



SPECIFIC LITIGATION INSURANCE MARKETING MATERIAL

Underwritten by The Transactional Risk Insurance Team of
Hartford Specialty Financial Products

1. INTRODUCTION TO SPECIFIC LITIGATION INSURANCE

A. The Definition of and Need for Specific Litigation Insurance

Specific Litigation Insurance provides coverage to a party to a pending or threatened lawsuit. Although, Specific Litigation Insurance typically covers a defendant in a lawsuit, it may also cover a plaintiff seeking to “guarantee” a recovery. In almost all instances, however, Specific Litigation Insurance is offered in the context of an extraordinary transaction, such as a capital infusion (of equity or debt), sale, merger or acquisition. The insurance is bought to facilitate the extraordinary transaction.

For example, if a company seeks an infusion of debt or equity financing, but is hampered in its efforts because of a pending or threatened lawsuit, Specific Litigation Insurance may insure that any final adverse judgment will not exceed a certain amount (the attachment or retention under the policy). This allows the parties to “cap” their exposure and consummate their transaction.

As another example, if a company has successfully obtained a judgment against a large, solvent defendant and desires to finance a portion of that judgment while an appeal is pending, Specific Litigation Insurance may serve as collateral for such financing.

Specific Litigation Insurance coverage typically excludes coverage for any settlement and may require settlement if, for defendant-based coverage, offered at or below the retention/attachment point or, for plaintiff-based coverage, if offered at or above the limit of liability for the insurance program.

The need for Specific Litigation Insurance arises because parties contemplating an extraordinary transaction may find that a pending or threatened lawsuit is a hindrance to consummating that transaction.

B. Overview of Our Underwriting Criteria

Generally, the Hartford considers the following factors as key underwriting safeguards for Specific Litigation Insurance:

1. We have been given the opportunity to thoroughly review the merits of the lawsuit and the candor and competence of counsel, etc.¹;
2. Because the insurance is sought in the context of an extraordinary transaction, the parties benefit by obtaining “catastrophic coverage”, thus allowing us to attempt to “arbitrage” the amount of risk exposure with the cap or guaranty amount needed to close a deal;
3. Generally (particularly if plaintiff coverage), settlement not covered and may be “mandatory” at stated levels²; and
4. We will have an adequate opportunity to participate in the claim handling.

HFP’s Transactional Risk Insurance Team will generally consider any litigation (or threatened litigation) where the factual basis of the claim can be evaluated and a damage analysis can be made.

C. Overview of the Transactional Risk Insurance Team

HFP’s Transactional Risk Insurance Team is comprised of experienced trial attorneys, and a forensic accountant, with the assistance and input of claims professionals such as Joseph Monteleone. When appropriate, the team retains outside counsel to help assess the risk.

¹ The Hartford has developed a process to protect the confidentiality of any information imparted to it both at time of initial underwriting and thereafter.

² Since the existence of Specific Litigation Insurance may be discoverable, “mandatory” settlement options may be resisted by an insured. For example, if we insure a defendant excess of \$5M and the defendant believes the case against it should settle for no more than \$1M, it will be difficult to have a policy provision requiring settlement at \$5M if the insured believes that the plaintiff will discover the policy. Accordingly, the policy may instead use “hammer clauses”, “additional premium provisions” and/or cooperation provisions supported by side-agreements to achieve the desired result fairly.

The team is managed by David S. De Berry, Esq., First Vice President and is supported by Kenneth W. De Berry, CPA, First Vice President; Martin J. Conroy, Esq.; Vice President and David M. Anderson, Esq., Vice President as well as by the internal underwriting resources, and the Hartford Financial Products claims department which is headed by Joseph Monteleone, Vice President.

2. SAMPLE POLICIES & EXPLANATORY NOTES

A. Explanatory Notes to Defendant-Based Policy. SEE ATTACHED GENERIC DEFENDANT-BASED POLICY (Appendix “A”)

Generally:

1. Loss is defined as a final adverse judgment in a specific lawsuit awarding monetary relief. Hence, equitable relief (such as an order to enjoin certain activity) would not give rise to loss.
2. Defense costs may be covered (but not recommended).
3. The insured will have a duty to defend the litigation with appropriate zeal and diligence as if no insurance were in place.
4. The insurer has the right to meaningfully participate in the selection of counsel, all substantive strategies and all settlement discussions.
5. The Insured may be required to accept a settlement at an amount that is below the Retention, if offered.
6. There may be a “hammer” provision for settlement offered above the Retention.
7. There is a broad duty to cooperate.
8. The Insured will represent certain facts upon which coverage is predicated.

Typically, such representations include:

- Sufficient financial ability to litigate the dispute
 - All material information known to the Insured has been disclosed to the Insurer
 - All settlement discussions have been disclosed to the Insurer
9. The Insurer obtains subrogation rights

10. Any dispute arising under the Policy must be arbitrated applying New York law construing the Policy under principles of construction with respect to negotiated agreements (without a presumption in favor of any party).
11. When appropriate, the Hartford may remove certain of the conditions from the Policy and enter into a side agreement with an indemnifying party in order to facilitate the transaction giving rise to the need for the insurance.

B. Explanatory Notes to Plaintiff-Based Policy. SEE ATTACHED GENERIC PLAINTIFF-BASED POLICY (Appendix “B”)

Generally:

1. Loss is defined as a final judgment in a specific lawsuit awarding monetary relief in an amount that is less than the amount stated in the Policy. Prejudgment interest (and perhaps taxed costs) would be included in the amount awarded.
2. Defense costs are not covered.
3. The insured will have a duty to prosecute the litigation with appropriate zeal and diligence as if no insurance were in place.
4. The insurer has the right to meaningfully participate in the selection of counsel, all substantive strategies and all settlement discussions.
5. The Insured may be required to accept a settlement at an amount that is above the limits of liability, if offered.
6. There may be a “hammer” provision for settlement offered below the limits of liability.
7. There is a broad duty to cooperate.
8. The Insured will represent certain facts upon which coverage is predicated.

Typically, such representations include:

- i. Sufficient financial ability to litigate the dispute
 - ii. All material information known to the Insured has been disclosed to the Insurer
 - iii. All settlement discussions have been disclosed to the Insurer
9. The Insurer obtains subrogation rights

10. Any dispute arising under the Policy must be arbitrated applying New York law construing the Policy under principles of construction with respect to negotiated agreements (without a presumption in favor of any party).
11. When appropriate, the Hartford may remove certain of the conditions from the Policy and enter into a side agreement with an indemnifying party in order to facilitate the transaction giving rise to the need for the insurance.

Appendix A

NUTMEG INSURANCE COMPANY

**A Member of the Hartford Financial Services Group, Inc.
Underwritten Through The Transactional Risk Insurance Team of
Hartford Specialty Financial Products**

Pending Litigation Insurance Policy

Policy Number: _____

**NOTICE: THE COVERAGE OF THIS POLICY IS LIMITED SOLELY TO LOSS
RESULTING FROM THE SPECIFIC LITIGATION NOTED HEREIN.**

DECLARATIONS

Named Insured:

Mailing Address:

State of Issuance:

Broker of Record:

Surplus Lines Broker No.:

Limit of Liability:

Retention:

Premium:

Escrow Participation:

Underwriting Fee:

Covered Litigation:

Policy Period:

Endorsements:

This Declarations Page, together with the Pending Litigation Insurance Policy attached hereto shall constitute the Policy declared to hereby.

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Authorized Representative

**NUTMEG INSURANCE COMPANY
PENDING LITIGATION INSURANCE POLICY
(Buyer's Coverage)**

In consideration for and subject to the payment of the premium, and subject to all of the terms and conditions of this Policy, the Insurer and the **Insured** agree as follows:

I. INSURING AGREEMENT

The Insurer shall pay the **Insured** for **Loss** after satisfaction of the **Retention** but not in excess of the **Limit of Liability**.

II. DEFINITIONS

As used in this Policy:

- (A) **“Acquired Company”** means each company whose stock, assets, membership interests or partnership interests, as the case may be, have been acquired pursuant to the **Agreement**.
- (B) **“Agreement”** means the stock purchase agreement, asset purchase agreement, or other agreement, as the case may be, annexed to or referenced in the **Proposal**.
- (C) **“Claim”** means the **Covered Litigation** brought against an **Acquired Company**
- (D) **“Covered Litigation”** shall mean the lawsuit captioned as
- (E) **“Defendant”** shall mean, in the aggregate, each **Acquired Company** that is a named defendant in the **Covered Litigation** as of the **Inception Date**.
- (F) **“Defense Costs”** means reasonable and necessary fees (including attorneys' fees and experts' fees) and expenses incurred by the **Insured** or an **Acquired Company** in the investigation, defense or appeal of the **Covered Litigation**, but shall not include the wages, salaries, benefits or expenses of any directors, officers or employees of the **Insured** or any **Acquired Company**.
- (G) **“Inception Date”** means the first day of the **Policy Period**.
- (H) **“Insured”** means the following Person(s): [The Buyer and its successors and/or assigns]
- (I) **“Limit of Liability”** means covered **Loss** (i.e., not excluded and in excess of the **Retention**) in the aggregate amount of \$_____, which is the

maximum amount of covered **Loss** payable under this Policy. The **Limit of Liability** shall be reduced by all covered **Loss** including **Defense Costs**.

- (J) "**Loss**" means (a) a final adverse judgment for monetary relief obtained in favor of the plaintiff in the **Covered Litigation** and against the **Insured** or an **Acquired Company**, and (b) **Defense Costs**; provided, however, that **Loss** shall not include any monetary award or **Defense Costs** related to any amendments and/or supplements to the complaint filed in the **Covered Litigation** as of the **Inception Date** or to any cross claim, counterclaim or third party claim that may be filed in the **Covered Litigation**.
- (K) "**Policy Period**" means the period beginning on _____ and terminating one year thereafter.
- (L) "**Retention**" means **Loss** that is not excluded hereunder in the amount of _____.

ADDITIONAL TERMS AND CONDITIONS REGARDING THE COVERED LITIGATION

- (A) With respect to the **Covered Litigation**, the Insurer shall have the right and shall be given the opportunity to associate effectively with, and shall be consulted in advance by, the Defendant and the Insured regarding (1) the selection of appropriate defense counsel, including without limitation the need to alter defense arrangements, (2) substantive defense strategies, including without limitation decisions regarding the filing and content of substantive motions, and (3) any settlement offers, demands, discussions or negotiations or offers by or on behalf of the Defendant and the Insured before they are made. The Insurer shall further have the right to insist upon non-binding mediation.
- (B) The Insurer may make any investigation it deems appropriate. However, it shall be the duty of the Defendant, not the Insurer, to defend the **Covered Litigation** and the Defendant shall defend the **Covered Litigation** with all reasonable diligence as if no insurance were in place.
- (C) The Insurer may, with the written consent of the Defendant, settle the **Covered Litigation** for solely a monetary amount which the Insurer deems reasonable. If the Defendant withholds consent to such settlement, the Insurer's liability for all Loss shall not exceed the amount for which the Insurer could have settled the **Covered Litigation** plus defense expenses accrued as of the date such settlement was proposed in writing by the Insurer to the Defendant.
- (D) As a condition precedent to its rights under the insurance policy herein contemplated, the Defendant shall provide to the Insurer all information and cooperation as the Insurer may reasonably require and shall do nothing that

may prejudice the Insurer's position or its potential or actual rights of recovery.

IV. GENERAL CONDITIONS

(A) Subrogation

In the event of any payment under this Policy, the Insurer shall be subrogated to the extent of such payment to all of the **Insured's** rights of recovery thereof; except that no such right of subrogation shall lie against any **Acquired Company**, its directors, officers or shareholders. The Insured shall execute or cause to be executed all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the **Insured** or an **Acquired Company**.

(B) Cancellation Clause

This Policy may not be cancelled by either the **Insured** or the Insurer. The premium shall be deemed fully earned upon the inception date of this Policy.

(C) Notice

Notices under this Policy shall be given to (i) **Hartford Specialty, at 2 Park Avenue, 5th Floor, New York, New York 10016, attn.: Transactional Risk Claims Department**; and (ii) the broker of record as identified in the Declarations Page of this Policy, at the address noted therein. Such notice shall contain particulars sufficient to identify the Insured and the fullest information obtainable at the time.

(D) Appeals

In the event the **Insured** elect not to appeal a judgment which exceeds the retention, the Insurer may elect to do so at the Insurer's expense and shall be liable for the taxable costs, disbursements and interest incidental thereto.

(E) Other Insurance

If other insurance is available to the **Insured** which covers **Loss** also covered by this Policy, other than insurance that is specifically purchased to be in excess of this Policy, this Policy shall operate in excess of, and not contribute with, such other insurance.

(F) Disclosures

The **Insured** shall not, directly or indirectly, make any disclosure whatsoever relating to the existence or terms of this Policy unless the Insurer has given its written consent to such disclosure or is under legal compulsion to make such disclosure. Promptly following execution of this Policy, the **Insured** shall provide to all counsel for the **Defendant** a copy of this Policy and shall expressly inform such counsel of this provision of the Policy.

(G) Representations

The **Insured** represent as follows:

- (1) It has used (and caused the **Acquired Companies** to use) all reasonable efforts to disclose to the Insurer or its representatives all material information concerning the **Claim**, including without limitation any offers, demands or proposals of settlement in the **Claim** previously communicated to or by the **Insured** or their representatives by or to the claimants or their representatives;
- (2) To the best of its information and belief, the facts set forth in annexed Schedule "A" are correct;
- (3) They are authorized to enter into this Policy and neither the execution nor performance of this Policy conflicts with any law to which they are subject or violates any agreement or instrument to which they are bound.

This Policy is issued in reliance upon the truth of these representations. In addition to and apart from any rights of rescission that the Insurer may have as a result of any misrepresentation made by or on behalf of the **Insured**, the Insurer shall not be liable to make any payment for **Loss** that renders any of the representations made to the Insurer materially false.

(H) Arbitration

All disputes between the **Insured** and the Insurer which may arise under or in connection with this Policy, whether arising before or after the termination of this Policy, and whether arising in connection with the interpretation of this provision of the Policy, shall be submitted to binding arbitration before the American Arbitration Association under its then prevailing Commercial Arbitration Rules. The locale of such arbitration shall be New York City, N.Y. The construction of this Policy shall be made in accordance with the general principles of construction with respect to negotiated agreements and without any presumption in favor of any party.

Appendix B

NUTMEG INSURANCE COMPANY

**A Member of the Hartford Financial Services Group, Inc.
Underwritten Through The Transactional Risk Insurance Team of
Hartford Specialty Financial Products**

Specific Litigation Insurance Policy

Policy Number: _____

NOTICE: THIS IS A CLAIMS MADE POLICY. EXCEPT TO THE EXTENT OTHERWISE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS LIMITED TO LOSS REPORTED DURING THE POLICY PERIOD.

DECLARATIONS

Named Insured: [May be listed on Schedule A]

Mailing Address:

State of Issuance:

Broker of Record:

Limit of Liability:

Retention:

Premium:

Covered Litigation:

Policy Period:

This Declarations Page, together with the Specific Litigation Insurance Policy attached hereto, shall constitute the Policy declared to hereby.

Authorized Representative

**NUTMEG INSURANCE COMPANY
SPECIFIC LITIGATION INSURANCE POLICY**

In consideration for and subject to the payment of the premium, and subject to all of the terms and conditions of this Policy, the Insurer and the **Insured** agree as follows:

I. INSURING AGREEMENT

The Insurer shall pay the **Insured** for **Loss** after satisfaction of the **Retention** but not in excess of the **Limit of Liability**.

II. DEFINITIONS

As used in this Policy:

- (A) **“Adverse Judgment”** means a judgment for money damages entered against _____ following a contested trial on the merits in the **Covered Litigation**.
- (B) **“Claim”** means the **Covered Litigation**.
- (C) **“Covered Litigation”** means the case styled _____.
- (D) **“Final Judgment”** means a final non-appealable judgment for money damages entered against _____ following a contested trial on the merits in the **Covered Litigation**.
- (E) **“Inception Date”** means the first day of the **Policy Period**.
- (F) **“Insured”** means _____.
- (G) **“Limit of Liability”** means covered **Loss** (i.e., not excluded and in excess of the **Retention**) in the aggregate amount of \$ _____, which is the maximum amount of covered **Loss** payable under this Policy.
- (H) **“Loss”** means the amount of any **Final Judgment** entered against the **Insured** in the **Covered Litigation**. **Loss** shall not include any payments made in settlement of the **Covered Litigation**.
- (I) **“Policy Period”** means the period beginning on _____ and terminating one year thereafter.
- (J) **“Retention”** means **Loss** that is not excluded hereunder in the amount of \$ _____.

III. ADDITIONAL TERMS AND CONDITIONS REGARDING THE COVERED LITIGATION

- (A) With respect to the **Covered Litigation**, the Insurer shall have the right and shall be given the opportunity to associate effectively with, and shall be consulted in advance by, the **Insured** regarding (1) the selection of appropriate defense counsel, including without limitation the need to alter defense arrangements, (2) substantive defense strategies, including without limitation decisions regarding the filing and content of substantive motions, evidentiary motions, the presentation of witnesses and exhibits, trial briefs, requested jury instructions, etc. and (3) any settlement offers, demands, mediation, arbitration, discussions (including any proposals, negotiations or invitations or responses to any of settlement offer, demand, mediation, arbitration or discussion) with the adverse party before they are made. The Insurer shall further have the right to compel that the **Insured** make a good faith effort to have the **Covered Litigation** submitted to a non-binding mediation.

- (C) The Insurer may make any investigation it deems appropriate. However, it shall be the duty of the **Insured**, not the Insurer, to defend the **Covered Litigation** and the **Insured** shall defend the **Covered Litigation** with all reasonable diligence as if no insurance were in place. The **Insured** shall provide to the Insurer all information and cooperation as the Insurer may reasonably require.

IV. GENERAL CONDITIONS

(A) Scope of Policy

The Insurer acknowledges that the **Covered Litigation** constitutes a **Claim** reported under this Policy within the **Policy Period** set forth on the Declarations Page. This Policy applies solely to the **Covered Litigation** and not to any other case, matter or proceeding even if such case, matter or proceeding is based on the same or similar facts.

(B) Subrogation

In the event of any payment under this Policy, the Insurer shall be subrogated to the extent of such payment to all of the **Insured's** rights of recovery thereof; except that no such right of subrogation shall lie against the **Insured**. The **Insured** shall execute or cause to be executed all papers required and shall do everything reasonably necessary to secure and preserve such rights, including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the **Insured**.

(C) Cancellation Clause

Neither the **Insured** nor the Insurer may cancel this Policy. The premium shall be deemed fully earned upon the **Inception Date**.

(D) Notice

All notices under this Policy must be in writing and will be deemed to have been given when either sent by facsimile (with written confirmation of receipt) or received by the intended recipient when mailed by certified mail, return receipt requested, or sent by a nationally recognized overnight delivery service (receipt requested). All notices to the Insurer made under this Policy shall be given to (i) **Hartford Specialty, at 2 Park Avenue, New York, New York 10016, attn.: Transactional Risk Claims Department** and (ii) the broker of record as identified in the Declarations Page of this Policy, at the address noted therein. All notices to the Insurer shall contain particulars sufficient to identify the **Insured** and the fullest information obtainable at the time. All notices to the **Insured** made under this Policy may be given to counsel for the **Insured**. The address or facsimile number for any party may be changed by sending a notice of such change to the other party.

(E) Appeals

The **Insured** shall appeal the entry of an **Adverse Judgment** unless appellate counsel for the **Insured** reasonably opines that the appeal is not likely to succeed, in which event the Insurer may elect to appeal the **Adverse Judgment** in the name of the **Insured**.

(F) Other Insurance

If other insurance is available to the **Insured** that covers **Loss** also covered by this Policy, other than insurance that is specifically purchased to be in excess of this Policy, this Policy shall operate in excess of, and not contribute with, such other insurance.

(G) Confidentiality

The **Insured** shall not, directly or indirectly, make any disclosure whatsoever relating to the existence or terms of this Policy unless the Insurer has given its written consent to such disclosure or is under legal compulsion to make such disclosure. Without limiting the generality of the foregoing, if the **Insured** is not a party to the **Covered**

Litigation, the **Insured** shall not disclose the existence of this Policy to any such party absent legal compulsion to make such disclosure. The **Insured** shall allow the Insurer to effectively associate in contesting or satisfying (or considering whether to contest or satisfy) any discovery demands or required disclosures for the existence, terms and/or copy of this Policy and/or any communications or documents related to this Policy.

(H) Representations

The **Insured** represent as follows:

- (4) It has used all reasonable efforts to disclose to the Insurer or its representatives all material information concerning the **Claim**, including without limitation any offers, demands or proposals of settlement in the **Claim** previously communicated to or by the **Insured** or their representatives by or to the claimants or their representatives;
- (5) To the best of its information and belief, the facts set forth in annexed Schedule "A" are correct;
- (6) They are authorized to enter into this Policy and neither the execution nor performance of this Policy conflicts with any law to which they are subject or violates any agreement or instrument to which they are bound.

This Policy is issued in reliance upon the truth of these representations. In addition to and apart from any rights of rescission that the Insurer may have as a result of any misrepresentation made by or on behalf of the **Insured**, the Insurer shall not be liable to make any payment for **Loss** that renders any of the representations made to the Insurer materially false.

(I) Arbitration

At the request of any **Insured**, the **Insured** and the Insurer shall submit any dispute hereunder to non-binding mediation administered by the American Arbitration Association, in which the Insurer and the **Insured** shall attempt in good faith to settle the dispute by mediation. All disputes between the **Insured** and the Insurer which may arise under or in connection with this Policy, whether arising before or after the termination of this Policy, and whether arising in connection with the interpretation of this provision of the Policy, shall be submitted to binding arbitration before the American Arbitration Association under its then prevailing Commercial Arbitration Rules. Such arbitration shall be conducted in New York City. This Policy

shall be construed in accordance with the general principles of construction with respect to negotiated agreements and without any presumption in favor of any party.

