INSURANCE 101 SEMINAR OUTLINE

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1. A Proud Tradition: 100 Years of Not Reading Insurance Policies

It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous -- the one before us covering thirteen pages of the transcript – and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder such provisions as the one before us. The courts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent. Raulet v. Northwestern National Ins. Co. (1910) 157 Cal. 213, 230.

2. Importance of Insurance in the Litigation Process: "It's not whether you win or lose, its whether you get insurance."

a. Fundamental nature of litigation

   i. Law School: Adversarial process leads to the "truth", and therefore justice is done.

   ii. Reality: For most clients, litigation is like "Survivor."

b. Guaranteed results in 24 hours!

EXCERPT FROM DEMAND LETTER

As you know, where an insurer wrongfully denies coverage, the insured is relieved of the policy's covenant of cooperation, and may negotiate any kind of a settlement which will remove him or her from harm's way. The classic expression of this rule in California is as follows:

> *Courts have for some time accepted the principle that an insured who is abandoned by its liability insurer is free to make the best settlement possible with the third party claimant, including a stipulated judgment with a covenant not to execute. Provided that such settlement is not unreasonable and is free from fraud or collusion, the insurer will be bound thereby. Pruyn v. Agri. Ins. Co., 36 Cal. App. 4th 500, 515 (1995)*

*As noted above, should [ABC Insurance Company] fail to acknowledge its defense obligations within **twenty four (24) hours**, I will contact plaintiff's counsel and attempt to negotiate a settlement of this nature. Please note that the plaintiff's current settlement demand, $600,000, is well within the available limits of coverage. However, the ultimate judgment against [XYZ Corp.] (whether entered by stipulation or default) may well exceed this amount by an order of magnitude or more. As you are undoubtedly aware, if ABC fails to settle within the policy limits, it will be found to have waived the limits, and will be required to pay the full amount of the judgment, **regardless of policy limits**.*

By way of example, the last time I was forced to negotiate a settlement of this nature with the plaintiff's counsel, the settlement demand was $300,000, the policy limits were $1 million, and the plaintiff obtained a default judgment of $20 million, most of which he later collected from the insurer. I am advising you of this example only to make sure you understand now the magnitude of the mistake you will be making if ABC Insurance Company continues to ignore its obligations under California law.

c. Insurance Strategies

i. Often overlooked in lawyer training: E.g., Inn of Court programs last year from intake of case, through trial. No mention of insurance! It should have been mentioned at each stage of litigation process, e.g.,

1. 1st meeting with client who is defendant, get all policies, and tender to all potential insurers (or else call your own malpractice insurer)

2. Motion practice – Do you really want to demur out the only covered claim?

3. Discovery: Plaintiffs must obtain insurance information. You can't even think about settling without it! Can also provide information that will destroy coverage (by mistake or on purpose). Defense can ask question that will trigger coverage (e.g., form rog no. 7.1).

4. Settlement conferences/mediations: Of course!

ii. Plaintiff

1. Trigger coverage to assure maximum recovery via judgment or settlement, or

2. Avoid triggering coverage to avoid vigorous defense (e.g., trade secrets case – large company plaintiff against small competitor)

iii. Defense

1. Where insurer is defending, ask yourself this **throughout** the case:

   a. Am I about to demur out (or summarily adjudicate, etc.) the only covered claim?

   b. Does my client have anything to gain by going to trial? [**Almost never!**]

   c. If the answer to (b) is "no", how do I get my client out of the case (with insurance company money)?

2. Where insurer has denied a defense, ask yourself this **throughout** the case:

   a. Passive approach: If the original denial was correct, are there any new developments since then that trigger coverage?

   b. Active approach: If the original denial was correct, is there anything I can do to get the insurer to defend? (e.g., explain the coverage problem to a mediator or directly to plaintiff's counsel; if plaintiff doesn't want you to have insurance, think of a way to trick them into triggering your coverage.

   c. If the original denial was at least arguably in error, is it in your client's best interest to give the insurer another chance by pointing out the error, or is it better to make an "alliance" with the plaintiff?

3. What Every Litigator/In House Lawyer Should Know

a. **Mythology** - "Everything you know is wrong" - U2

i. Contract claims may be covered: See *Vandenberg v. Superior Court* (2000) 21 Cal.4th 815 (overturning six court of appeal decisions); also, EPL policies (wrongful termination arising out of employment contracts); E&O (e.g., legal malpractice arising out of retainer agreement)

ii. Intentional conduct may be an "accident":

*As insurers point out, in one obvious sense the 1978 discharges were not accidental: the wastes were intentionally released at Anderson's direction. But Anderson ordered the release only to prevent a larger, uncontrolled discharge of wastes . . . which the State maintains **would have been** an accidental discharge. Liability policies have been held to cover damages resulting from an act undertaken to prevent a covered source of injury . . . State of California v. Allstate Ins. Co. (2009) 45 Cal.4th 1008, 1019*

iii. Intentional conduct may be covered: CGL policies routinely cover a broad range of intentional torts: defamation, disparagement, infringement torts, unfair competition, wrongful eviction, wrongful entry. D&O and EPL policies cover many more including misstatements and misrepresentations, wrongful termination, discrimination, etc.

iv. Punitive Damages may be covered: D&O policies frequently have "most favorable jurisdiction" provisions

v. Business Disputes are often covered: Most clients and brokers seem to think that CGL policies only provide coverage for bodily injury and property damage claims. Even the California Supreme Court made this mistake:

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, product disparagement, wrongful eviction, infringement of copyright, title or slogan, misappropriation of advertising ideas, invasion of privacy, unfair competition.

b. Rules of Construction

i. Plain meaning rule: *In interpreting policy language, we construe it as would a reasonable layperson, not an expert, attorney, or a historian. Emmi v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465.

ii. Reasonable expectations doctrine: If the terms have no plain meaning, and thus are ambiguous, they must be interpreted in accordance with the insured's objectively reasonable expectations. CPG, Insurance Litigation, Section 4:305.

iii. Grants of coverage construed broadly in favor of insured. *Montrose Chem Corp v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 667

iv. Exclusions construed narrowly. *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271.

v. Exclusions must be "conspicuous, plain and clear" and written in "clear and unmistakable language." *State Farm v. Jacober* (1973) 10 Cal.3d 193, 201-202.

c. **Basic Concepts**

i. "Occurrence" versus "Claims Made" trigger of coverage

1. Multiple or continuous triggers

2. Notice/prejudice rule

a. CGL policies

b. Claims Made policies

3. Notice of circumstances – trap for the unwary!

a. Threatening letters/Demand letters

b. Tolling agreements

ii. Duty to defend versus reimbursement of defense costs

1. "Bare potential" of a covered claim triggers duty to defend. *Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 297, 295.

2. Duty to defend: full defense required immediately upon tender of defense:

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.

3. Reimbursement of defense costs: Allocation issue.

iii. Policy limits settlement demand.

iv. Cumis counsel. Civil Code Section 2860: *"If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured . . ."*

v. Concurrent cause: *"Coverage exists whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause."* State of California v. Allstate at 1030 (accidental overflows from holding pond [covered], combined with gradual seepage [not covered] caused property damage. Insurer is liable for the full amount if damages are indivisible)

d. Plaintiff to do list

i. Decide whether you want to plead in, or out of, coverage

ii. In discovery, obtain complete copies of all potentially applicable policies – don't trust the defense attorney to tell you what the coverages are!

iii. Consider making a demand at or close to the policy limits

1. The single most powerful lever to get a case settled

2. But completely ineffective if the defendant does not join in the demand!

e. Defendant/In House Lawyer to do list

i. Obtain copies of all policies as soon as suit is filed, or even threatened

1. Remember, claims made policies are triggered when "claim" is first made, not when lawsuit is filed. Failure to report during policy period means no coverage! Extremely time-sensitive.

2. Tender immediately to all potentially applicable insurers

a. E.g., construction defect: all policies in force from when project was completed through the present

b. E.g., trade dress/copyright infringement: all policies in force from when infringing activity first allegedly took place through the present

ii. Re in house lawyers: Based on 25 years experience: your broker probably does not know whether a claim is covered; your risk manager almost certainly does not know!

iii. Re defense lawyers: "I am only hired to defend the lawsuit, not to explore insurance coverage for it" is not a good motto.

iv. Remember, a denial of coverage is only the beginning of the process!

    1. Immediate demand letter to insurer, or

    2. Wait until litigation is concluded so insurer has to pay full defense costs and settlement at full rates

v. Re D&O coverage, the response in which they propose to pay only for a portion of the covered claim is only the beginning of the process!