



JPA or Insurance: What's the Difference?

PRESENTED BY GEORGE MURPHY AND DOUG ALLISTON OF
MURPHY, CAMPBELL, ALLISTON & QUINN

Reasons for differences

- ▶ **Different purposes:**

- ▶ Businesses intended to make a profit
- ▶ Mutual assistance
- ▶ Public service

- ▶ **Different laws apply:**

- ▶ Civil Code
- ▶ Insurance Code
- ▶ Corporations Code
- ▶ Government Code

Purpose for existence

- ▶ Profit is the goal of many insurance companies
- ▶ Mutual assistance is the goal of many risk retention groups, mutual insurance companies, nonprofit pools, and intergovernmental pools (including JPAs)
- ▶ Public service may be an additional aspect of JPAs and other intergovernmental pools

Effect of the profit motive

- ▶ Pricing that may rise drastically when alternatives are hard to find
- ▶ Claims handling may be geared primarily to minimizing insurer obligations without consideration of long-term effects on future claims or public relations
- ▶ Coverage interpretations may be as narrow as company's attorneys believe they can get away with, without regard to concerns of the assured



Effect of mutual assistance motive

- ▶ Pricing may be based more on concerns for long-term stability
- ▶ Risk management may be emphasized more based on assumption that the relationship will last many years, so that investments in risk management are more likely to pay off for the group over time
- ▶ Claims handling more likely to take into account effects on assured
- ▶ Coverage decisions more likely to be based on a neutral reading of the coverage document

Effect of public service motive

- ▶ Governmental pools may provide coverage for risks that insurance would not consider, such as for defense of contract actions or injunctive relief matters
- ▶ May provide more extensive risk reduction services to members, such as employee applicant testing, human resources advice, or ADA compliance assistance

Laws that may apply

- ▶ Civil Code
- ▶ Insurance Code
- ▶ Corporations Code
- ▶ Government Code

Civil Code § 2772 et seq.

- ▶ Potential application to all indemnity agreements, including insurance policies, coverage contracts, memorandums of coverage, and the indemnity provisions in contracts
- ▶ Cannot agree to indemnify for future unlawful acts, but can agree to do so as to effects of past unlawful acts if not felonies
- ▶ Provides default rules in absence of agreement to the contrary, such as rule that an agreement to indemnify against damages embraces the cost of defense
- ▶ Limits indemnification in construction contracts

Insurance Code

- ▶ Specifies required provisions in automobile liability (including UM/UIM), fire insurance, workers' compensation, and bodily injury and property damage policies
- ▶ Limits cancellation and nonrenewal
- ▶ Is basis for Fair Claims Settlement Practices regulations

Government Code

- ▶ Authorizes public entity insurance, or self-insurance, solo or as part of a JPA pool
- ▶ “The pooling of self-insured claims or losses among entities as authorized in subdivision (a) of Section 990.4 shall not be considered insurance nor be subject to regulation under the Insurance Code. (Gov. Code § 990.8(c).)”
- ▶ Allows liability or loss under a joint powers agreement to be reinsured.

Insurance Policies

- ▶ Insurance policies often standardized language, meaning that the same language has been used many times and is likely to have been construed in court cases
- ▶ Some provisions may be required or authorized by statute, such as:
 - ▶ Uninsured motorist provisions
 - ▶ Judgment creditor provisions
 - ▶ Cancellation and nonrenewal provisions

Insurance Policies (cont.)

- ▶ Statutes also impose additional requirements:
 - ▶ Insurance Code §533 imposes a public policy restriction, prohibiting the insuring of liability due to “wilful” acts (those intended or expected to cause harm or “inherently harmful”)
 - ▶ Insurance Code sections 530 and 532 are the basis for concurrent causation analysis

JPA Coverage Documents

- ▶ JPA coverage documents often borrow from standard forms, but may use standard language in unusual ways or use nonstandard language.
- ▶ Prevalence of arbitration provisions means there are not usually court decisions about nonstandard JPA language
- ▶ Do not necessarily include statutorily required language (such as UM or cancellation) and not subject to statutorily-imposed rules of construction
- ▶ May provide for assessments

Different Obligations?

- ▶ Contribution with other coverage providers
- ▶ “Bad Faith” Liability
- ▶ Duty to Settle
- ▶ Notice/Prejudice Rule
- ▶ Independent Counsel obligation
- ▶ Cancellation/Nonrenewal

Contribution

- ▶ “Other insurance” provisions in insurance policies may not apply to non-insurance coverage like a JPA, in which case insurer may have to pay first
- ▶ Many newer insurance policies refer to “other coverage,” in which case the JPA may be primary or co-primary

Insurer “Bad Faith” Liability

- ▶ Implied covenant of good faith and fair dealing requires the insurer to protect the insured’s reasonable expectations and give insured’s interests as much consideration as own interests
- ▶ Basis for imposing extracontractual liability for unreasonable breach is that breach cannot be addressed by going to another provider, as would be normally be the case if a contractor or vendor breached. No one sells coverage for a loss already incurred. (Griffin Dewatering Corp. v. Northern Ins. Co. of New York (2009) 176 Cal.App.4th 172, 195.)

JPA "Bad Faith" Liability

- ▶ No published appellate decisions
- ▶ Same rationale exists: after the loss is sustained, JPA member cannot obtain alternate coverage
- ▶ If no extracontractual liability possible, JPA could gamble with the member's contractual benefit, knowing that worst case scenario is payment of amounts owed on the claim in the first place. (See *Griffin Dewatering*, 176 Cal. App. 4th at 196.)

Duty to Settle

- ▶ Insurers may have “duty to settle” in cases where liability may exceed policy limits
- ▶ Rationale: insurers cannot unreasonably gamble with insured’s money
- ▶ Test: failure to evaluate settlement as if the limits did not apply
- ▶ Same rationale would apply to JPA

Notice/Prejudice Rule

- ▶ Insurer cannot deny claim based on late notice unless it can show prejudice (exception for claims-made-and-reported policies, where reporting is a basic coverage element)
- ▶ Rationale is the law's preference for an avoidance of forfeitures
- ▶ Rationale could be applied to JPA, but aware of at least one case where notice/prejudice rule not applied to JPA

Duty to Provide Independent Counsel

- ▶ Attorney hired by insurance company to defend insured deemed to have two clients—insurer and insured.
- ▶ When insurer reserves its rights as to coverage issue to be decided in the action being defended, possible conflict between insurer and insured in the outcome
- ▶ Attorneys' Rules of Professional Responsibility restrict ability of attorney to represent clients with conflicting interests
- ▶ Courts require insurer to pay independent counsel where its counsel would have conflict

Independent Counsel and JPAs

- ▶ Rationale for deeming both insurer and insured to be clients is their shared interest in defense of action, and their shared interest in maintaining confidential communications with defense attorney
- ▶ Same shared interests exist with JPAs and JPA members
- ▶ Right to independent counsel not based on Insurance Code, but on attorney rules of ethics

Cancellation and Non-renewal

- ▶ Insurance Code prescribes minimum times for notice of nonrenewal, and limits cancellation during term.
- ▶ No such protections for JPA members, unless written into coverage documents, bylaws, or other JPA documents
- ▶ Rules may allow JPA to reduce coverage significantly after member's time to withdraw for coming year has passed



MURPHY • CAMPBELL • ALLISTON • QUINN

A PROFESSIONAL LAW CORPORATION

www.murphycampbell.com

(916) 400-2300

George E. Murphy | Douglas R. Alliston