What Every Lawyer Should Know About Insurance Coverage

January 14, 2021

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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 Harassment Claims (Vicarious Liability)

Insurable:

- California
- Illinois
- Minnesota
- New Jersey

Non-insurable:

- Georgia
- Texas

Direct Claims

Allowed:

- Louisiana
- Wisconsin

Disallowed:

Almost everywhere else





II. Types Of Insurance



First Party v. Third Party



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



Claims Made v. Occurrence



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 inst payment based on the te Insurance claims are re ... to the insurer

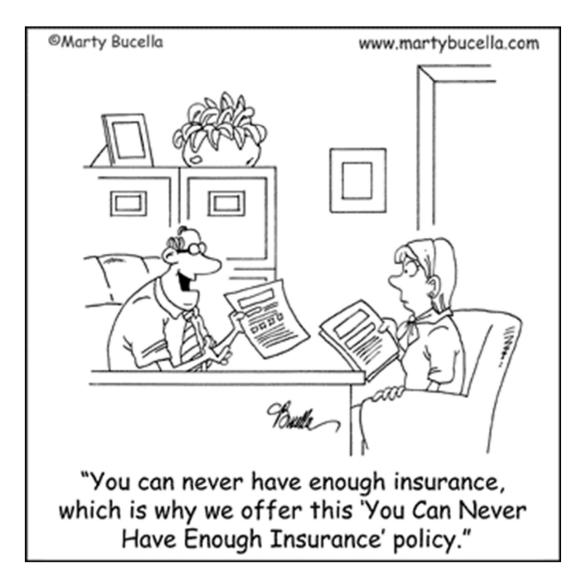
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Occurrence-Based Policies

- 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





III. The Continuous Occurrence Trigger



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



IV. Multiple Occurrences



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.





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

V. 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

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





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





VI. 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

- 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



VII. What is a Suit?



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



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).



IX. The Duty To Indemnify



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

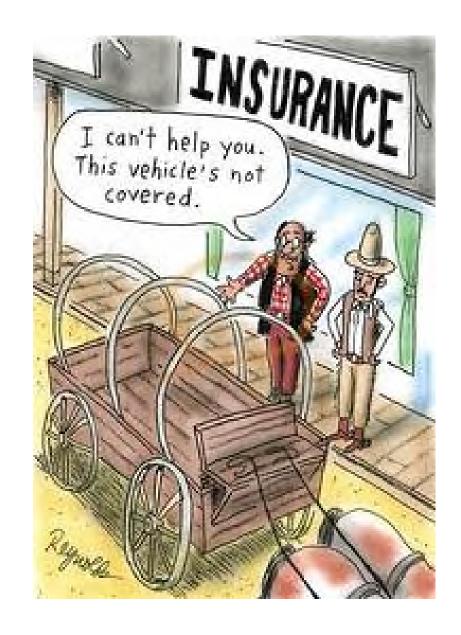


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X. Exclusions





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Policy Exclusions

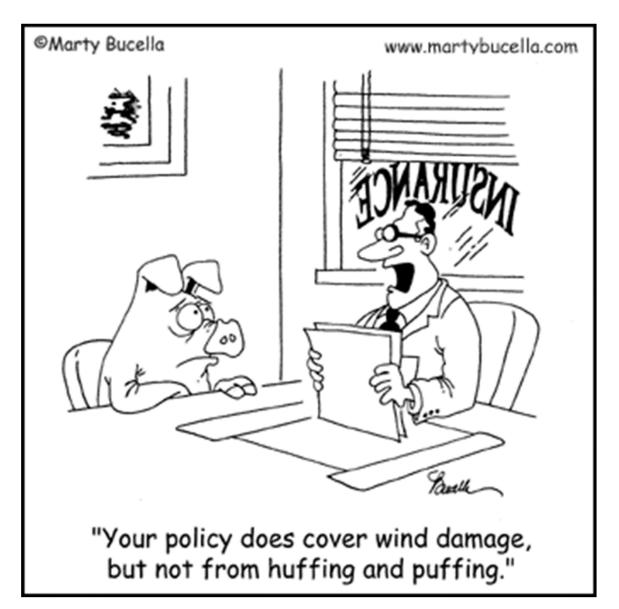
- Insurer has the burden to prove an exclusion applies
- Any exclusion must conform to the law and be consistent with public policy
- Exclusions are construed narrowly in favor of coverage



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







XI. Covid



Covid Coverage

- Business Interruption
- Civil Authority



Appellate Decisions

- Property Damage
- Virus Exclusion
- Motions to Dismiss





Questions?

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