STRATEGIES FOR OPTIMIZING INSURANCE COVERAGE

FOR BUSINESS LITIGATION

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"Insurance coverage for business litigation is the most important thing."

Paul Hilding (before he discovered surfing).

I. INSURANCE MYTHOLOGY

A. You know what liability coverages are in your business policies without looking at them. Wrong!

Coverages, e.g., CGL, vary substantially within the industry, and change year to year.

If you handle or manage litigation, you must have complete copies of all of your current and recent liability policies in your office, or close at hand. If you have to wait for the CFO to copy them and send them over, it may never happen, or you may be too late. If you have to wait for the Risk Manager to copy them, it will never happen.

B. Your Risk Manager knows what liability coverages are in your business policies. Usually wrong!

Most Risk Managers, even at large companies, have little training regarding coverage for business torts. Much of the training they do have is from the insurance industry. And they may have a bias in favor of being conservative, because they are often in charge of buying insurance. The cost of insurance comes out of their budget, while the cost of uninsured legal fees and settlements comes out of yours!

C. Your Broker knows what liability coverages are in your business policies. Not often enough!

You should ask your broker for advice. But if he/she says "no coverage," you should investigate independently. Most brokers can handle personal injury and property damage liability issues, but are less familiar with business coverages in CGL policies.

Even if they say there is coverage, make sure they explain to you why they notified a particular insurer and not others. Most common broker errors: (1) They notify the current insurer, but the trigger of coverage often precedes the current policy. (2) They notify only one type of insurer (e.g., the D&O, with the $200,000 deductible), and fail to consider the possibility that other policies (e.g., the CGL with the $1000 deductible) are triggered.

D. The California Supreme Court knows what liability coverages are in your standard CGL policy. Not always!

Waller v. Truck Ins. Exchange (1995) 11 Cal.4th 1: This is a "business dispute." "Allegations of....business torts...could not give rise to coverage under a CGL policy."

But the Supreme Court was looking only at Coverage A (bodily injury and property damage). In Coverage B, standard CGL policies expressly grant coverage for a broad range of business torts: e.g., defamation, disparagement, wrongful eviction, infringement of copyright, title or slogan, misappropriation of advertising ideas, invasion of privacy.

E. CGL insurance does not cover liability arising from contracts. Wrong!

Stein-Brief Group v. Home Indem. Co. (1998) 65 Cal.App.4th 364: "If liability stems from the contract, the policy will not cover any award even if some of the damages are based on tort claims arising from the contract relationship. "

Apparently it has escaped the attention of the insurance industry that *Stein-Brief* and five other similar appellate decisions, were reversed by the California Supreme Court three years ago. The fact that a claim arises out of a contractual relationship does not necessarily mean there is no coverage. *Vandenberg v. Superior Court* (2000) 21 Cal.4th 815.

F. The legal theories alleged in the complaint determine whether coverage exists. Wrong!

"Predicating coverage upon an injured party's choice of remedy or the form of the action sought is not the law of this state . . . . Instead, courts should focus on the nature of the risk and the injury, in light of the policy provisions, to make that determination . . . [T]he legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered." *Vandenberg, supra.*

G. In a lawsuit with covered and non-covered claims, the insurer need only pay defense costs related to the covered claims. Wrong!

"To defend meaningfully, the insurer must defend immediately. To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not." *Buss v. Superior Court* (1997) 16 Cal.4th 35.

II. TRICKS OF THE TRADE

A. Look for triggers of coverage in earlier policies. They often have broader coverage.

e.g., many CGL policies have more restrictive coverage for intellectual property in recent years. Did any of the alleged infringing conduct occur in the late 90's?

War Story: Broker failed to tender claim to earlier carriers with broader coverage. When later notified, earlier insurer asserted late notice defense

B. Look at umbrella policies. They may also have broader coverage.

e.g., "discrimination & humiliation," "unfair competition."

War Story: Same!

C. Be creative when reviewing the complaint. Forget the labels of the causes of action. Could the allegations of the complaint support a covered theory?

e.g., in *Vandenberg*, the only cause of action was for breach of contract, but plaintiff landlord could have alleged a cause of action against his tenant for negligent property damage.

e.g., in *Atlantic Mutual Ins. Co. v. J. Lamb* (2002) 100 Cal.App.4th 1017, the Court of Appeal agreed that a cause of action for interference with contract was covered because it contained allegations of disparagement.

War Story: Recent wins on disparagement/defamation arguments where complaint only alleged interference and unfair competition torts.

C. Think about coverage when planning discovery. The scope of the defense obligation is determined by all of the facts and allegations in the lawsuit, not just by what is alleged in the complaint.

e.g., Plaintiff alleges unfair competition and interference torts, but does not specify how your client interfered or unfairly competed. If interference consisted of defamation or disparagement, there may be coverage.

e.g., Plaintiff alleges emotional distress. But emotional distress may not be covered unless accompanied by physical symptoms.

War Story: Deposition:

Q: In addition to all the other terrible things you say my client did to you, are you claiming he discriminated against you?
A: Yes.
Q: And did you feel humiliated by this?
A: Yes.

e.g., Judicial Counsel form interrogatory No. 7.0 re property damage

D. Think about coverage when filing dispositive motions

e.g., Don't move to dismiss the one covered claim!

War Story: Client's high priced lawyers demurred to wrongful eviction claim, leaving client to defend and settle complex franchise litigation on its own nickel.

E. Settlement

If you are concerned about liability, and want to settle, a policy limits demand will exert a great deal of pressure on your insurance company.

Your insurer cannot allow consideration of coverage defenses to influence how much it will offer in settlement

"The only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." *Johansen v. California State Auto. Assn.* (1975) 15 Cal.3d 9, 16 (emphasis added); *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 243. "The insurer cannot permit coverage defenses to interfere with its duty to effect a reasonable settlement. Thus, coverage issues . . . may not be considered in determining whether a settlement offer is reasonable." Croskey, *California Practice Guide, Insurance Litigation* (2002) §12:329 at p. 12B-29, citing *Johansen, supra*.

F. Your Indemnitor's Coverage

When demanding indemnity, also be sure to demand the indemnitor puts his/her insurers on notice. His/her policy probably provides coverage for the indemnity liability if it covers the primary claim.

Also, be sure to tender to any insurers that name you as additional insured, often part of indemnity agreements. This may make you a hero to your Risk Manager.

F. Your Opponent's Coverage

If you are suing someone else, or cross-complaining, ask yourself: Do you want to trigger your opponent's coverage so you can get a larger settlement or judgment? Or do you want to avoid doing so to prevent his/her insurer from funding his/her defense?

What you say in your pleadings and discovery may well determine this issue.

III. CLOSING

You should consider the availability and effect of liability insurance in all civil lawsuits you file or defend.