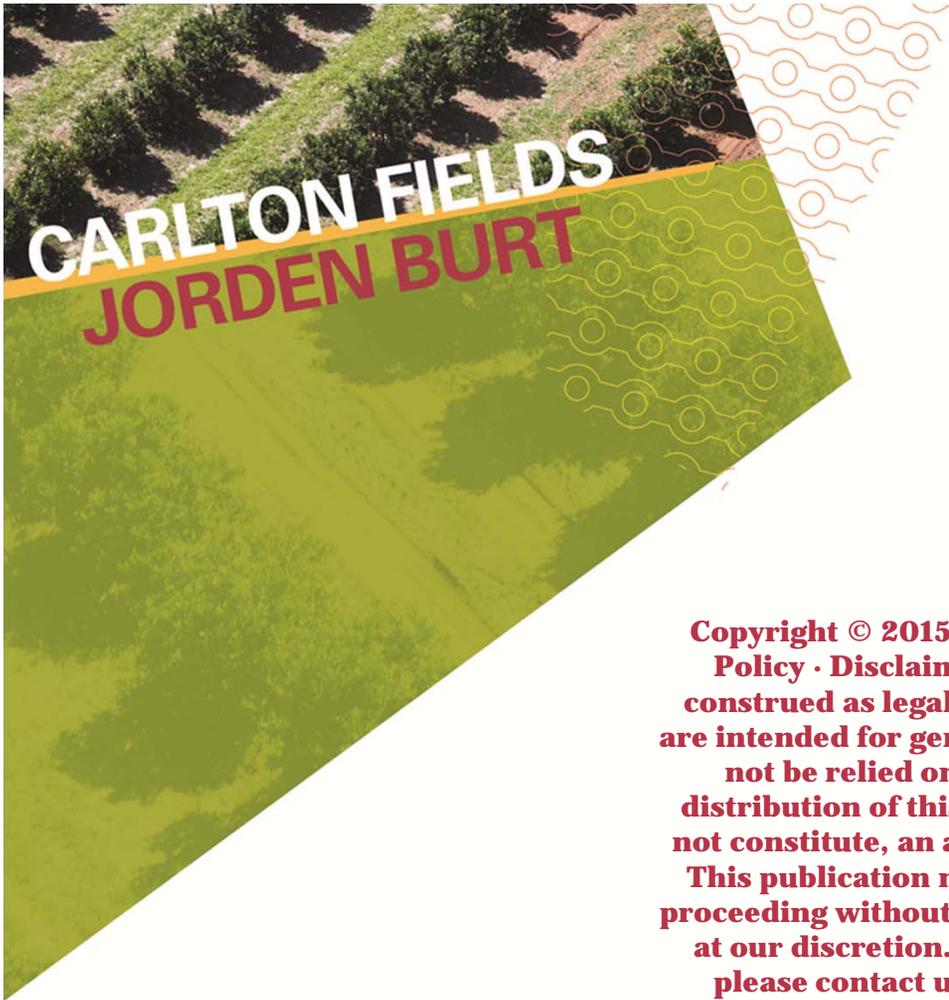


CARLTON FIELDS **JORDEN BURT**

50 Shades of Indemnity

Navigating the allocation of
risk and responsibility in
contractual relationships



Copyright © 2015 · Carlton Fields Jordan Burt · All Rights Reserved · Privacy Policy · Disclaimer Carlton Fields Jordan Burt publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields Jordan Burt. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please contact us. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm.

I-n-d-e-m-nity, find out what it means to me...

- *in·dem·ni·ty*

- noun

- security or protection against a loss or other financial burden.

- synonyms: insurance, assurance, protection, security, indemnification, surety, guarantee, warranty, safeguard

Start Spreading the Risk

- The concept of indemnity allows or requires one person (or entity) to take on responsibility for losses caused by another.
 - A classic example of indemnity is an insurance policy. Insurance policies provide that, for a premium, certain types of losses will be paid for by the insurer. The types of losses, limits of payment, and other contours of the coverage are defined in the policy.
 - Typically parties indemnify each other for suits or claims that should or could have been directed at the other party.

Imagine no Indemnity

- Indemnity essentially commoditizes risk, allowing it to be spread, and therefore tolerated. Edward Lloyd ran a coffee house near the docks in London in the late 1600/early 1700s. Lloyd's coffee house was a popular gathering spot for sea-faring commercial shippers. In order to hedge against bearing the entire risk if a ship went down and the cargo was lost, the folks who gathered developed a system of "spreading" the risk by purchasing shares in the venture. Thus, if a ship went down, the owner had some protection, and the losses were spread amongst the group. In return, he shared a "premium" of his returns if the venture went as planned. Many aspects of the modern insurance industry trace their roots to Lloyd's Coffee House.
- Creates mechanism to ensure each party is responsible for its own acts or omissions that cause loss, and not those of its counterparty.
- Creates legal cause of action to apportion liability

What is, and what should never be... indemnified

Indemnity has its limits

- Insurance and other contractual limitations
 - Typically no coverage for intentional acts, problem of “moral hazard.”
 - No coverage, and contractual provisions void, for illegal conduct.
- Public policy limitations
 - Contracts and insurance typically cannot shift responsibility for statutory or regulatory penalties, other violations of public policy.
 - Non-delegable duty doctrine applies to landowners

We can work it out: Contractual and Common law indemnity

- Contractual Indemnity:
 - Responsibility to pay for losses caused by another transferred by contract (before-the-fact agreement).
- Common Law Indemnity:
 - In certain instances, the responsibility to pay for losses may be transferred by common law (court ruling), where the transferee is shown to have been responsible for a loss for which the transferor has been sued. “Indemnity *shifts the impact of liability from passive joint tortfeasors to active ones....*” *City of Bristol v. Dickau Bus Co., Inc.*, 63 Conn. App. 770, 774 (2001) (citation omitted emphasis in original)).

Wish You Were Here: Apportionment

- In rendering verdicts in cases involving multiple defendants, fault may be “apportioned” among the defendants (as well as the plaintiff’s own fault), such that each negligent party is assigned a numerical percentage of fault.
- In Connecticut, this is governed by statute. See Conn. Gen. Stat. § 52-572h.

Sample Indemnification Provision

A. **SUBCONTRACTOR shall**, to the fullest extent permitted by law and at its own cost and expense, defend, **indemnify** and hold **PRINCIPAL** and their respective, directors, officers, employees and affiliates harmless from and **against any and all claims**, loss, (including reasonable attorneys' fees and court costs), damages, expense and liability (including statutory liability), **resulting from injury and/or death of any person or damage to or loss of any property to the extent arising out of the negligent conduct or willful misconduct of SUBCONTRACTOR** and shall not be limited in any way by any amount or type of damages provided, however, that, SUBCONTRACTOR shall not indemnify, defend or hold harmless the Additional Insured for the negligence or intentional misconduct of third parties not affiliated with SUBCONTRACTOR.

B. **PRINCIPAL shall** defend, **indemnify** and hold **SUBCONTRACTOR**, its parents, partners, directors, officers, employees and affiliates (the "Indemnified Parties") harmless from and **against any and all claims**, loss, (including reasonable attorneys' fees and court costs), damages, expense and liability (including statutory liability), **resulting from injury and/or death of any person or damage to or loss of any property to the extent arising out of the negligent conduct or willful misconduct of PRINCIPAL**, other than SUBCONTRACTOR, and shall not be limited in any way by any amount or type of damages, provided, however, that PRINCIPAL will not indemnify, defend or hold harmless the Indemnified Parties from the negligence or intentional misconduct of third parties not affiliated with PRINCIPAL.

Get by with a little help from your “Additional Insured”

- Contracts that contain indemnity provisions almost always include requirements that contracting party (typically the “principal”) be added to the counter-party’s insurance policy, as an “Additional Insured”
- Additional Insured is added by name to the policy.

Sample Insurance provision

A. SUBCONTRACTOR will maintain and have in full force and effect, at all times for the duration of this Agreement, the following types and coverage amounts of insurance:

- i. Commercial General Liability: \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate for bodily injury and property damage subject to no contractual limitation other than those found in the standard ISO General Liability form. The policy shall cover assault and battery to the extent permitted by law.
- ii. Workers compensation insurance coverage for ACME employees in accordance with the laws of the state in which the Services are provided and Employers Liability Insurance at limits of at least \$500,000.00 each employee.
- iii. Comprehensive Automobile Liability insurance with a limit for bodily injury and property damage of not less than \$1,000,000.00 per occurrence with respect to SUBCONTRACTOR's owned, hired or nonowned vehicles.

B. Subject to the limitations and provisions as stated herein, SUBCONTRACTOR will provide to PRINCIPAL, before the commencement date of this Agreement, a certificate of insurance coverage that shall show PRINCIPAL and its respective partners, parents, subsidiaries and affiliated companies (the "Additional Insured") as additional insured on the Commercial General Liability insurance policy as it respects the operations of named insured.

But first, are you an Insured? Have you ever been an Insured? Well I am...

Named insured

- Purchaser of the policy (pays premiums)
- Listed on the Declarations

Additional insured

- Party specifically added to policy by endorsement or schedule, as a result of contractual agreement

Insured

- Other parties may come within this more narrowly defined term, by virtue of relationship to the Named Insured or an Additional Insured (such as family members, agents, employees, representatives).

Policy Definition of Additional Insured

Section II – Who Is An Insured is amended to include as an additional insured: 1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and 2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Insured Contract

Typical CGL defines "Insured contract" as:

- That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Additional Insured coverage limits

“The insurance afforded to such additional insured only applies to the extent permitted by law. . . . If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured. . . . If coverage to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance: 1. required by the contract or agreement; or 2. available under the applicable Limits of Insurance shown in the Declarations; whichever is less.”

Stairway to coverage

- Typical CGL insuring agreement: “We will pay those sums that the insured becomes legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies. We will have the right and duty to defend the insured against any **suit** seeking those damages.”
- Coverage is triggered by allegations of negligence in a lawsuit against an insured (they need not be proven, or even true, to trigger the duty to defend)

You gotta fight... for your right... to coverage

Common coverage issues for Additional Insureds:

- Sole negligence: insurance not intended to cover “sole negligence” of additional insured, even though the “insured contract” requires it.
- Allegations of intentional conduct typically not covered. Breach of contract is often considered “non-accidental” and may not come within insuring agreement. Big issue with construction-related claims.
- “Business risk” exclusions

Products and completed operations coverage

- An add-on to CGL coverage for manufactures and builders.
- Covers losses and claims caused by products or services the insured has introduced into the stream of commerce (hence “completed”).
- only applies to products that have been sold and operations that have been completed. E.g., liability for design defects, product recalls.
- Not a warranty, does not cover breach of contract.
- Complex and often misunderstood by courts, lawyers and claims professionals.

You can't always get what you want

Judges, mediators, juries, claims adjusters, even plaintiffs' lawyers, are people, and people make mistakes, and people have honest disagreements.

Sometimes, there is no “right” answer.



Indemnity / Additional Insured claim checklist

- What is the nature of the claim(s)?
- What parties' possible (even if improbable) negligence is implicated or alleged?
- What parties have been named as defendants?
- Analyze the contracts between all potentially responsible parties: who indemnifies who for what?
- Analyze the insurance policies. Are you an insured? Claim covered? Additional insureds covered?
- Demand defense and indemnity (in writing) from parties (1) that have contracted to indemnify you; or (2) whose negligence is possibly primary.
- Make sure all potentially responsible parties are at the table. File apportionment claims, claims for common law indemnification or contractual indemnification.

Producing a rock and roll show: risk management workshop

All the world is a stage. Meet the players:

1. The venue owner/operator (contracts with all other parties)
2. The town/city (lease or other contract with venue operator, venue must indemnify town)
3. The performer (contract with venue owner/operator, standard reciprocal indemnity obligations)
4. Security company (contract with venue owner/operator, standard reciprocal indemnity obligations)
5. Food and Alcohol Vendor/Permittee (contract with venue owner/operator, standard reciprocal indemnity obligations)
6. Maintenance Company (contract with venue owner/operator, standard reciprocal indemnity obligations)

Slip Sliding Away

Scenario 1: Adult female concertgoer sues venue operator for injury resulting from slip and fall on stair with spilled beer during dimly lit performance.

Variation: plaintiff was drunk, and stumbled over chipped concrete stair lip of city-maintained portion sidewalk leading from street to venue entrance.

Dancing in the Dark

Patron sues venue operator and security contractor for injuries sustained when a tipsy, but not intoxicated, patron who is dancing nearby, trips over his feet, falls and lands on the plaintiff.

Variation: MOSH PIT INJURY!

Saturday Night's Alright for Fighting

Intoxicated woman starts fight with another woman, husband attempts to intervene, and second woman's boyfriend kicks and punches husband's face and head repeatedly resulting in injury. Husband sues security subcontractor.

Variation: patrons were all underage and intoxicated, having been served alcohol inside the venue

Happiness is a Warm Gun

Opening band has water cannon special effects, operated by crew member of headlining band. Operator purposefully targets patron with water cannon. Patron storms the stage, gets past security and knocks cannon operator to the ground. Cannon operator sues the venue and security contractor and makes workers compensation claim against his employer, the headlining band.

Diver Down

Rapper declares he is a god, flies like Icarus off the stage, over a line of security guards, careens off a moveable wooden barricade, causing him to land awkwardly on a patron, injuring her. Patron sues performer.



Smoke on the Water

Exuberant and intoxicated partygoers discover the performer's bus in a back parking lot of the venue after the show and tip it over, starting a fire destroying the bus, while the band sits by and gently weeps watching as firefighters douse their burned equipment. Band sues city, security contractor, and venue.



John C. Pitblado

Shareholder

jpitblado@cfjblaw.com

Hartford

T: 860.392.5024

F: 860.392.5058

John Pitblado has extensive experience in a wide range of insurance-related litigation, including class action, ERISA, coverage and other insurance litigation involving contract disputes, bad faith, statutory unfair insurance and trade practices, RICO, fraud and misrepresentation claims, for insurers in the life, health, property & casualty and reinsurance industries. Mr. Pitblado also has experience handling regulatory matters, including market conduct examinations and complaint handling procedures before state insurance regulatory authorities.

Mr. Pitblado has handled numerous cases before Connecticut's state and federal trial and appellate courts, including the complex litigation docket, and bankruptcy court, and numerous other state and federal trial and appellate courts as pro hac vice counsel, in pre-trial proceedings, at trial, and on appeal. Representative cases include *Chen v. Hopkins School, Inc.*, 148 Conn. App. 543, 86 A.3d 482 (2014); *Merrimon v. Unum Life Ins. Co. of Amer.*, 758 F.3d 46 (1st Cir. 2014) (amicus); *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013) (amicus); *Nationwide Life Ins. Co. v. Haddock*, 460 Fed. Appx. 26 (2d Cir. 2012) (amicus); *Northwestern Mut. Life Ins. Co. v. Gil*, No. 3:07-cv-00303-VLB. 2009 WL 276086 (D. Conn. Feb. 5, 2009), aff'd 351 Fed. Appx. 515 (2d Cir.); *Royal Indemnity Co. v. King*, 512 F. Supp. 2d 117 (D. Conn. 2007); *Nichols v. Salem Subway Restaurant*, 98 Conn. App. 837, 912 A.2d 1037 (2006); and *Waldman v. Jayaraj*, 89 Conn. App. 709, 874 A.2d 860, cert. denied, 275 Conn. 907, 882 A.2d 680 (2005). He also has extensive experience in alternative dispute resolution, having represented insurance companies in numerous private and court-annexed mediations and arbitrations.

From 2007 to 2009, Mr. Pitblado served as co-chair of the Appellate Practice Committee of the Connecticut Bar Association's Young Lawyers Section. During law school, he clerked full time during summers and part time during the school year for a large Connecticut firm, and was an associate editor of *The Connecticut Law Review*. He received CALI awards for achievement in Criminal Law, International Law, and the Law and Literature of Crime, and the school-wide Ralph Colucci Award for Excellence in the

education

University of Connecticut
School of Law (J.D., 2003)

University of Vermont
(B.A., 1999)

related practices

[Data Privacy and
Cybersecurity Task Force](#)

[Financial Services and
Insurance Litigation](#)

[Intellectual Property and
Technology](#)

[National Class Actions](#)

related industries

[Insurance](#)

bar admissions

Connecticut

court admissions

United States Supreme
Court

U.S. Court of Appeals, First
Circuit

U.S. Court of Appeals,
Second Circuit

U.S. District Court, District
of Connecticut

U.S. District Court, District
of Colorado

Study of Law and Literature.

Mr. Pitblado has been consistently recognized for his pro bono work on behalf of minor children subject to neglect and abuse petitions brought by the Connecticut Department of Children and Families in Connecticut's juvenile courts.

Representative Experience

- *Rochow v. Life Ins. Co. of N. Am.*, -- F.3d --, 2015 WL 925794 (6th Cir. Mar. 5, 2015) (amicus counsel in support of appellant/prevaling party)
- *Chen v. Hopkins School, Inc.*, --- A.3d ----, 148 Conn. App. 543 (2014)
- *Merrimon v. Unum Life Ins. Co. of Amer.*, 758 F.3d 46 (1st Cir. 2014) (amicus counsel in support of appellant/cross-appellee/ prevailing party)
- *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013) (amicus counsel in support of appellee/prevaling party)
- *Nationwide Life Ins. Co. v. Haddock*, 460 Fed. Appx. 26 (2d Cir. 2012) (amicus counsel in support of appellant/prevaling party)
- *Northwestern Mut. Life Ins. Co. v. Gil*, No. 3:07-cv-00303-VLB. 2009 WL 276086 (D. Conn. Feb. 5, 2009), aff'd 351 Fed. Appx. 515 (2d Cir.)
- *Royal Indemnity Co. v. King*, 512 F. Supp. 2d 117 (D. Conn. 2007)
- *Nichols v. Salem Subway Restaurant*, 98 Conn. App. 837, 912 A.2d 1037 (2006)
- *Waldman v. Jayaraj*, 89 Conn. App. 709, 874 A.2d 860, cert. denied, 275 Conn. 907, 882 A.2d 680 (2005)

Publications

10.09.2015 "Phishing For Coverage: When Is Fraud A 'Computer Fraud'?" Law360 (October 2015).

10.08.2015 "Phishing for Cybersecurity Coverage: When is a Fraud a 'Computer Fraud'?" PropertyCasualtyFocus (October 2015).

09.28.2015 "Your Data Breach Collided With My Personal Injury Coverage," Expect Focus Vol. III (Summer 2015).

09.15.2015 Contributor, "Reinsurance Focus@" Carlton Fields Jordan Burt (August 2015).

09.15.2015 Contributor, "PropertyCasualtyFocus," Carlton Fields Jordan Burt (September 2015).

06.22.2015 Cybersecurity Coverage Litigation: Learning to Survive After the Second Wave

06.15.2015	"Telematics and Usage-Based Insurance," Expect Focus, Vol. II (Spring 2015).
05.07.2015	"Pros And Cons Of Telematics And Usage-Based Auto Insurance," Law360 (May 2015).
04.24.2015	"Telematics and Usage-Based Insurance: Benefits, Challenges, and the Future," PropertyCasualtyFocus (April 2015).
02.20.2015	Co-Author, "Cyber Risk as a Regulatory Issue: Tales of Encryption," PropertyCasualtyFocus (February 2015).
01.28.2015	Co-Author, "Cyber Risk as a Regulatory Issue: A Connecticut Regulator Shares Her Insights," PropertyCasualtyFocus (January 2015).
12.22.2014	"New York's Late Notice Statute Leaves No-Prejudice Rule Intact for Out-of-State Policies," Expect Focus, Vol. IV (Fall 2014).
10.01.2014	Co-Author, "Life Insurer Prevails in First Circuit Appeal in ERISA Class Action Challenging Retained Asset Accounts," ABA Tort Trial & Insurance Practice (October 2014).
09.16.2014	"Washington Supreme Court Narrows Efficacy of Late Notice Defense," Expect Focus, Vol. III (Summer 2014).
07.08.2014	Co-Author, "First Circuit Finds for Life Insurer in ERISA Class Action Challenging Retained Asset Accounts to Pay Life Insurance Benefits," Carlton Fields Jordan Burt Client Alert (July 2014).
07.08.2014	"Appellate Court Rejects "Explosive Corpse" Theory," Expect Focus, Vol. II (Spring 2014).
05.23.2014	"Is SLIMPACT Losing Steam? Tennessee Switches to NIMA," Reinsurance, Harris Martin Publishing (May 23, 2014).
03.31.2014	"Individualized Inquiries Defeat Class Certification in UM/UIM Case—Again," Expect Focus, Vol. I (Winter 2014).
03.31.2014	"Summary Judgment Victory for Life Insurer in Annuity Class Action," Expect Focus, Vol. I (Winter 2014).
12.01.2013	"In a Tennessee Coverage Dispute, All Insured Things Must Come to an End," ExpectFocus, Vol. IV (Fall 2013).
12.01.2013	Co-Author, "Connecticut District Court Again Certifies Nationwide Class in 401(k) Revenue Sharing Case," ExpectFocus, Vol. IV (Fall 2013).
05.01.2013	Co-Author, "Seventh Circuit Rejects Novel DOL Position in Affirming Summary

Judgment for Retirement Plan Service Provider in 'Revenue Sharing' Class Action," Carlton Fields Jordan Burt Client Alert (May 2013).

- 03.04.2013 Co-Authors, "Washington Supreme Court Makes it Dangerous to Involve Lawyers in Claims Handling," Carlton Fields Jordan Burt Client Alert (March 2013).
-
- 12.18.2012 "NAIC Active on Captives and Special Purpose Vehicles," Reinsurance, Harris Martin Publishing (December 18, 2012).
-
- 08.30.2012 Co-Author, "Courts May Still Be Expanding Coverage for Liability of Computer Hacking Victims," Carlton Fields Jordan Burt Client Alert (August 2012).
-
- 04.01.2012 "Revisiting AT&T v. Concepcion: Can you Hear Me Now?" Lexology (April 2012).
-
- 02.08.2012 Co-Author, "Second Circuit Vacates Class Certification Order in Long-Running ERISA Retirement Plan 'Revenue Sharing' Case," Carlton Fields Jordan Burt Client Alert (February 2012).
-
- 01.11.2012 Author, "Solvency Ho! An Update on U.S. and European Solvency Initiatives," Reinsurance, Harris Martin Publishing (January 11 2012).
-
- 09.16.2011 Author, "Pride and Prejudice: Prompt Notice in Reinsurance Claims," LexisNexis Mealey's Litigation Report Reinsurance, Vol. 22, Issue 10 (September 16, 2011).
-
- 02.08.2011 Author, "7th Circuit Brings Down Curtain on Pre-Award Challenge to Arbitrator Partiality," Reinsurance, Harris Martin Publishing (February 2011).
-
- 11.30.2010 Author, "Uberrimae Fidei: Contracting with the Utmost Good Faith," Reinsurance, Harris Martin Publishing (November, 2010).
-
- 08.11.2010 Author, "Pre-Pleading Security Statutes: Tying the Hands of the Unwary," Reinsurance, Harris Martin Publishing (August, 2010).
-
- 03.31.2010 Author, "The Latest in Insurance-Linked Securities," Reinsurance, Harris Martin Publishing (March 2010).
-
- 06.30.2009 Author, "Enforcing Class Arbitration Waivers: the FAA and Unconscionability," Reinsurance, Harris Martin Publishing (June 2009).

Speaking Engagements

- Speaker, What Insurance Lawyers Need to Know About Claims Handling Software, ExecSense Webinars (July 7, 2011)
- Speaker, What Insurance Lawyers Need to Know About the New Generation of Pollution Legal Liability and Related Environmental Insurance Policies and the

Potential for Litigation over Duty to Defend Under These Policies, ExecSense Webinars (December 3, 2010)

- Speaker, The Instant Impact on Insurance Lawyers of Baker v. Nat'l Interstate Ins. Co. (Cal. App. January 11, 2010) on Products and Completed Hazards Exclusions and Negligent Service Claims, ExecSense Webinars (February 5, 2010)

Professional Recognition

- Selected for inclusion in *New England Super Lawyers "Rising Star"* (Insurance) (2009-2013)
- Pro Bono Honor Roll 2010, Connecticut Lawyer Magazine
- CALI Awards in Criminal Law, International Law and Law and Literature of Crime
- Associate Editor, Connecticut Law Review

Professional and Civic Activities

- American Bar Association
- Connecticut Bar Association
Insurance Law Committee (2010-present); Young Lawyers Section, Appellate Committee Co-Chair (2007-2009)
- Board of Directors, Lawyers for Children America, Inc. (2013-present)

News

10.12.2015	John Pitblado Authors Article for Law360
05.07.2015	Pros and Cons of Telematics and Usage-Based Auto Insurance
02.03.2015	Eleven Carlton Fields Jordan Burt Attorneys Elected to Shareholder
08.18.2014	Carlton Fields Jordan Burt Launches Property and Casualty Insurance Industry Blog