WHAT EVERY LAWYER SHOULD KNOW ABOUT INSURANCE COVERAGE

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I.

TYPES OF INSURANCE
FIRST PARTY V. THIRD PARTY
CLAIMS MADE V. OCCURRENCE
D&O (DIRECTORS AND OFFICERS)

- "Loss"
- "Claim"
- First made during the policy period
- "Wrongful Acts"
CGL
(COMMERCIAL GENERAL LIABILITY)

• "Occurrence"
• Coverage A
  – Bodily Injury
  – Property Damage
• Coverage B
  – Personal and Advertising Injury
“You can never have enough insurance, which is why we offer this ‘You Can Never Have Enough Insurance’ policy.”
II.

THE DUTY TO DEFEND
"LITIGATION INSURANCE?"

- Breach of Contract
- Construction Delay
- Lost Income
- Building Code Violations
DUTY TO DEFEND

• "We will have the right and duty to defend any suit seeking damages for bodily injury and property damage to which this insurance applies."
DUTY TO DEFEND V. THE DUTY TO INDEMNIFY

• The duty to defend is broader than the duty to indemnify.

• The duty to defend can include:
  – Groundless claims;
  – False claims;
  – Fraudulent claims;
  – Allegations of intentional torts;
  – Allegations of willful acts; or
  – Allegations of criminal conduct.
THE TEST TO TRIGGER A DEFENSE OBLIGATION

- The carrier must defend a suit which potentially seeks damages within the coverage of the policy." Gray v. Zurich, 65 Cal. 2d 263 (1966).

- The defense is excused only where "the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." Montrose I, 6 Cal. 4th 287 (1993).
THE DETERMINATION OF THE EXISTENCE OF A DUTY

• An insurer may have a duty to defend based on either:
  • The allegations in the third-party complaint
  • Any facts known to the insurer from any source
  • No potential for coverage exists for speculative pleadings
WHEN THE DUTY BEGINS AND ENDS

• The duty to defend arises when the insured tenders the defense of a "suit"
• The duty to defend does not end until:
  – The underlying lawsuit is concluded
  – The facts show that there is "no potential for coverage"
  – The policy limits are exhausted
WHO CONTROLS THE DEFENSE?

• The insurer controls the defense absent a conflict of interest

• Not all conflicts of interest entitles the insured to *Cumis* counsel
  – Insurer merely disputing coverage or reserving rights does not automatically trigger *Cumis*
"We deny most claims, but that’s how we keep your premiums so low."
CONFLICTS ENTITLING THE INSURED TO CUMIS COUNSEL

• Insurer has filed suit against the insured.
• Insurer insures opposing parties in a suit.
• Insurer pursues settlement in excess of policy limits without insured's consent.
• Insurer reserves rights on a given issue and the outcome of that issue can be controlled by the insurer retained counsel.
WHAT ARE DEFENSE COSTS?

- Repair costs?
- Investigation costs?
- Filing affirmative cross-complaints?
- "Chase" costs

Costs that are reasonable and necessary to "avoid or at least minimize liability." *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal. 4th 38, 60 (1997)
III.

THE TENDER OF DEFENSE
The One Thing You Should Remember About Insurance If You Remember Nothing Else:

CLAIMS THAT MIGHT BE INSURED SHOULD BE TENDERED TO THE INSURER AS EARLY AS POSSIBLE
LATE NOTICE
CLAIM DENIED
WHY TENDER EARLY?

A liability insurer generally has the right and duty to defend a case. The insurer cannot be held responsible for that duty until it is asked to undertake the defense. Therefore insurers are generally not held responsible for defense costs incurred before tender.
TENDERING IS NOT DIFFICULT

- Name of insured
- Policy information
- Summons, complaint, and any other pleadings filed
- Date of service
- Any correspondence from plaintiff, counsel or other parties
• Settlements reached or judgments entered before a claim is tendered may be covered, depending on which approach the court takes:
  • Late notice as absolute bar to coverage
  • Policyholder’s burden to show prejudice
  • Insurer’s burden to show preudice (California)
IV.

WHAT IS A SUIT?
Standard form CGL policies typically provide that the insurer:

“Shall have the right and duty to defend any suit against the insured seeking damages...”.
ARE THESE SUITS?

• Settlement demands?
• Arbitrations?
• Governmental administrative actions?
The duty to defend “does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder.”

MINORITY VIEW

The duty to defend is limited to a "suit seeking damages;" i.e., a lawsuit filed in a trial court


But see *Ameron Internatl. Corp. v. ICOP*, 50 Cal.4th 1370 (Federal Administrative Proceeding before an administrative law judge is a “suit”)
V.

ALLOCATION BETWEEN INSURER AND INSURED RE "MIXED" CLAIMS
If an underlying action against a policyholder alleges several claims, some covered and some not, the insurer must provide a defense as long as at least one claim raises the potential of insurance coverage.
RETREATING VIEW?

- An insurance company can obtain reimbursement from the policyholder for defense costs paid solely for claims “that are not even potentially covered.”

VI.

THE CONTINUOUS INJURY TRIGGER OF COVERAGE
Glexco Insurance

"I think you misunderstood. The million dollar umbrella policy only covers you for claims involving an umbrella."

THE OCCURRENCE

• A CGL or occurrence-based policy is "triggered" if bodily injury or property damage "occurs" during the policy.

• The date of the wrongdoing or negligent act that ultimately causes the injury is essentially irrelevant.
MONTROSE II'S "CONTINUOUS TRIGGER"

The "continuous injury trigger of coverage should be adopted for third-party liability insurance cases involving continuous or progressively deteriorating losses."

10 Cal. 4th 645.
WHERE DOES THE CONTINUOUS TRIGGER APPLY?

- Asbestos Property Damage

- Asbestos Personal Injury

- Environmental Contamination

- Soil Subsidence

- Rot

- Construction Leakage

- Corrosion
VII.

THE DUTY TO INDEMNIFY
THE DUTY TO INDEMNIFY IS LESS BROAD

DUTY TO DEFEND ≠ DUTY TO INDEMNIFY

• Duty to defend is triggered by allegations of complaint
• Duty to indemnify is triggered by actual grounds of judgment
MULTIPLE CAUSES OF ACTION

Example:

Plaintiff sues for fraud and negligence
• Duty to defend entire action is triggered by claim for negligence even though fraud is not covered

Jury finds fraud but no negligence
• Duty to indemnify policyholder for cost of judgment is not triggered, because the judgment is based solely on a noncovered cause of action
VIII.

ALLOCATION AMONG MULTIPLE INSURERS
HOW DOES THE DUTY TO DEFEND APPLY WITH MULTIPLE INSURERS?

• Each insurer with a duty to defend has an obligation to defend the entire action.
• It is the responsibility of the insurer—not the insured—to allocate defense costs among other insurers with an applicable duty to defend.
IX.

THE NUMBER OF OCCURRENCES
MULTIPLE OCCURRENCES

"The issue of how to determine the number of occurrences has huge financial significance" to insurers and insureds alike.

MULTIPLE OCCURRENCES =

- Multiple policy limits
- Multiple per-occurrence deductibles
THE STANDARDS

• Majority rule: If the injury or injuries result from a "single proximate cause," there is likely one occurrence. If multiple injuries result from multiple causes or intervening causes, each cause may be deemed a separate occurrence.

• "Unfortunate events" test (New York rule): There is a separate occurrence for each unfortunate event that results in bodily injury or property damage.

• Courts generally look to the cause to determine the number of accidents or occurrences, rather than the effects.
X.

EXCLUSIONS
I can't help you. This vehicle's not covered.
"Your policy does cover wind damage, but not from huffing and puffing."
POLICY EXCLUSIONS

• The test – insurer has the burden to prove an exclusion applies. Exclusions are construed narrowly in favor of coverage.
TYPICAL EXCLUSIONS AFFECTING REAL ESTATE CLAIMS

• Your "work"
• Owner, Renter, Occupier
• Subsidence/earth movement
• Montrose exclusion
• Mold
• Pollution
• EIFS
• Condo exclusion
• Wrap policy
WHEN EXCLUSIONS DON'T APPLY

• Concurrent cause – third-party cases
• Efficient proximate cause - first-party cases
XI.

THE LAW IS DIFFERENT IN EVERY STATE
CHOICE OF LAW

• Place of Contracting
• Place of Injury
• Place of Insured
• Place of Insurer
• Place of Insured Risk
• Governmental Interest
SUCCESSOR LIABILITY

Insurable:
• Georgia
• New Jersey
• Wisconsin

Non-insurable:
• California
PUNITIVE DAMAGES

Insurable:
• Connecticut
• Illinois
• Michigan

Non-insurable:
• California
• Florida
• New York
DISCRIMINATION AND HARRASSMENT CLAIMS  
(Vicarious Liability)

Insurable:  
• California  
• Illinois  
• Minnesota  
• New Jersey

Non-insurable:  
• Georgia  
• Texas
EMOTIONAL DISTRESS

Insurable:
• Maryland
• New York (split)
• Wisconsin

Non-insurable:
• California
• Connecticut
• Illinois
DIRECT CLAIMS

Allowed:
• Louisiana
• Wisconsin

Disallow:ed:
• Almost everywhere else
XII.

LOST POLICIES
CLAIMANT MUST PROVE:

• It was insured under a policy lost in good faith which covered the applicable years;
  and

• The substance of each policy

XIII.

COVERAGE FOR CORPORATE SUCCESSORS
HAS YOUR CLIENT/COMPANY/INSURED IN THE LAST 50 YEARS:

• Been involved in a merger of any kind?
• Acquired any
  – division?
  – subsidiary?
  – product line?
  – real property?
"SUCCESSOR" CORPORATION IS LIABLE IF IT:

- is a "continuation of the old" business
- has "practically the same stockholders and directors"
- "continues to carry on the same business"

THE CURRENT TREND IN CALIFORNIA – NO COVERAGE FOR SUCCESSOR CORPORATIONS

According to the California Supreme Court, courts will enforce insurance policies’ “anti-assignment clauses.”

XIV.

“ADDITIONAL” INSURANCE
TYPICAL ADDITIONAL INSURANCE CLAUSE

Insurance. Contractor shall obtain ... the following Insurance in a company or companies satisfactory to Builder:

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(b) Liability Insurance ... providing coverage at least equivalent to a standard [CGL] insurance policy .... Any policy of insurance herein required shall contain a contractual liability endorsement covering indemnity and defense obligations of Contractor and such other coverage as may be required by Builder ....

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and name the Builder as an additional insured under the policy.
A-1 insurer was obligated to provide developers with full and complete defense even though its indemnification was more limited.

See also:
• *Aerojet*, 17 Cal. 4th 38 (1997)
• *Buss*, 16 Cal. 4th 35 (1997)
CALIFORNIA CONSTRUCTION CONTRACT INDEMNITY LAW AND INSURANCE
XV.

BAD FAITH AND PUNITIVE DAMAGES
BAD FAITH AND PUNITIVE DAMAGES

• Standard-Insured must show by clear and convincing evidence that the insurer acted with fraud, malice, and/or oppression

• Limits on punitive damages: