10 CASES
IN 45 MINUTES

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AMERICAN COLLEGE OF COVERAGE COUNSEL

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SPEAKER:

Robert D. Chesler, Esq.
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Robert D. Chesler is a shareholder in Anderson Kill's Newark office. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs. Bob is also a member of Anderson Kill's Cyber Insurance Recovery group.

A leading participant in the birth of modern insurance law in the early 1980s, Bob has earned the reputation as "The Insurance Guru" for exceptional insurance coverage knowledge, and has emerged as a leader in such new areas of insurance coverage as cyber-insurance, D&O, IP, and privacy insurance.

Bob has served as the attorney of record in more than 30 reported insurance decisions, representing clients including General Electric, Ingersoll-Rand, Westinghouse, Schering, Chrysler, and Unilever, as well as many small businesses including gas stations and dry cleaners. He has received numerous professional accolades, including a top-tier ranking for Insurance Litigation: New Jersey in Chambers USA: American's Leading Lawyers for Business, which dubs him a "dominant force in coverage disputes" and cites a client who calls him "a dean of the insurance Bar; one of the brightest in writing about and analyzing insurance coverage.“

He is also listed in The Legal 500, The Best Lawyers in America, Super Lawyers and Who's Who Legal in the Insurance and Reinsurance section of the publication.

Bob is a relentless advocate for his clients in their efforts to obtain coverage from their insurance companies. He has strength in creatively analyzing complex insurance coverage disputes and rapidly driving towards resolution. He has spent his entire career obtaining settlements from insurance companies. He can speak "insurancese" as well as the insurers, and knows how to approach insurance companies, when to talk to them and when to litigate. His depth of experience enables him to distinguish a bad insurance claim from a good one, and understand and implement best strategies for obtaining money for his clients quickly and cost-effectively.

Bob taught history at the State University of New York at Purchase and Legal Methods at Harvard University. He currently teaches insurance law at Rutgers Law School. He holds a Ph.D. in history from Princeton University and maintains a scholarly interest in insurance. He is co-author of the seminal article Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9 (1986), which has been cited by numerous courts, including seven state supreme courts and the Second Circuit, along with dozens of other articles on insurance issues. He is co-author of Insurance Coverage for Intellectual Property and Cyber Insurance Claims, published by Thomas West, and is former co-editor in chief of the Environmental Claims Journal. Bob is also co-editor of Coverage, the ABA Insurance Journal. He has chaired seminars on the new cyber-policies and food insurance issues for the ABA and NJSBA, and is currently Chair of the Insurance Sub-Committee of the American Intellectual Property Law Association.

SPEAKER:

Suzanne C. Midlige, Esq.
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Prior to election to managing partner, Suzanne served as the practice group leader for the Insurance and Reinsurance Services Group from 2004 to 2012. Suzanne's practice focuses on the representation of domestic and international insurers and reinsurers in litigated and non-litigated matters. She has extensive experience representing multi-national companies involved in transnational disputes. Suzanne has years of experience representing the interests of insurers and reinsurers in disputes relating to financial institutions, director and officer disputes, asbestos, pollution, health hazards, and the recent opioid litigation. Suzanne has acted for multinational reinsurers in a series of corporate malfeasance claims and failed tax strategy claims, as well as coordinating counsel for a multinational reinsurer in relation to subprime and credit exposures. She has significant experience with asbestos coverage disputes, including the area of asbestos bankruptcy litigation. Significant cases include acting as counsel to 50 multinational insurers in a complex insurance and antitrust dispute involving US and Australian asbestos claims, as well as counsel to European insurers in asbestos coverage litigation filed in the US and London. Suzanne works closely with insurers in relation to the development and implementation of models to allocate losses across complex insurance programmes, and in evaluating future loss projections and developing burn rate analyses.

Suzanne served as a judicial clerk to Hon. William G Bassler, Judge of the United States District Court for the District of New Jersey.

SPEAKER:

Anthony B. Leuin, Esq.
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With nearly 40 years of practice, Tony Leuin is a senior litigation partner at Shartsis Friese in San Francisco, California. Although Tony has a broad background in civil disputes of all types, he has focused for more than two decades on representing policyholders in insurance coverage disputes. Tony litigates and advises on coverage under the widest range of policies, including general liability, directors and officers, professional liability, property, cyber, mergers and acquisitions, surety bonds, and more.

Tony has been a Contributing Editor to California Practice Guide: Insurance Litigation (The Rutter Group); has been named to “Super Lawyers” and Best Lawyers in America for his expertise in Insurance Coverage; currently serves on ACCC’s Membership Committee; and frequently writes and speaks on coverage matters. Tony also chairs a Risk Purchasing Group through which over 2,000 lawyers at over 40 mid-size law firms around the country purchase professional liability coverage.

PRINCIPLE SOLUTIONS GROUP LLC V. IRONSHORE INDEMNITY, INC., 944 F. 3D 886 (11TH CIR. 2019) – CYBER INSURANCE

- Classic phishing case.
- Company's controller received message purportedly from company's managing director, advising her to wire $1,700,000 pursuant to instructions she would receive from an attorney.
- Purported attorney gave instructions to wire funds to a bank in China Transferring bank asked for verification that the wire was legitimate-controller replied yes.
- Insurance company – no direct loss.
- Eleventh Circuit found coverage: Georgia standard was proximate cause, which included "all of the natural and probable consequences" of the act "unless there is a *sufficient and independent* intervening cause." (emphasis in original).

PITZER COLLEGE V. INDIAN HARBOR INS. CO., 8 CAL. 5TH 93, 447 P. 3D 669 (CAL. 2019) – LATE NOTICE

- California insured suing in California on insurance policy that contained a NY choice of law provision.
- Pitzer College gave late notice of environmental claim. Under NY law – fatal. Under Calif. Law, insurance company has the burden of demonstrating substantial prejudice.
- Pitzer argued that California late notice law constituted state's fundamental public policy and overrode contractual choice of law provision.
- Ninth Circuit certified to Calif. Supreme Court.
- California Supreme Court held that even without legislative pronouncement, late notice prejudice rule was fundamental public policy that overrode choice of law provision.

CRUM & FORSTER SPECIALTY INS. CO. V. DVO, INC., 939 F.3D 852 (7TH CIR. 2019) – ILLUSORY COVERAGE

- Professional liability policy – insured contracted to design and build an 'aerobic digester'.
- After accident, insurance company denied coverage on basis of breach of contract exclusion. Trial court agreed, Seventh Circuit reversed.
- All of insured's work was pursuant to contracts. Enforcing the breach of contract exclusion would render coverage illusory.
- See also, *McGraw Hill Education v. Illinois National Ins. Co.*, (Ill. App. Div. 2019) (applying fortuity defense to copyright infringement claim "would render that portion of the policy illusory.").
- *Starr Surplus Lines Co. v. Star Roofing*, 2019 WL 5617575 (Ariz. Ct. App. 2019). "The scope of interpretation requested by Starr Surplus would result in illusory coverage for the ordinary business activities of the insured…."

R.T. VANDERBILT V. HARTFORD ACC. & IND. CO., 216 A. 3D 629 (CONN. 2019) – ASBESTOS

1. Court adopted continuous trigger, affirming lower court's decision not to allow expert testimony that asbestos injury did not occur until the final cellular mutation that caused the disease to develop.
2. Court adopted unavailability rule – no allocation to insured for period after insurance industry inserted an absolute asbestos exclusion.
3. Court held that indoor asbestos was not pollution – pollution exclusion limited to traditional environmental pollution.
4. 'Occupational disease' exclusion applied to any employee, not just insured's employees.

UNIVERSAL CABLE PRODUCTIONS, LLC V. ATLANTIC SPECIALTY INS. CO., 929 F. 3D 1143 (9TH CIR. 2019) – WAR RISK EXCLUSION

- Insured was making a film in Israel when fighting between Israel and Gaza broke out. Production halted, business interruption loss.
- Insurance company – war risk exclusion.
- District court – no coverage – Israel-Gaza conflict was a war within their ordinary understanding of the term. Ninth Circuit reversed.
- Court refused to apply *contra proferentem* because of insurance broker's role in drafting the policy.
- Court rejected "ordinary understanding" rule of policy construction. Cal. Civil Code – ordinary meaning applies "*unless a special meaning is given to them by usage, in which case the latter must be followed*."
- Court found that in the insurance context, 'war' meant conflict between sovereign states, and neither Hamas nor Gaza were sovereign states.

THE PREMCOR REFINING GROUP, INC. V. ACE INS. CO. OF ILLINOIS (ILL. APP. CT. 2019) – ASSIGNMENT

- Premcor purchased assets from Apex, and then found itself subject to environmental litigation arising from those assets.
- Insurance companies denied coverage, asserting that asset purchase agreement ("APA") did not assign policies to Premcor. Apex intervened and agreed with the insurance companies.
- Court – no assignment. APA assigned certain policies, but not earlier policies. "a valid assignment must describe the subject of the assignment with sufficient particularity."
- See also, *PCS Nitrogen, Inc. v. Continental Casualty Co.*, N. 5699 (S.Car. App. 2019) – insured was not a successor and did not receive an assignment.

EMMIS COMMUNICATIONS CORP. V. ILLINOIS NAT. INS. CO., 323 F. SUPP. 3D 1012 (S.D. IND. 2019) – RELATIONSHIP BACK

- Insurance company tried to relate later action back to prior one. Court ruled for insured. Seventh Circuit reversed. Seventh Circuit reviewed its reversal, reversed itself, and withdrew its decision, letting the district court's decision stand.
- District court – standard for relationship back – "operative facts…that is, facts that form the basis of the causes of action asserted in the lawsuits." Court found that facts relied on by insurance company to relate back were just 'window dressing.'

THEE SOMBRERO, INC. V. SCOTTSDALE INS. CO., 28 CAL. APP. 5TH 729 (2019) – LOSS OF USE

- After a shooting, city canceled Thee Sombrero's night club license, but club could still be used as banquet hall.
- Thee Sombrero sued its security company, which defaulted. Thee Sombrero then sued security company's insurance company.
- Trial court dismissed – no property damage – just economic loss.
- Appellate court reversed. Thee Sombrero suffered loss of use of property as nightclub, and loss of use was within definition of property damage.
- Measure of damages – loss of value of the property.
- See also, *Conte's Pasta Co. v. Republic Franklin Ins. Co.*, No. 18-12410 (D.N.J. 2020).
- Allegation of conversion of underlying plaintiff's property was sufficient allegation of loss of use to trigger duty to defend.

CONDUENT STATE HEALTHCARE, LLC V. AIG SPECIALTY INS. CO., 2019 WL 3337216 (DEL. SUPER. 2019) – DEMAND FOR DOCUMENTS WAS A CLAIM BECAUSE IT WAS A DEMAND FOR NON-MONETARY RELIEF.

- See also
  - *IDT Corp. v. U.S Specialty Ins. Co.*, 2019 WL 413692 (Del. Super. 2019) – 'wrongful act' had a broad meaning not limited to just breach of duty.
  - Claim arising from corporate spinoff was not a securities claim.
  - *Arch Ins. Co. v. Murdock*, 2019 WL 2005750 (Del. Super. 2019) – settlement payments by company to its shareholders were not excluded as 'increase in the consideration paid' but a covered loss.
  - *Solera Holdings v. XL Specialty Ins. Co.*, 2019 WL 4733431 (Del. Super. 2019) – appraisal action was a covered security claim.

IN RE VERIZON INSURANCE COVERAGE APPEALS, 2019 WL 5616263 (DEL. SUPR. CT. 2019) - D&O

- Verizon was sued for violation of fraudulent transfer statutes, payment of unlawful dividends, common law counts of breach of fiduciary duty, promoter liability, unjust enrichment.
- Verizon successfully defended suit – attorneys' fees $48,000,000
- Insurance policy defined security claim as a claim "alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities."
- Trial court found definition ambiguous, applied contra proferentem, and found coverage.
- Supreme Court reversed – definition was unambiguous. District court's broad definition "would encompass a variety of non-security related claims."

YAHOO! INC. V. NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA, NO. 5:17-CV-00489 (N.D. CA. 2019) – BAD FAITH

- National Union moved for SJ on bad faith.
- Yahoo alleged examples of bad faith.
- National Union's letter cited to an exclusion not found in policy.
- National Union used an incomplete copy of the policy to determine coverage.
- National Union did not construe "the allegations of the underlying suits in a manner that would favor a finding of coverage."
- National Union did not reconsider its coverage position.
- National Union did not conduct a thorough investigation.
- Court denied motion – "there is a legally sufficient evidentiary basis for a jury to find that National Union acted or failed to act without proper cause."
- See also *Prucker v. American Economy Ins.*, 2019 WL 2880369 (Conn. Sup. Ct. 2019).
- Sufficient allegation of bad faith –"insurance company knew of and chose to ignore the rulings by state and federal courts in Connecticut…."

THREE MORE CASES

- *First Acceptance Ins. Co. of Ga. v. Hughes* (GA. Sup. Ct. 2019) – Duty to Settle.
- Insurance company does not have a duty to settle until valid offer from plaintiff within policy limit.
- *T-Mobile USA, Inc. v. Selective Ins. Co. of America*, 450 P. 3d 150 (Wash. Sup. Ct. 2019)
- Insurance company bound by agent's representation on COI as to additional insured.
- *New Jersey Transit v. Underwriters*, (N.J. App. Div. 2019), certif. granted – court used efficient proximate cause doctrine to find coverage for excluded flood loss that was caused by covered storm surge.

QUESTIONS?

THANK YOU.

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