

## ASSIGNMENT AND COVENANT

USE NOTES: The policyholder's insurer has denied all coverage. The policyholder and the plaintiff has agreed to cooperate and to enter into a reasonable, non-collusive settlement. Several paragraphs suggest alternative language. Adapt the contract below by using the Legend. Before sending the text below, delete everything above this line.

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## ASSIGNMENT AND COVENANT

### RECITALS

#### 1. Parties

This \_\_ (**Agreement**) is between &Client& (**&Client&**), &Plaintiff& (**&Plaintiff&**) &IndependentCounsel& (**&IndependentCounsel&**), &PlaintiffCounsel&, (**&PlaintiffCounsel&**), and &CoverageCounsel& (**&CoverageCounsel&**) (collectively the **Parties**).

#### 2. Liability Action

&Plaintiff& sued the &Client& in an action entitled &Plaintiff& v. &Client& (**Liability Action**). The &Client& was represented by &IndependentCounsel&. &Plaintiff& was represented by &PlaintiffCounsel&. The Liability Action has been resolved as set forth in Exhibit 1 attached hereto.

#### 3. Liability Insurance

&Client& is a policyholder of each of the following liability insurance policies.

A. &InsCo& (**&InsCo&1**) issued a policy of liability insurance bearing Policy no. \_\_ to &Client& with limits of liability of \$\_\_ by which it agreed to pay those sums that &Client& becomes legally obligated to pay as damages because of physical injury to tangible property, including all resulting loss of use of that property and loss of use of tangible property that is not physically injured and agreed that it has the duty to defend the &Client& against any lawsuit seeking those damages.

B. &InsCo& (**&InsCo&2**) issued a policy of liability insurance bearing Policy no. &Blank& to the &Client& with limits of liability of \$\_\_ by which &InsCo& agreed to pay on behalf of the &Client& amounts that the &Client& becomes legally obligated to pay as the result of claims made against it for any error, act, omission, neglect, or breach of duty by the &Client&. &InsCo&1 and &InsCo&2 are sometimes referred to as the **Insurers**.

#### 4. Notice of Liability Action

On &Date&, &Client& notified the Insurers of the Liability Action and requested that they defend and indemnify &Client&.

#### 5. Failure to Investigate

After notice, the Insurers did not conduct a thorough investigation. The Insurers did not contact or interview &Client&, &IndependentCounsel&, &Plaintiff&, &PlaintiffCounsel&, or any witnesses.

6. Evidence Supporting &Client&'s Covered Liability to &Plaintiff& &Blank&

7. Legal Principles Supporting &Client&'s Covered Liability to &Plaintiff& &Blank&

8. &Client&'s Liability and &Plaintiff&'s Damages

Based upon the facts and the law set forth above, &Client& believes that &Client& is [legally obligated to pay damages to &Plaintiff& because of bodily injury, physical injury to

tangible property and loss of use thereof caused by an accident and exposure to harmful conditions]. &Client& further believes that &Plaintiff& has suffered reasonably provable damages in the range of \$\_\_\_ to \$\_\_\_.

9. &Client&'s Risk of Exposure to Liability and Damages

&Client& is concerned that [he/she/it] may be found to be legally obligated to pay damages to &Plaintiff& because of breach of duties they owe to &Plaintiff& and because of physical injury to tangible property and loss of use thereof caused by an accident and exposure to harmful conditions in a substantial sum.

10. Coverage Denial

The Insurers denied coverage and failed to faithfully defend or indemnify &Client& in the Liability Action.

Alt. 11. Failure to Defend

The Insurers agreed to defend &Client& in the Liability Action, but failed to faithfully discharge their duty to defend &Client& in the Liability Action.

Alt. 11. Failure to Hire Ethical Counsel

The Insurers hired &DependentCounsel& to defend &Client& in the Liability Action under a reservation of rights. &DependentCounsel& failed to comply with Rules of Professional Conduct, Rule 1.7. &Client& did not give informed written consent nor authority to appear in court to &DependentCounsel&.

Alt. 11. Insurers' Failure to Pay for Defense

"By its very nature the duty assumed by [the insurer] to defend its assured against suits must necessarily be classified as a delegable duty [s]ince a carrier is not authorized to practice law, it must rely on independent counsel for the conduct of the litigation." (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 880-881.) &Client& retained &IndependentCounsel& to defend &Client& in the Liability Action. &Client& transmitted to the Insurers &IndependentCounsel&'s invoices for defense fees and costs. Each invoice constituted a first party claim. The Insurers failed to timely pay invoices in the amounts required by law.

Alt. 11. The Insurers Recanted Denial of All Coverage

On &Date&, the Insurers notified &Client& that they had reconsidered its previous denial of all coverage and agreed to pay for &Client&'s defense in the Liability Action under a reservation of "all" of its rights to later deny coverage to &Client& and threatened to sue &Client& for all costs of defense and settlement. The Insurers appointed &DependentCounsel& to control &Client&'s defense and refused to provide &IndependentCounsel&. Despite the Insurers' reservations of "all" of its rights to later deny coverage, &DependentCounsel& refused to comply with Rule 1.7. The Insurers paid &DependentCounsel&'s defense costs and fees in violation of Rule 1.7. The Insurers refused to pay &IndependentCounsel& invoices.

12. Failed Settlement Opportunity

On &Date&, &Plaintiff& offered to settle the Liability Action with &Client& on terms set forth in Exhibit 2 attached hereto, for a sum that is less than the Insurers' policy limits. &Client& notified the Insurers of this settlement offer and requested that the Insurers accept the offer of settlement on terms set forth in Exhibit 3 attached hereto. The parties believe and notified the Insurers that this offer was fair and reasonable when made because &Client& was faced with a substantial likelihood of a recovery by &Plaintiff& in excess of the applicable limits of the Insurers' insurance policy based on the damage claimed by &Plaintiff& and the evidence regarding &Client&'s legal responsibility for causing such damage. "The law favors settlements." (*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 602.)

13. The Insurers' Refusal to Settle

The Insurers rejected &Plaintiff&'s settlement offer.

14. &Client&'s Inability to Pay Settlement

Language in the Insurers' policies state that &Client& must adjudicate issues of liability and damages in the Liability Action. &Client& was not able to accept &Plaintiff&'s settlement offer in part because &Client& had incurred or paid &IndependentCounsel&'s defense invoices which the Insurers failed to reimburse.

15. Breach of Duties

The Insurers's has breached their duties to &Client& to investigate, defend, settle, and indemnify. &DependentCounsel& has breached its duties to &Client& to analyze conflicts of interest, make written disclosure to and obtain the informed written consent of &Client& as required by Rule 1.7. &Client& and &Plaintiff& believe that they are entitled to make this reasonable settlement in good faith. (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)

16. Procedural Agreements

&Client& and &Plaintiff& stipulated to try the Liability Action by a general reference and further agreed to certain procedural efficiencies. &Client& notified the Insurers of their stipulation on terms set forth in Exhibit 4 attached hereto.

Alt. 1A. Settlement

&Client& agreed to enter into a settlement agreement with &Plaintiff& rather than incur additional expense and risk a judgment in excess of the settlement amount. (Not recommended)

Alt. 17B. Arbitration

&Client& agreed to enter into a settlement agreement with &Plaintiff& to arbitrate the Liability Action.

Alt. 17C. Trial by General Reference

&Client& agreed to enter into a settlement agreement with &Plaintiff& to resolve the Liability Action by a trial by general reference.

Alt. 17D. Court Trial

&Client& tried the Liability Action to judgment in Superior Court.

18. Notice of Resolution

&Client& notified the Insurers of the resolution of the Liability Action and requested that the Insurers pay the (settlement or judgment). The Insurers refused to pay the (settlement or judgment).

19. Assignment and Covenant

&Client& and &Plaintiff& desire to cooperate with each other to protect their mutual interests and to assign certain rights and to assume certain obligations to each other. &Client& "need not indulge in financial masochism. . . . [h]aving executed an assignment . . . may relax into neutrality or even smile benevolently upon the [&Plaintiff&'s] efforts to collect from" the Insurers. (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 801.).

20. Notification to the Insurers

Although the Insurers denied all coverage to &Client&, &Client& has kept the Insurers informed. "[I]f an insurer denies coverage to the insured, the insured's contractual obligation to notify the insurer ceases." (*Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 238.) &Client& notified the Insurers that: 1) &Plaintiff& sued &Client& in the Liability Action; 2) &Plaintiff& offered to settle the Liability Action with &Client& for a sum within the Insurers' policy limits; 3) &Client& faced significant exposure to to pay damages to &Plaintiff& in a substantial amount; 4) &Plaintiff& and &Client& intended to resolve their liability dispute; and

5) &Client& incurred defense fees and costs through &IndependentCounsel& and transmitted invoices to the Insurers.

21. Coverage Action

&Client& sued the Insurers in an action entitled &Client& vs. Insurers. (**Coverage Action**). Upon execution of the Agreement, &Plaintiff& may join and a plaintiff in the Coverage Action. &Client& and &Plaintiff& are represented by &CoverageCounsel&.

22. Malpractice Action

On &Date&, &Client& sued &DependentCounsel& in an action entitled &Client& vs. &DependentCounsel& bearing Case No. \_\_\_ for legal malpractice, breach of fiduciary duty, declaratory relief, and disgorgement of attorneys fees and costs &DependentCounsel& accepted from the Insurers in violation of Rule 1.7. (**Malpractice Action**).

23 Potential Conflicts of Interest

&Client& and &Plaintiff& understand and acknowledge that: 1) their interests conflict in the Liability Action and that they share some common interests in the Coverage Action and the Malpractice Action; 2) their relationships with other Parties to this Agreement will change upon execution of this Agreement; 3) each has had the opportunity to consult with independent counsel who are not a Party to this Agreement; 4) potential conflicts of interest that may divide &Client& and &Plaintiff& regarding the joint retention of &CoverageCounsel& and the execution of the Agreement; 5) each must give informed written consent to jointly retain &CoverageCounsel&; and 6) each must give informed written consent to execute this Agreement. &Client& and &Plaintiff& desire to: 1) resolve disputes between them by executing this Agreement; 2) waive potential conflicts of interest between them; and 3) to jointly retain &CoverageCounsel& to represent them and their interests in the Coverage Action and the Malpractice Action.

## AGREEMENT

1. Payment

&Client& agrees to pay to &Plaintiff& the sum of \$ \_\_\_. &Client& further agrees to pay to &Plaintiff& the sum of \$ \_\_\_ per month with interest at the legal rate of ten percent (10%) until the principle sum of \$ \_\_\_ and interest has been paid in full.

2. Assignment

&Client& assigns and transfers to &Plaintiff& any and all claims and causes of action that are assignable-at-law that &Client& may now have or hereafter acquire against the Insurers based on, among other things, the Insurers' failures and refusals to defend, investigate, settle, and indemnify &Client& in the Liability Action. The Parties understand and acknowledge that certain claims and/or causes of action are not assignable in law, e.g., claims by &Client& for physical injuries, emotional distress, punitive damages, and claims for legal malpractice (**Non-assigned Claims**). &Client& does not assign any such Non-assigned Claims. &Client& makes no warranty as to the merits or value of the assigned claims or causes of action herein. &Client& warrants that [he/she/it] has not previously assigned any of the claims or causes of action that are the subject of this agreement and that [he/she/it] will not do any act or thing to interfere with &Plaintiff&'s ability to prosecute the assigned claims and causes of action.

3. Grant of Lien on Non-assigned Claims

&Client& grants to &Plaintiff& a lien upon any and all sums that may be recovered by &Client& at any time on account of any Non-assigned Claims. &Client& grants to &Plaintiff& a lien upon any Net Recovery based upon any and all rights &Client&'s may now have or hereafter acquire against &DependentCounsel& based on, among other things, breach of fiduciary duty

and legal malpractice. &Client& makes no warranty as to the merits or value of the non-assigned claims or causes of action. &Client& warrants that except for an attorney's lien in favor of &IndependentCounsel&, [he/she/it] has not previously granted any prior lien on any of the non-assigned claims or causes of action that are the subject of this agreement.

Alt. 4A. Covenant Not to Execute

&Plaintiff& covenants and agrees not to cause any levy or writ of execution upon any claim or judgment in the Liability Action against any asset or property of &Client& or any of [his/her/its] successors-in-interest.

Alt. 4B. Covenant to Defer Execution

Except for the payment(s) described in paragraph 1 above, &Plaintiff& covenants and agrees to defer any levy or writ of execution upon the (settlement judgment) in the Liability Action against any asset or property of &Client& or any of its successors-in-interest until efforts to collect from the Insurers have been exhausted, or \_\_\_ months following entry of judgment in the Liability Action, whichever is sooner. Best efforts to collect are deemed to be exhausted when the Coverage Action and the Malpractice Action are finally concluded.

5. Best Efforts

&Plaintiff& and &Client& agree to use their best efforts to prosecute the Coverage Action to conclusion to enforce the claims and causes of action of each in the name(s) of each and at their own expense. &Client& agrees to use [his/her/its] best efforts to prosecute the Malpractice Action to conclusion to enforce the claims and causes of action [his/her/its] name and at their own expense.

6. Conflict of Interest Waiver

&Client& and &Plaintiff& have read and understand Rules of Professional Conduct, Rule 1.7 and acknowledge that &CoverageCounsel& has made written disclosure to them of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to each by their joint representation by &CoverageCounsel&. &Client& has been advised by &IndependentCounsel& and &Plaintiff& has been advised by &PlaintiffCounsel& regarding Rule 1.7, the Coverage Action, the Malpractice Action and this Agreement. &Client& and &Plaintiff& acknowledge that each has had the opportunity to consult with independent counsel who have no interest in this Agreement regarding the subject matter of this Agreement. &Client& and &Plaintiff& give their informed written consent and agree to waive potential conflicts of interest that may divide &Client& and &Plaintiff& regarding the joint retention of &CoverageCounsel& and the execution of the Agreement. &Client& and &Plaintiff& give their informed written consent and agree to jointly retain &CoverageCounsel& to prosecute the Coverage Action and the Malpractice Action. &Client& and &Plaintiff& give their informed written consent and agree to execute this Agreement to which &IndependentCounsel&, &PlaintiffCounsel&, and &CoverageCounsel& are also Parties. &Client& and &Plaintiff& understand and agree that if either asserts a conflict of interest in the future, that such Party shall be solely responsible to pay for continued prosecution of the Coverage Action and/or the Malpractice Action independently of this Agreement.

Alt. 6. Liens on &Client&'s Property

&Plaintiff& agrees to not cause any and all notices of liens to be transmitted or filed.

Alt. &Plaintiff& agrees to cause any and all notices of lien previously transmitted or filed to be expunged by &Date&.

Alt. &Plaintiff& agrees to not cause any notices of liens to be transmitted or filed, except that a judgment lien may be filed and served in the Coverage Action and the Malpractice Action pursuant to Code Civ. Proc. §708.410 et. seq.

Alt. &Client& agrees that &Plaintiff& may cause notices of liens to be transmitted or filed against assets of &Client&. Promptly after the Coverage Action and the Malpractice Action are finally concluded, &Plaintiff& shall cause any and all notices of lien to be expunged.

7. Net Recovery

“Net Recovery” means all things of value paid in the Coverage Action and/or the Malpractice Action after satisfaction of liens. “Net Recovery” does not include any sums paid by &Client& to &Plaintiff& from &Client&’s personal assets other than rights in the Coverage Action and/or the Malpractice Action.

8. Sharing of Net Recovery

&Client& agrees to pay to &Plaintiff& ten percent (10%) of the Net Recovery collected by &Client& at any time on account of the Coverage Action and/or the Malpractice Action.

9. Management of Coverage Action and Malpractice Action

As the holder of a 90% interest in any Net Recovery, &Plaintiff& has the right to manage and to settle the Coverage Action and/or the Malpractice Action through &CoverageCounsel&.

10. &IndependentCounsel& Lien

&IndependentCounsel& has previously earned and is therefore entitled to receive reasonable fees and costs incurred in defending &Client& in the Liability Action in the sum of \$\_\_\_ for past services in the Liability Action plus reasonable and necessary costs and fees for future services in representing &Client& pursuant to the terms of an existing Retainer Agreement.

11. &PlaintiffCounsel& Lien

&PlaintiffCounsel& has previously earned and is therefore entitled to receive reasonable fees and costs incurred in representing &Plaintiff& in the Liability Action in the sum of \$\_\_\_ for past services in the Liability Action plus reasonable and necessary costs and fees for future services in representing &Client& pursuant to the terms of an existing Retainer Agreement in the Liability Action.

12. &CoverageCounsel& Lien

&CoverageCounsel& has previously earned and is therefore entitled to receive reasonable fees and costs incurred in representing &Client& (and/or &Plaintiff&) in the Coverage Action and the Malpractice Action in the sum of \$\_\_\_ for past services in the Coverage Action, in the sum of \$\_\_\_ for past services in the Malpractice Action plus reasonable and necessary costs and fees for future services in the Coverage Action and the Malpractice Action pursuant to the terms of an existing Retainer Agreement.

13. Notice of Liens

All Parties to this Agreement may give notice of their respective liens in the Liability Action, Coverage Action, and Malpractice Action.

14. Priority of Liens

- A. &PlaintiffCounsel&’s lien has first priority to all sums paid by &Client& from personal assets other than sums paid in the Coverage Action and the Malpractice Action;
- B. &CoverageCounsel&’s lien has first priority to all sums paid from any recovery in the Malpractice Action, and the Coverage Action;
- C. &IndependentCounsel&’s lien is senior to &Plaintiff&’s and &Client&’s rights to collect any recovery;
- D. Any lien granted by &Client& or &Plaintiff& to additional counsel retained by either of them shall be junior to the liens stated in paragraph 14A, B, and C, immediately above.

15. Priority of Distribution upon Recovery

- A. All sums paid by &Client& from personal assets other than sums paid in the Coverage Action and the Malpractice Action shall be distributed as follows:
- 1.) &IndependentCounsel& shall be paid to satisfy of sums due pursuant to paragraph 10 above, until all sums due have been paid to in full;
  - 2.) Thereafter, &PlaintiffCounsel& shall be paid to satisfy sums due pursuant to paragraph 11 above, until all sums due have been paid in full;
  - 3.) Thereafter, the remainder shall be paid to &Client&.
- B. All sums collected in the Coverage Action and the Malpractice Action shall be distributed as follows:
- 1.) &CoverageCounsel& shall be paid to satisfy of sums due pursuant to paragraph 12 above, until all sums due have been paid to in full;
  - 2.) Thereafter, &IndependentCounsel& and &PlaintiffCounsel& shall be paid pro rata to satisfy sums due pursuant to paragraphs 10 and 11 above, until all sums due have been paid in full;
  - 3.) Thereafter, the remainder shall be paid ninety percent (90%) to &Client& and ten percent (10%) to &Plaintiff&.

16. Signatures on Additional Documents

The Parties agree to execute any additional documentation reasonably deemed necessary or desirable by any other Party to evidence, establish or enforce the claims and causes of action set forth herein. The Parties agree to immediately, but in no event more than five (5) days endorse all negotiable instruments received pursuant to the settlement all of any portion of the Coverage Action and/or the Malpractice Action. Any Party who fails to do so shall pay all costs, expenses, reasonable attorney fees actually and reasonably incurred plus interest at the rate of ten percent (10%) per annum in connection with negotiating said instruments (**Enforcement Costs**). Such failing Party agrees that [his/her/its] share of any distribution to be made pursuant to this Agreement shall be reduced by the amount of all such reasonably claimed Enforcement Costs.

17. Cooperation

The Parties agree to cooperate with each other in the prosecution of the Coverage Action and the Malpractice Action including, without limitation, (a) to provide &Plaintiff& with copies of all documents and correspondence between &Client& and the Insurers relating to the claim involved in the Liability Action; (b) to make a limited waiver of the attorney-client privilege with each and every attorney that represented &Client& in the Liability Action including, without limitation, &DependentCounsel&, and to provide copies of all correspondence to and from said attorneys; (c) to exchange, upon request, all documents and information relevant to the prosecution of the claims and causes of action against the Insurers. Such disclosure shall not waive the attorney-client privilege generally as to any person other than &Client& and &Plaintiff& and their counsel, pursuant to the Common Interest Doctrine. Counsel for any Party may assert the attorney-client privilege and the work produce doctrine to withhold documents in good faith. Any dispute regarding the assertion of any privilege shall be resolved by an in camera review by the court in the Coverage Action.

18. Miscellaneous

A. *Truthful Testimony*

The Parties agree to give truthful testimony upon reasonable notice without the necessity of service of legal process, *e.g.*, a subpoena in deposition, at trial, upon any court hearing or legal proceeding in each Action.

*B. Additional Documents*

The Parties agree to sign all papers and to execute and deliver such other additional documents as may be required to effectuate each of the terms of this Agreement. This Agreement is not the only agreement among these Parties.

*C. Costs*

Except as otherwise provided, each Party shall bear his or its own respective costs and attorneys' fees incurred in connection with preparation and execution of this Agreement.

*D. Binding Effect*

This Agreement and all the terms, conditions and obligations contained herein are binding upon and inure to the benefit of the heirs, executors, administrators, personal representatives, successors in interest and assigns of each Party.

*E. Warranty of Authority*

Each Party executing this agreement directly or in a representative capacity represents and warrants that he or it has the authority and is empowered to do so.

*F. Attorneys Fees and Costs*

The Parties agree to pay their own costs, expenses, and attorneys' fees incurred in connection with negotiation and execution of this Agreement. Should any Party hereto institute any legal action or proceeding to enforce any provision of this agreement or for damages by reason of any alleged breach of any provision of this agreement, the prevailing Party shall be entitled to receive from the losing Party all of its costs and expenses, including, without limitation, reasonable attorney fees, court costs, and disbursements actually and reasonably incurred in connection with said proceeding.

*G. Time Is of the Essence - Condition*

Time is of the essence in this Agreement. This Agreement is conditioned upon acceptance of these terms by all parties in writing no later than &Date& and completion of all obligations by the dates specified in this Agreement and Related Documents. The signatures of each Party to this Agreement shall constitute his or its signature, where required, to each of the Related Documents.

*H. Construction*

This Agreement shall be construed without regard to who drafted same, and shall be construed as though all hereto participated equally in the drafting of the Agreement. The Parties agree that any rule pertaining to the construction of contracts to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

*I. California Law*

This Agreement, including matters of construction, validity and performance, shall be interpreted, governed by and construed in accordance with the laws of the State of California. If any provision of this agreement is invalid or contravenes California law, such provision shall be deemed not to be a part of this Agreement and shall not affect the validity or enforceability of the remaining provisions. Any action arising out of this Agreement shall be brought in the Superior Court for the State of California, County of Los Angeles.

*J. Counterparts*

This agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which together shall constitute one document. A facsimile, scan or PDF copy of an originally executed counterpart signature shall be afforded the same validity as the originally executed counterpart.



*K. Headings*

The paragraph headings contained in this Agreement are for convenience only and shall not be considered for any purpose in construing this Agreement.

*L. Number and Gender*

As used in this Agreement, the singular shall include the plural, and the masculine shall include the feminine and neuter gender.

*M. Amendment*

This Agreement may not be modified, amended, supplemented, or terminated, and no provision of this Agreement shall be waived, except by a writing executed by all of the Parties to this Agreement.

*N. Notices and Demands*

Any notice or demand hereunder shall be made in writing mailed by certified mail, return receipt requested, or hand delivered, to the Parties addressed as follows:

&Client&  
care of  
&IndependentCounsel&

&Plaintiff&  
care of  
&PlaintiffCounsel&

*I. Effective Date*

This Agreement is executed at Los Angeles, California and shall be effective on the following date.

Date: \_\_\_\_\_

&PlaintiffCounsel&

\_\_\_\_\_  
&Plaintiff&

\_\_\_\_\_  
By:

&Client&

&IndependentCounsel&

\_\_\_\_\_  
By:

\_\_\_\_\_  
By:

&CoverageCounsel&

\_\_\_\_\_  
By: