



# What Every Lawyer Should Know About Insurance Coverage

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# Agenda

- I. The Law Is Different In Every State**
- II. Types Of Insurance**
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**I.**

**The Law Is Different In Every State**

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# 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 Harassment Claims (Vicarious Liability)

Insurable:

- California
- Illinois
- Minnesota
- New Jersey

Non-insurable:

- Georgia
- Texas



# Direct Claims

Allowed:

- Louisiana
- Wisconsin

Disallowed:

- Almost everywhere else



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## **II.**

# **Types Of Insurance**

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# First Party v. Third Party

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# First Party Policies

- Cover losses or damages to the policyholders' property or themselves
  - A policyholder can be an individual or a corporation, or people in a certain class (i.e., employees of a company)
- First party policies include:
  - Automobile insurance
  - Medical or health insurance
  - Homeowner's insurance
  - Personal or business property insurance

# Third Party Policies

- Protect the policyholder against liability to third parties
- Third party policies include:
  - Comprehensive General Liability (CGL) Insurance
  - Directors and Officers (D&O) Insurance
  - Employee Practice Liability (EPL) Insurance
  - Errors and Omissions (E&O) Insurance
  - Professional Liability Insurance



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# Claims Made v. Occurrence

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# Claims-Made Policies

- Cover a “**claim**” made during the policy period
  - A “**claim**” is defined by **the policy language**
  - **Claim** definitions **vary widely** but include:
    - A written demand for monetary or non-monetary relief
    - Any civil proceeding in a court of law or equity
    - Any administrative or regulatory proceeding
    - Any written notice describing circumstances that will likely lead to a civil proceeding, including potentially covered claims

# Claims-Made Policies

## Insurance Claim

An insurance claim is  
A formal request to an insur  
payment based on the te  
Insurance claims are re  
out to the insurer

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# Occurrence-Based Policies

- Provide coverage:
  - for incidents that happened **during the policy period or when the policyholder was insured** regardless of when a claim is filed by a third party

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"You can never have enough insurance,  
which is why we offer this 'You Can Never  
Have Enough Insurance' policy."

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# III. The Continuous Occurrence Trigger

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# The Occurrence

- An 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.

# Policy Language

- “Occurrence [is] an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”



# 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
  - *Carey Canada, Inc. v. California Union Ins. Co.*, 748 F. Supp. 8, 11 (D.D.C. 1990)
- Asbestos Personal Injury
  - *J. H. France Refractories v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993)
- Environmental Contamination
  - *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645 (1995)
- Soil Subsidence
  - *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 4 Cal. App. 4th 1810 (1996)
- Rot
  - *Time Oil Company v. CIGNA Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1416 (W.D. Wash. 1990)
- Construction Leakage
- Corrosion

# Continuous Injury Exclusion

- This insurance does not apply to: [Injury] which first manifest, or occurs before the effective date of this policy . . . .

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# IV. Multiple Occurrences

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# Multiple Occurrences

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

*Dow Chem. v. Associated Indem.*, 727 F. Supp. 1524, 1526 (E.D. Mich. 1989)

# 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:** 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.



Glaxco  
Insurance



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



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**V.**  
**The Tender Of Defense**

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**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*

# Why Tender Early?

- Tendering early could mean the difference between:
  - your client paying hundreds of thousands of dollars in legal fees and costs versus an insurance carrier paying those dollars under the policy
- The insurer is not obligated to defend and provide defense costs until it is asked to undertake its duty to defend



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# Tendering Is Not Difficult

- Refer to the policy for direction
  - Tendering **differs depending on the policy**, but at least requires:
    - Name of insured
    - Policy information
    - Summons, complaint, etc.
    - Date of service
    - Any correspondence from plaintiff, counsel or other parties





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# VI.

## The Duty To Defend

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# “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

- The duty to defend is broad and can include:
  - Groundless claims;
  - False claims;
  - Fraudulent claims;
  - Allegations of intentional torts;
  - Allegations of willful acts; or
  - Allegations of criminal conduct.

# Test To Trigger A Defense Obligation

- The insurance 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



# What Are Defense Costs?

- Repair costs?
- Investigation costs?
- 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)

# Who Controls The Defense?

- The insurer controls the defense of a claim absent a conflict of interest:
  - After a claim is tendered, an insurer may:
    - deny coverage; or
    - accept its duty to defend but reserve rights to deny coverage later

# Who Controls The Defense?

- An initial reservation of rights by the insurer:
  - amounts to nonexistent or theoretical conflicts of interest unless:
    - the outcome of a potential coverage issue can be controlled by the insurer against the insured (e.g., Intentionality)

# Conflicts Entitling The Insured To *Cumis* Counsel

- The insured is entitled to independent counsel (or *Cumis* counsel) of its choosing at the carrier's expense if:
  - A conflict of interest exists; or
  - The outcome of a potential coverage issue can be controlled by the insurer against the insured's interest

# Conflicts Entitling The Insured To *Cumis* Counsel

- Examples of conflicts include:
  - Insurer filed a suit against the insured
  - Insurer insures opposing parties in a suit
  - Insurer pursues settlement in excess of policy limits without insured's consent

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# VII.

## What is a Suit?

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# 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?

# Broad Interpretation

- 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.*”
- *Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987).

# Minority View

- The duty to defend is limited to a “suit seeking damages;” i.e., a lawsuit filed in a trial court
  - *Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co.* 18 Cal. 4th 857 (1998)
  - But see *Ameron Internatl. Corp. v. ICOP*, 50 Cal. 4th 1370 (Federal Administrative Proceeding before an administrative law judge is a “suit”); *Michigan Millers Mut. Ins. v. Bronson Plating Co.*, 519 N.W. 2d 864, 870 (Mich. 1994) (EPA PRP Letter is a “suit”)

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**VIII.**

**Allocation Between Insurer And  
Insured Re “Mixed” Claims**

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# Majority View

- 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**
  - *Buss v. Superior Court*, 16 Cal. 4th 35, 39 (1997).



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# **IX.**

# **The Duty To Indemnify**

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# Duty To Indemnify

- Duty to indemnify requires the insurer to pay the cost of damages or settlements resulting from a claim against the insured
  - Duty to indemnify:
    - is triggered when **liability is established**
    - runs to claims **actually covered**

# Duty To Indemnify

Example:

## **Jury finds negligence but not fraud**

- Duty to indemnify policyholder for cost of judgment is triggered to cover negligence (not fraud)
  - The judgment is based solely on a covered cause of action

# Duty to Indemnify

## Do Not Settle Without Insurers' Consent

- Insurers are not obligated to accept every settlement offer
  - So, while insurers may indemnify policyholders for settling a claim, it will only do so if the **insurance company consented** to the settlement beforehand

# Duty To Indemnify

## Strategy To Get Insurers To Settle

- An insurer is obligated to evaluate the reasonableness of a settlement offer by considering:
  - **whether an ultimate judgment is likely to exceed the amount of the policy limit**
- **Tip:** Analyze the extent of the injuries or damages, the evidence related to the insured's liability, the merits of the case, and jury verdicts rendered in similar cases

# Duty to Indemnify

## Strategy To Get Insurers To Settle



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# X. Exclusions

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# Policy Exclusions

- Insurer has the burden to prove an exclusion applies
- Any exclusion must conform to the law and be consistent with public policy
- Exclusions are construed narrowly in favor of coverage

# Typical Exclusions

- **General Liability policies** may exclude coverage for property owned, operated, and leased by the policyholder; certain business risks; and pollution
- **Directors and Officers policies** may exclude coverage for illegal personal gain, short swing profits, and claims that should be covered by other available insurance policies
- **Prior wrongful act and knowledge exclusions** may exclude coverage of alleged conduct that predates the policy's effective date

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"Your policy does cover wind damage,  
but not from huffing and puffing."

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# XI. Covid

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# Covid Coverage

- Business Interruption
- Civil Authority

# Appellate Decisions

- Property Damage
- Virus Exclusion
- Motions to Dismiss



*That's all Folks!*



# Questions?

For more information, contact us at ...



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