PRESENTATIONS

Business Interruption Insurance and the Coronavirus: The emerging landscape of claims for COVID-19 loss

2020 Annual Meeting

September 9-11, 2020

Chicago, IL

Presenters

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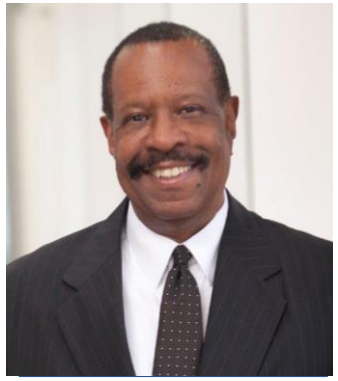

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Background

Are business interruption losses covered by commercial property insurance?

Battle Lines

Policyholders: YES

- Losses are due to “physical loss of or damage to property”
- Civil authority orders prohibit access due to physical damage
- Virus exclusion does not apply to non-virus causes; or exclusion is invalid
- Contamination exclusion does not bar coverage for viruses

Insurers: NO

- No physical loss or damage to property
- Civil authority orders not due to physical damage
- Virus/contamination exclusions bar coverage
- This is not what property policies were designed to cover

Key Commercial Property Provisions

- “All risk” vs. specified causes of loss
- “Loss of or damage to” property
- Business interruption/contingent BI
- Civil authority, ingress/egress
- Sue & Labor
- Virus / Contamination exclusions
- Communicable disease extensions

Key Questions: Trigger

Did the loss result from “physical loss or damage”?

Physical Loss or Damage

This Policy covers property… against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded….

The Insurer will pay for direct physical loss of or damage to property ….

"Loss" means accidental physical loss or accidental physical damage.

This Policy insures TIME ELEMENT loss … directly resulting from physical loss or damage of the type insured.

The Insurer will pay for the actual loss of business income … due to the necessary suspension or delay of operations caused by direct physical loss of or damage to property….

Key Questions: Period of Restoration

Assume there *was* direct physical loss or damage and BI coverage applies.

How does one calculate the period of restoration and quantify the damages?

Period of Restoration/Liability

The period:

a) starting from the time of physical loss or damage of the type insured; and

b) ending when with due diligence and dispatch the building and equipment could be:

(i) repaired or replaced; and

(ii) made ready for operations,

under the same or equivalent physical and operating conditions that existed prior to the damage.

"Period of restoration" means the period of time that:

a. Begins at the time of direct "loss".

b. Ends on the earlier of

(i) The date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(ii) The date when business is resumed at a new permanent location.

Key Questions: Civil Authority

What are the arguments for and against civil orders being due to physical loss or damage?

Civil Authority coverage

… if an order of civil or military authority limits, restricts or prohibits partial or total access … provided such order is the direct result of physical damage of the type insured….

…caused by action of civil authority that prohibits access to the premises, provided that:

(a) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage…

- Related: “ingress/egress”

Key Questions: Exclusions

Which exclusions pose the biggest obstacles to coverage? Are there ways around them?

Virus Exclusions

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

ISO form CP 01 40 07 06

This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:

1) contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use….

Contamination - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

Pollutant/Contamination Exclusions

We will not pay for "loss" caused by or resulting from any of the following:

(l) Pollutants

Discharge, dispersal, seepage, migration, release, escape or emission of "pollutants" ….

"**Pollutants**" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, asbestos, chemicals, petroleum, petroleum products and petroleum by-products, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. "Pollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property, or the environment regardless of whether injury or damage is caused directly or indirectly by the "pollutants"….

ISO Form FM 101 05 16

Key Questions: Bad Faith

When insurers respond with across-the-board denials, without investigating, is this bad faith?

Potential Claims for First-Party Bad Faith

- The "Predetermined Investigation"
- Unreasonable coverage interpretations
- Inadequate investigation (unfair claim practices)
- Bad faith without coverage?
- Agent/Broker errors and omissions

What Is (Usually) Not Bad Faith

- "Bona fide dispute" over coverage
  - *But check state law standards*
- Reliance on insured's description of loss
- Reasonable interpretation of policy rights and duties
- Reasonable but short investigation

Duty of “Utmost Good Faith”

- Insurers have an obligation to act in “Utmost Good Faith”:
  - To demonstrate that the insurer reasonably interpreted the policy
  - To demonstrate that the insurer reasonably conducted an investigation
  - To demonstrate that the insurer “looked for coverage” and not for a reason to deny the claim
  - To demonstrate a commitment to fulfill the insurer’s obligations to its policyholders

Conclusions and Parting Thoughts

Questions?

COVID-19:
General & Employers Liability Claims

Jay Sever
Phelps Dunbar: New Orleans

Linda Kornfeld
Blank Rome; Los Angeles

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American College of Coverage Counsel

2020 Annual Meeting

Theories of Recovery in Underlying Litigation

Negligence: Viable Causes of Action

1. **Breach of Duty: Does a duty exist?**
   - Infected employees (at premises)
   - Infected family members (not at premises)
2. **Causation: Is the risk foreseeable?**
   - Timing of infection
     - February 2020 (perhaps not foreseeable)
     - April 2020 (perhaps foreseeable)
     - Future dates?
   - Derivative exposure (chain of infection from the directly exposed individual)
3. **Damages: Was there actual damages to a third party?**
   - Insuring agreements to cover “property damage,” “bodily injury,” “personal injury”
   - Mental anguish?

Theories of Recovery in Underlying Litigation

- Workers' Compensation

  Underlying defendants are seeking dismissal of negligence claims, arguing that workers' compensation is the exclusive remedy available to plaintiffs.

- Public Nuisance

  Some plaintiffs have filed suits alleging public nuisance, as opposed to negligence, to avoid the exclusive remedy of workers' compensation.

Actual Cases So Far

- *Tyson Foods* – Three cases were filed in Texas alleging gross negligence for Tyson's alleged failure to protect its employees. Tyson does not subscribe to workers compensation insurance but rather provides its own injury settlement program.
- *Amazon* (NY) & *McDonald's* (CA, IL) – Plaintiffs primarily seeking injunctive relief under a theory of public nuisance, alleging that steps taken by employers to prevent spread of the disease were inadequate. Complying with the injunctive relief sought would require the employers to pay for measures that mitigate the spread of COVID-19.
- *Walmart* (IL) – Wrongful death complaint alleging negligence & recklessness. Walmart filed a motion to dismiss on June 25 on the grounds that the lawsuit is barred by the exclusive remedy provision of the Illinois Workers' Compensation Act.
- *Benjamin vs. JBS* (PA) – Wrongful death complaint alleging that defendant beef processing plant exposed employee to COVID-19 by failing to take protective measures. Defendants assert that claims are barred by the Workers' Compensation Act.
- *Built Brands LLC* (UT) – Personal injury lawsuit alleging negligence, willful misconduct, reckless infliction of harm, and gross negligence. One plaintiff was employed by defendant (direct exposure); the remaining two plaintiffs were members of the employee's household (derivative exposure). This case, filed on May 13, 2020, is the first COVID-19 exposure case seeking recovery for persons who were not exposed at the defendant's facility.

GL Coverage Questions

- **Insuring Agreement**
  - **"Occurrence"**
    - Is transmission of a virus an accident?
    - Number of Occurrences?
  - **"Bodily injury" or "property damage/loss of use" –** Claims against insured businesses include:
    - Negligent failure to disinfect
    - Negligent failure to protect & separate customers/employees
    - Negligent failure to require facemasks
    - Negligent failure to follow other CDC/state/local mandates

GL Coverage Questions

- **Exclusions**
  - Pollution

    Is a virus a pollutant? state law dependent
  - Communicable disease (CG 21 32 05 09)
  - Fungi / Bacteria/ Contaminant
  - Impaired property
  - Employers liability

Expected Claims

- **EPL Claims**
  - Bodily injury by employees from infection at work
  - Discrimination
  - Harassment
  - ADA

Expected Claims

- **<u>Vulnerable businesses</u>**
  - Universities, boarding schools
  - Summer camps
  - Prisons/ Jails
  - Transportation Industry
    - Cruise ships
    - Airlines

Preview of COVID-19 Liability Survey

(VERY) Preliminary Results (as of Sept. 1st))

- **Mirror Survey to First Party BI/EE Survey from Spring/Summer 2020**
- **Goal is 10,000+ responses from all 50 states.**
- **Balancing gender, age, race & socioeconomic in all 50 states.**
- **Survey closes October 1st.**

If a nursing home was accused of causing the premature death of a 73 year-old Caucasian female who tested positive for COVID-19 while in quarantine and then died two weeks later of heart failure, *I would presume the virus caused her death* unless someone could prove to me otherwise.

Surrogate Jurors:

SD:	**6%**
D:	**13%**
N:	**21%**
A:	**42%**
SA:	**18%**

If a retired otherwise healthy father of a waiter died of COVID-19 lung failure which the family believes came from the 18 year-old son's job, in the family's wrongful death suit against the restaurant I would start out leaning in favor of finding liability against the restaurant.

Surrogate Jurors:

SD: 7%

D: 14%

N: 24%

A: 37%

SA: 18%

I believe prisons and jails have an obligation to exercise a high degree of caution to protect inmates from COVID-19 exposure and would be willing to award damages to inmates who get sick or die if the prisons and jails failed to do so.

Surrogate Jurors:

SD: 3%

D: 11%

N: 27%

A: 38%

SA: 21%

If a restaurant's negligent hygiene practices caused multiple people to get sick from COVID-19, I would not hesitate to award damages to those injured even if the restaurant was in financial distress because of the coronavirus shutdown.

Surrogate Jurors:

SD:	**9%**
D:	**11%**
N:	**29%**
A:	**34%**
SA:	**17%**

COVID-19 Liability Survey

- **Survey will be completed by October 1st**
- **Final Results published in November**
- **Follow up survey Q2 2021**

Conclusions/ Questions

COVID-19: General & Employers Liability Claims

Jay Sever
Phelps Dunbar: New Orleans

Linda Kornfeld
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2020 Annual Meeting

IS THE BEST DEFENSE A GOOD OFFENSE?

2020 Virtual Annual Meeting

September 10, 2020

Lyndon Bittle—Carrington, Coleman, Sloman & Blumenthal, LLP—Dallas, TX
(Moderator)

Laura Foggan—Crowell & Moring LLP—Washington, DC

(Insurer Representative)

Marion Adler—Adler Law Practice, LLC—Chicago, IL

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Best Defense a Good Offense?

The Questions:

- Does an insurer's duty to defend ever include the duty to fund the insured's "offensive" claims against the plaintiff or third parties?

- If so, under what circumstances?

Best Defense a Good Offense?

Insurers' Perspective

- Plain meaning: "defend" ≠ "prosecute."
- Affirmative counterclaim is not a "claim" against policyholder.
- Distinguishing covered/uncovered affirmative claims unwieldy.
- Public policy supports strict meaning of defense.

Best Defense a Good Offense?

Policyholders' Perspective

- Policies do not define "defense."
- Common meaning includes counter-attack or flanking maneuver.
- Hence the adage: "The best defense is a good offense."

Best Defense a Good Offense?

Circumstances Favoring Policyholders

- Counterclaims, cross-claims, third-party actions to minimize liability:
  - e.g., multiparty environmental or construction suits;
  - upstream indemnity claims (product liability or IP).
- Strongest position is where Insurer does not control defense:
  - e.g., Insurer forfeited right by denying defense;
  - policy language entitles policyholder to control defense.
- Preemptive suit after demand (to choose forum) is a legitimate defense tactic.

Case Study—Employment Claims

Mt. Vernon Fire Ins. v. VisionAid (Mass. 2017)

- Insured is sued for age discrimination and wrongful termination.
- Insurer accepts defense, appoints counsel.
- Defense: termination justified by employee's misappropriation.
- Insured wants to counterclaim for misappropriation.
- Insurer refuses to fund counterclaim, files DJ.
- District Court grants summary judgment for insurer.
- → **1st Circuit certifies question to Massachusetts Court.**

Case Study—Employment Claims

Mt. Vernon Fire Ins. v. VisionAid (Mass. 2017)

Holding: Insurer has no duty to fund counterclaim.

- The "essence of what it means to defend is to work to defeat a claim that could create liability."
- Plain meaning: "defend" ≠ "prosecute."
- "In for one, in for all" does not extend to counterclaims.

Case Study—Employment Claims

Mt. Vernon Fire Ins. v. VisionAid (Mass. 2017)

Holding: Insurer has no duty to fund counterclaim.

Comments?

Compare: *Int'l Ins. v. Rollprint Packaging Products* (Ill. App. 2000)

Case Study—Construction Defects

D.R. Horton—Denver v. Mountain States Cas. (D. Colo. 2014)

Nationwide Ins. v. D.R. Horton—Birmingham (S.D. Ala. 2016)

- Horton (GC) is Additional Insured under Subs' CGL policies.
- GC and Subs are sued for construction defects.
- Insurers defend Subs, but not GC (deny AI status).
- GC defends, asserts cross-claims for indemnity v. Subs.

➡ **Questions: (1) GC entitled to defense?**

(2) Defense include funding cross-claims?

Case Study—Construction Defects

D.R. Horton—Denver v. Mountain States Cas. (D. Colo. 2014)

Nationwide Ins. v. D.R. Horton—Birmingham (S.D. Ala. 2016)

Holdings:

(1) GC is entitled to defense as additional insured.

(2) Insurers must pay costs of pursuing cross-claims.

- Cross-claims intended to reduce GC's liability,
  so "defensive in nature."

(Insurers must fund both prosecution and defense of cross-claims.)

Case Study—IP / Dueling Jurisdictions

Creation Supply v. Selective Ins. (N.D. Ill. 2019)

- Insured is sued for trade-dress infringement in D. Oregon, challenges jurisdiction.
- Insured files two suits in N.D. Illinois:
  1. DJ non-infringement action
  2. Third-party indemnity action v. vendor.
- Illinois actions transferred to D. Ore. & consolidated.

→ Coverage case in N.D. Illinois:

Insurers required to pay for Illinois cases before transfer?

Case Study—IP / Dueling Jurisdictions

Creation Supply v. Selective Ins. (N.D. Ill. 2019)

Holding: Insurers must pay fees incurred in Illinois cases before transfer.

- Although unsuccessful, Illinois actions were legitimate defense strategy to avoid jurisdiction of Oregon court.

Comments?

Case Study—Forum Shopping

IBP v. National Union (D. S.D 2003)

- Insured (IBP) sells its business to Tyson.
- Tyson sues IBP in Arkansas to rescind merger for fraud.
- Tyson and IBP are defendants in Delaware shareholder suit.
- IBP files cross-claim against Tyson in Delaware; Tyson counterclaims.
- Delaware court enters specific-performance judgment for IBP.

➡ IBP Coverage action:

D&O Insurer required to pay IPB's fees in Delaware case?

Case Study—Forum Shopping

IBP v. National Union (D. S.D 2003)

Holding: Insurer required to pay Insured's fees in Delaware case.

- IPB's actions were effective defense against Tyson's claim.
- Delaware was more favorable forum for litigating the dispute.

Comments?

Case Study—Separate Suit

Post v. St. Paul Travelers (3d Cir. 2012)

- Client sues insured lawyer: malpractice caused inflated settlement.
- Lawyer files separate lawsuit against client.
- Dist. Ct. holds E&O insurer liable for lawyer's costs in both actions.

Holding: Insurer has no duty to pay Insured's fees in separate suit, even if defensive (although it would have had to pay for counterclaim).

Comments?

Back Door—Allocation / Reimbursement

Potomac Elec. Power v. Cal. Union Ins. (D.D.C. 1991):

- Preemptive action "reasonably related" to covered defense.

MGA Entertainment v. Hartford Ins. (C.D. Cal 2012):

- No reimbursement unless fees "solely" support affirmative claims.

Sullivan v. Am. Family Ins. (Minn. App. 2007):

- No recovery if fees for affirmative claims are "separable."

Question: Whose burden?

Best Defense a Good Offense?

QUESTIONS?

THANK YOU

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10 CASES
IN 45 MINUTES

2020 Annual Meeting
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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:

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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:

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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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The Impact of Delaware's Sudden Dominance in D&O Coverage Disputes

2020 Annual Meeting

September 9-11, 2020

Chicago, IL

Leslie Ahari - Seth Lamden – Mike Manire

Introduction

- Pro-policyholder rulings in D&O insurance disputes by Delaware Superior Court

- Surge in D&O coverage suits filed in Delaware as policyholders seek to take advantage

Choice of Law

State of incorporation as determinative factor in most significant relationship test

- *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, C.A. No. 09C-11-174, 2010 WL 8250837 (Del. Super. Ct. Nov. 5, 2010)
- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2019 Del. Super. LEXIS 96, 2018 WL 1129110 (Del. Super. Ct. March 1, 2018)

Forum Fight

- Delaware limits first filed rule
- Forum non conveniens – “overwhelming hardship” standard
- Personal jurisdiction
- Comity

Forum Fight

AR Capital, LLC v. XL Specialty Ins. Co., C.A. No. N19C-01-024 MMJ (Del. Super. Ct.)

- April 25, 2019, 2019 WL 1932061
- August 3, 2020, 2020 WL 4907990

XL Specialty Ins. Co. v. AR Capital, LLC, 181 A.D.3d 546 (N.Y. 1st Dep't 2020)

Settlement After Finding of Fraud

D&O policy's fraud exclusion does not bar coverage for settlement after trial court found conduct to be fraudulent

- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2016 Del. Super. LEXIS 645, 2016 WL 7414218 (Del. Super. Ct. Dec. 21, 2016)

Public Policy

Does Delaware public policy permit insurance coverage for fraud and disgorgement?

- Yes: *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2019 Del. Super. LEXIS 96, 2018 WL 1129110 (Del. Super. Ct. March 1, 2018) (fraud)
- Yes: *Gallup, Inc. v. Greenwich Ins. Co.*, Case No. N14C-02-136, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) (disgorgement)

Definition of "Securities Claim"

Requires "actual or alleged violation of any … statute, regulation or rule regulating securities"

Definition of "Securities Claim"

Does a statutory appraisal action under 8 Del. C. § 262 allege a violation of a law regulating securities?

- Yes: *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 213 A.3d 1249 (Del. Super. Ct. 2019) (interlocutory appeal pending)
- No: *Zale Corp. v. Berkley Ins. Co.*, Case No. 05-19-730, 2020 WL 4361942 (Tex. Ct. App. July 30, 2020)

Definition of "Securities Claim"

Do breach of fiduciary duty, fraudulent transfer and unlawful distribution of dividends counts allege violations of a law regulating securities?

- Yes: *In Re Verizon Ins. Coverage Appeals*, 2017 WL 1149118 (Del. Super. Ct. March 2, 2017) and 2018 WL 2317821 (Del. Super. Ct. May 16, 2018)
- No: Delaware Supreme Court reversed, 222 A.3d 566 (Del. 2019)

Related Wrongful Acts/Claims

Interrelated Wrongful Acts – “common nexus” of any fact, circumstance, situation

Logical or causal connection

Same or related Wrongful Acts

Based on, arising out, in any way involving <u>any</u> facts, circumstances, situations in prior matters

Related Wrongful Acts/Claims

Delaware: "Fundamentally Identical" Standard

- *United Westlabs, Inc. v. Greenwich Ins. Co.*, Case No. 09C-12-048, 2011 WL 2623932 (Del. Super. Ct. July 1, 2011)

Related Wrongful Acts/Claims

- RSUI Indem. Co. v. Sempris, LLC, Case No. N13C-10-096, 2014 WL 4407717 (Del. Super. Ct. Sept. 3, 2014)
- *Medical Depot, Inc. v. RSUI Indem. Co.*, Case No. N15C-04-133, 2016 WL 5539879 (Del. Super. Ct. Sept. 29, 2016)
- *Pfizer Inc. v. Arch Ins. Co*., No. N18C-01-310, 2019 WL 3306043 (Del. Super. Ct. July 23, 2019) and 2020 WL 5088075 (Del. Super Ct. Aug. 3, 2020)

Related Wrongful Acts/Claims

Compare “Fundamentally Identical” to

- Substantial Overlap (“same or substantially the same” facts)
- Lesser Connections
  - *UBS Financial Servs. v. XL Specialty Ins. Co.*, 929 F.3d 11 (1st Cir. 2019) (“in any way involving” does not require substantial overlap)
  - *Vozzcom, Inc. v. Great American Ins. Co.*, 666 F. Supp. 2d 1332 (S.D. Fla. 2009) (“in any way involving” requires only a “tenuous connection”), *aff’d* 374 F. App’x 906 (11th Cir. 2010)

Allocation

"Larger settlement rule" applied notwithstanding "relative legal and financial exposures" language

- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2020 Del. Super. LEXIS 156 (Del. Super Ct. Jan. 17, 2020).

Take Away

- More coverage litigation
- Delaware Supreme Court to address critical issues
- Impact on pricing and terms

The Impact of Delaware's Sudden Dominance in D&O Coverage Disputes

2020 Annual Meeting

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Sorting Out the Responsibilities of Primary and Excess Carriers in "Bet the Company" Litigation

2020 Annual Meeting

September 9-11, 2020

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[Speakers]

Scenario

- Multiple insureds
- Wrongful death
- Multiple layers of insurance
  - SIR $1,000,000
  - Primary $1,000,000
  - 3 excess layers--$5m each

- Defense
  - Single defense lawyer for 2 affiliated companies
  - Counsel hired to defend
  - Defense evaluation
    - Policyholder: evaluation unreasonable
    - Excess carrier: concern about experience level of counsel
  - Primary refuses to do mock trial
  - Limited experts hired

Enter the Excess Carrier

Defense

- Primary controls and pays
- Limits are committed
- Incentive to cut costs

- Excess can
  - Associate
  - Hired monitoring counsel
  - Take over the defense

Defense Variations

- Impact of right to independent counsel?
- SIR
- Primary picks the lawyer
- Primary uses captive counsel
- Compromises?
  - Cutting deals with excess

- Excess involvement
  - Monitoring counsel concerns
    - Client/privilege
    - Monitor plus coverage?
      - Preferences?
    - Disagreements re strategy
  - Association in the defense itself

- Is it time for the excess to reserve rights?

Primary Defense Wanted Out or Changed

- The truly inadequate or obstinate counsel
  - Seemingly unreasonable evaluation
  - Actual errors in the defense
  - Lack of experience
  - Captive counsel with conflict
- Tools for getting a change of counsel
  - Right to associate or monitor
  - Downward pressure re settlement
  - Finesse?
  - Mock trial
  - Second opinions
  - Verdict surveys
  - Lawyer experience

Advantages of Team Work With All Counsel

- Collective wisdom can assist with particular legal and litigation issues
- The same with strategy pre-trial and trial

- Examples
  - Excluding critical evidence—video of driver texting while headed directly at and hitting directly at plaintiff's car
  - Finding loss control evidence the carrier knew about and generated
  - Private investigation reveals more criminal offenses and possible perjury from key witness re criminal record
  - Determine estate is not suing properly in suit with huge conscious pain and suffering claim

The Care and Feeding of the Excess Carrier

- Information flow
- Obligations
  - Primary carrier
  - Defense counsel
  - Policyholder
  - Excess carrier
- Attempts to restrict information
  - Primary concerned about downward pressure re settlement
  - Adequacy of defense.
- Privilege issues

Information Needed for a Late Arrival

- Defense reports
- Email reports on depos or otherwise
- History of settlement
  - Written offers and counters
    - Demand letters are a window to damaging evidence
  - Mediation
  - Mediation statements
- Key depositions
  - Video if possible
- Critical evidence

Moving Towards Trial

Appellate Considerations

- Bet the company case should have skilled appellate counsel
- Primary is responsible for paying
- Separate firm?

- The policyholder needs to know bonding process early
  - Cost
  - Collateral
  - Sharing
  - Where covered and uncovered claims
  - Financial impact even if bonded

Settlement

Duty to Settle

- How to make the offer where there are multiple layers of insurance.
- Duty of primary
  - An offer within its limits
  - Difficulty of package offers to multiple carriers
- Duty of excess
  - Does the duty to settle apply?
  - Is it different?
  - How best effectuate it?

Settlement—Downward Pressure

- Rights of excess versus primary
  - Direct duty
  - Duty of good faith
  - Equitable subrogation
- Equitable subrogation
  - Volunteer defense
  - Contributory negligence?
  - Other defenses?
  - Need to make a demand on primary?

Special Problems—Downward Pressure

- SIR/front
  - SIR is not insurance in some jurisdictions and thus no duty to settle may exist
  - Fronting—insured is running the show, but the carrier is still on the hook potentially
- Solutions to an impasse
  - Try to get offers or settlements to exhaust the problem SIR/fronting layer.
  - Use duty of good faith in jurisdictions recognizing a duty

Questions?

Slide Text

Ethical Issues That May Arise In Multi-client Representations

2020 Annual Meeting

September 9-11, 2020

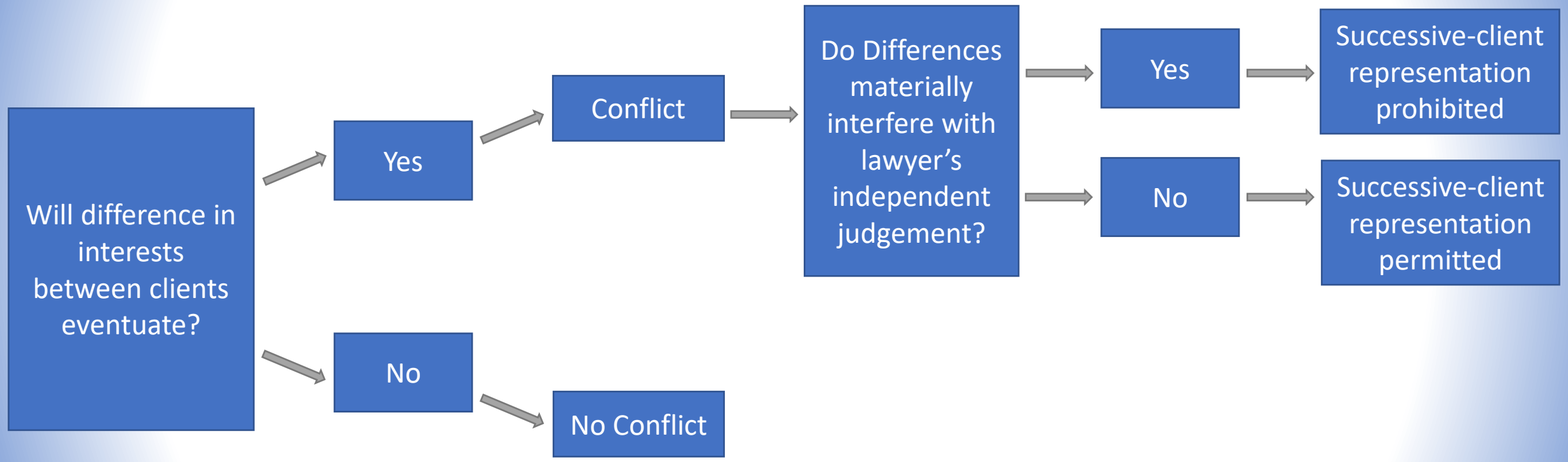
Chicago, IL

Tracy Alan Saxe, Saxe Doernberger & Vita, P.C.

Laura Hanson, Meagher & Geer, PLLP

Timothy Wilson Burns, Burns Bowen Bair, LLP

Is Multi-client Representation Permissible



Hypothetical

- Two unrelated entities are co-defendants in an underlying action.
- Both entities engage the same law firm to serve as coverage counsel in disputes against their respective insurers under separately acquired insurance policies.
- Each client has separate defense counsel.
- Coverage counsel attends mediation in the Underlying Action where coverage counsel learns of separate confidential settlement demands and offers with the underlying plaintiff that are not intended to be shared among the co-defendants.

Successive Client Representations

- Tortfeasor A, B, C, D, and E all contribute to Victim's injury
- Victim sues all Tortfeasors
- Lawyer A represents Tortfeasor A in coverage litigation against ACME Insurance Co.
- Tortfeasor A's litigation with ACME settles during mediation
- Tortfeasor B seeks to hire Lawyer A for Tortfeasor B's lawsuit against ACME
- Is Lawyer A permitted to represent Tortfeasor B?

Questions?

- What if Tortfeasor A's settlement with ACME includes a coverage-in-place agreement?
- What if ACME objects to Lawyer A representing Tortfeasor B because Lawyer A knows how much ACME is willing to pay in settlement?
- What if Tortfeasor A objects to Lawyer A representing Tortfeasor B because Tortfeasor A now wants a better relationship with ACME?
- What can Lawyer A disclose or not disclose to Tortfeasor B about Lawyer A's representation of Tortfeasor A?
- About the mediation?
- About the settlement?

Ethical Issues for Insurers with Multiple Insureds?

- Insurers often insure multiple defendants in multi-party cases
- Insurers often insure one defendant but also have potential Additional Insured coverage for other defendants
- There are typically coverage issues with respect to each insured and separate liability issues with respect to each insured

Hypothetical

- Solid Insurance provides primary insurance to General Contractor and Two Subcontractors, Plumbing and Electrical and they are all defendants in a construction defect lawsuit.

- Solid Insurance provided a defense under a reservation to General Contractor, Plumbing and Electrical.

- At mediation, Solid's coverage counsel is attending and addressing the coverage issues for all three insured defendants. All three have separate defense claim handlers from Solid attending as well.

- With respect to all three defendant insureds, Solid's coverage counsel participates in discussions among defense counsel, the defense handler from Solid and personal/corporate or coverage counsel for that insured related to settlement value and responding to settlement demands

- Solid's coverage counsel is therefore privy to the settlement demands and responses of each defendant insured, even though they each do not know what the other defendants are offering

- Is this a conflict of interest?
- Does each individual insured have the right to object?
- Appropriate boundaries are dependent on the coverage counsel not revealing any information about other offers/demands.

YOU DID… WHAT!

Looking at post-breach settlements under the light of a torch passed to third-party claimants

2020 Annual Meeting

SEPTEMBER 10-11 -24-25 2020

Virtual Sessions

[William Ford (Moderator) Collins Ford, LLP

Wendy Feng Covington & Burling, LLP

Jean Lawler Lawler ADR Services

Ellen Van Mier Thompson Coe

THE *GRAY* RULE

If the insurer wrongfully fails to defend it will be liable for the amount of a judgment against its insured whenever the trial in the underlying action involved a theory of recovery within the coverage of the policy and it was not clear whether the jury's verdict was based upon that theory.

(*Gray v. Zurich Insurance Company*, 65 Cal. 2d 263 (1966) (*Gray*).)

THE *ISAACSON* RULE

[I]f an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability.

Isaacson v. California Ins. Guarantee Assn., 44 Cal. 3d **7**75, 791–92 (1988) (quoting *Clark v. Bellefonte Ins. Co.*, 113 Cal.App.3d 326, 335 (1980) (additional citations omitted).

THE *HOGAN/GEDDES* RULE

One consequence of an insurer's failure to defend is that it may be bound in a subsequent suit to enforce the policy (on in a direct action under Insurance Code, § 11580), by the express or implied resolution in the underlying action of the factual matters upon which coverage turns. Thus, where the issues upon which coverage depends are not raised or necessarily adjudicated in the underlying action, then the insurer is free to litigate those issues in the subsequent action and present any defenses not inconsistent with the judgment against its insured.

(*Hogan v. Midland National Ins. Co.*, 3 Cal. 3d 553 at 564-565 (1970); *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.*, 51 Cal. 2d 558, 561-562 (1959); *see*, *Pruyn v. Agriculture Ins. Co.*, 36 Cal. App. 4th 500 at 514, n. 15.)

DUE PROCESS

But, . . . What about procedural Due Process?

- **Where the insured enters into a post-breach settlement, the insurer always has the right to contest whether the deal was reasonable and non-collusive. The availability of this defense guarantees fairness and due process.**

- **"A nonparty insurer must be given a fair opportunity to litigate the question of whether the settlement was unreasonable or was the product of fraud or collusion between a settling insured and the claimant."**

(*Pruyn v. Agricultural Ins. Co.*, 36 Cal. App. 4th 500, 527 (1995).)

ESTOPPEL

Under the estoppel rule, "an insurer will be precluded from denying coverage after it has unjustifiably refused to defend."

(Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insured* §4:37 (2015); see, Stanley C. Nardoni, *Estoppel for Insurers who Breach Their Duty to Defend: Answering Critics*, 50 J. Marshall Law Rev. 53 (2016)

In May of 2019, the Restatement of the Law of Liability Insurance (RLLI) passed. One section, §19, styled "Consequences of Breach of the Duty to Defend," reads as follows: "An insurer that breaches the duty to defend a legal action forfeits the right to assert any control over the defense or settlement of the action."

BIG PICTURE

- **DUTY defend**
- **BREACH of duty to defend**
- **RIGHT to settle, reasonably and without fraud or collusion**
- **In later suit for reimbursement of the post-breach settlement, the Settlement gives rise to PRESUMPTIONS: (a) liability and (b) amount of liability**
- **DUE PROCESS served because Insurer has the right to litigate whether post-breach settlement was reasonable or non-collusive.**

BIG PICTURE (CONT'D)

- **PUBLIC POLICIES are important:**

(a) ENCOURAGE PERFORMANCE AND DISCOURAGE BREACH:

- **The presumptions only arise in cases of breach of the duty to defend or denials of coverage--thus, their purpose is to provide a disincentive for breach--if the insured had to prove "coverage" the presumptions would be rendered pointless.**

(b) CONSERVE JUDICIAL RESOURCES:

- **By breaching the defense obligation, insurer "rejected chance to contest liability, it cannot reach back for due process to void a deal the insured has entered to eliminate personal liability."** (*Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th 718, 728 (2002).)

"Where such a breach has occurred, there is an obvious need, as a matter of policy, to permit the insured to protect his or her position by settling the third party's claim, so long as the settlement is in fact reasonable. The unacceptable alternative would be to compel the insured, following the insurer's breach, invariably to force the dispute to trial and thus to incur unnecessary expenditure of the insured's own money and of the state's overtaxed judicial resources." (*Xebec Dev. Partners, Ltd. v. National Union Fire Ins.*, 12 Cal. App. 4th 501, 549 (1993).

Duty to Defend Bad Faith Issues

2020 Annual Meeting

September 24, 2020

Robert Allen, Linda Dedman,

David Godwin, Daniel Litchfield

Duty to Defend and Bad Faith

- Choice of Law Analysis/Selection of Forum
  - Differences between State and Federal Court
  - Results Differ Significantly Depending on the Forum
  - Eight Corner Rule
  - Extrinsic Evidence Allowed to Grant a Defense
  - Extrinsic Evidence Allowed to Deny a Defense

Bad Faith

- Common Law
- Statutory
- Different Standards of Conduct

Duty to Defend and Bad Faith

- Defense is allegedly so substandard as to be bad Faith
  - Illinois cases: close but no bad faith finding
    - But poor defense breached the defense duty with all that entails for estoppel in Illinois
    - *See i.e., Delatorre v. Safeway Insurance Co.,* 989 N.E.2d 268 (Ill. App. Ct. 2013)(insurer's inactivity after accepting defense resulted in liability for default judgment including amounts in excess of policy limits).
  - Texas case: pending
    - *In re Farmers Texas County Mutual Insurance Co.,* 604 S.W. 2nd 421 *(*Tex. App.–San Antonio 2019).

Defenses to Bad Faith Claims

- Genuine Dispute Doctrine / Fairly Debatable Doctrine
- Reasonable and Timely Investigation of Claim
- Insured's Failure to Cooperate / breach of contract
- Statute of Limitations
- Insured's Failure to Mitigate
- Absence of Coverage
- Assignment of Claim to Third Party
- Advice of Counsel

September 24, 2020

The Code Word is...

WASH

Breach of the Duty to Defend

- Contractual Remedies
  - Out of Pocket Expenses (What Rates Must Insurer Pay)
  - Consequential Damages
  - Attorneys Fees, what rates must the insurer pay, *Taco Bell Corp. v. Continental Casualty Co*., 388 F.3d 1069 (7th Cir. 2004).
  - Statutory Interest Penalties (e.g., Tex. Ins. Code 542.051)

Breach of the Duty to Defend

- Extracontractual Remedies
  - Damages in Excess of Policy Limits
  - Treble Damages
  - Punitive Damages

Duty to Defend and Bad Faith

- Coverage by Estoppel resulting from breach of duty to defend. Examples are:
  - Illinois
  - Wisconsin
- Can lead to outcomes as adverse as bad faith damages
- See examples of liability for misrepresentations or inaction of insurer: *Liberty Mut. Fire Insurance Co. v. Canal Insurance Co.,* 177 F.3d 326 (5th Cir. 1999); *Delatorre v. Safeway Insurance Co.,* 989 N.E.2d 268 (Ill. App. Ct. 2013).
- See examples of coverage by estoppel for wrongful withdrawal of defense: *Pershing Park Villas Homeowners Ass'n v. United Pacific Insurance Co.,* 219 F.3d 895 (9th Cir. 2000); *Pacific Indemnity Co. v. Acel Delivery Service, Inc.,* 485 F.2d 1169 (5th Cir. 1973); *Beckwith Machinery Co. v. Travelers Indemnity Co.,* 638 F.Supp. 1179 (W.D. Pa. 1986).

Defense Under Reservation

- Defense by Panel Counsel
- Insurer's Responsibility for Defense Counsel Malpractice
- Insurer's Responsibility for Excess Judgments

Defense Under Reservation

- Right to Independent Counsel
- What Constitutes a Material Conflict
- Excess Exposure for Defense Handled by Independent Counsel
- How to Determine Reasonable Rates

When is a Policyholder Entitled to Independent Counsel

- No Independent Counsel Right
  - But defense may be controlled by policyholder because defense counsel owes allegiance to policyholder alone
- Existence of a Conflict of Interest
  - Statutory
  - Common law

When is a Policyholder Entitled to Independent Counsel

- What Reservation of Rights Result in a Conflict of Interest?
  - Intentional Acts
  - Facts at Issue in Underlying Lawsuit
  - Characteristics of Underlying Injury, Damage or Circumstance
  - Damages in Excess of Limits
  - Punitive Damages
  - Cross-claims
  - Defense Strategy (e.g. Special vs General Verdict Form)

Bad Faith Ramifications for Refusal of Independent Counsel

- Part of Duty to Defend
- Breach of Statutory Obligation
- Insurer's Liability for Inadequate Defense

Defense of Claims Within Self-Insured Retention

- Defense Expenses Erode SIR
  - May a policyholder erode the SIR with defense expenses at rates in excess of rates commonly paid by the insurer?
  - Must the Insurer Continue the Defense Using the Policyholder's Selected Counsel Once the SIR is Exhausted?
  - Who controls the defense following exhaustion of the SIR?
  - Burn Rate

Declaratory Judgment Actions

Declaratory Judgment Actions

- Most Common Method to Litigate Defense Obligations
  - Bad Faith for Filing Declaratory Judgment Action
  - Declaratory Judgment Action as a Defense to Bad Faith Allegations

Questions?

Duty to Defend Bad Faith Issues

2020 Annual Meeting

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IMPARTIALITY IN THE APPRAISAL PROCESS

American College of Coverage Counsel
Annual Conference 2020

Presenters

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AMERICAN COLLEGE OF COVERAGE COUNSEL

Standard Appraisal Provision

If we and you disagree on the value of the property or the amount of the "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. You and we must notify the other of the appraiser selected within twenty days of the written demand for appraisal. The two appraisers will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be the appraised value of the property or amount of "loss." If you make a written demand for an appraisal of the "loss," each party will:

a. Pay its chosen appraiser; and
b. Bear the other expenses of the appraisal and umpire equally.

- What is appraisal?

- How does it work?

Policies may require appraisers to be "disinterested" or "impartial."

- What does "disinterested" mean in this context?
- What does "impartial" mean?
- Is there a difference between those two requirements?
- Should there be a difference?
- If there is a difference, in your view, which should be more important in the selection of an appraiser?

Umpire Selection

- Who should select the umpire, and how should that process work?
- What are the umpire's required qualifications?
- Should they be the same as the appraisers?

Challenges to the Appraiser

- Should the parties be able to challenge the appraiser based on his or her conduct during the appraisal process?

- If so, should the parties be able to challenge the appraiser based on the appraiser being given information about ongoing litigation separate from the appraisal process?

Appraisers.....
Should they be disinterested or impartial?

- If there's an umpire in any event, why should it matter whether the appraiser is disinterested or impartial?

- In reality, isn't an appraiser hired by one side or the other necessarily going to advocate, even subtly, for the side paying him or her, such that the decision is going to come down to the umpire anyway?

Does the Appraisal Process Favor the Insurer or Policyholder?

- Do you think that the appraisal process tends to favor the insurer or the policyholder?

- Or does it depend on the circumstances?

- And if it depends, what types of factors would prompt you to request an appraisal, on behalf of either the insurer or the policyholder?

Appraiser Selection

- How do you suggest that insurers and policyholders should go about selecting appraisers that will give them the best result and that will minimize the risk of the appraisal being overturned?

Looking for IP Coverage: What's In or Out for CGL, Excess & Specialty Policies?

American College of Coverage Counsel

2020 Virtual Meeting

September 25, 2020

Michael Hamilton
Goldberg Segalla LLP

Marcus Snowden
Snowden Law P.C.

Joann Lytle
McCarter & English LLP

Tyler Gerking
Farella Braun + Martel LLP

Agenda

I. The CGL Policy – Personal and Advertising Injury

A. Elements required for PAI coverage to exist

B. Enumerated Offenses

C. “Advertisement”

D. “Damages”

E. Exclusions

II. Other Common Policies Potentially Providing Coverage for IP Risks

A. Media Liability Insurance

B. Cyber liability insurance policies

C. Technology Errors and Omissions policies

III. Specialty Forms for IP Risks

A. Infringement Liability Policies

B. “Abatement” or “Enforcement” Policies

PAI Enumerated Offenses Through the Years

1973 ISO FORM	1986 ISO FORM	1998 and 2001 ISO FORM
• Libel • Slander • Defamation	• oral or written publication of material that slanders or libels a person or disparages, goods, products or services	• oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services
• Violation of privacy	• oral or written publication of material that violates a person's right of privacy	• oral or written publication of material that violates a person's right of privacy
• Piracy • Unfair competition	• misappropriation of advertising ideas or style of doing business	• the use of another's advertising ideas in "your advertisement"
• Infringement of copyright, title, or slogan	• infringement of copyright, title, or slogan	• infringing upon another's copyright, trade dress or slogan in "your advertisement"
		• false arrest, detention or imprisonment
		• malicious prosecution
		• wrongful eviction, wrongful entry, or invasion of the right of private occupancy

PAI Coverage Requirements

- The claim must fall within one of the offenses enumerated in the policy.
- Certain offenses must take place in the named insured's "advertisement."
- The offense must be committed during the policy period.
- It must occur in the "coverage territory."
- It must occur in the course of the named insured's business.
- The claim or suit must seek "damages."
- The claim must fall outside the policy's exclusions to coverage.

Infringement in “Advertisements”

- Injury “arising out of”
  - the use of another’s advertising idea in your “advertisement”
  - infringing upon another’s copyright, trade dress or slogan in your “advertisement”
- Both offenses require that the infringement occur in the insured’s “advertisement”

Advertisement

- The use or infringement must take place "in your advertisement"
- "Advertisement" -- "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters
    - *Teletronics International, Inc. v. CNA Insurance Co.*, 120 Fed. Appx. 440 (4th Cir. 2005): The court held that posting an infringing user manual on its website constituted advertising because the defendant admitted that it employed the user manual to promote the sale of its product, and because by posting the manual on its website, it distributed the document to a large number of potential customers

Invasion of Privacy

- "Personal and Advertising Injury" is defined to include "injury . . . arising out of one or more of the following offenses: . . ."
  - "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" or
  - "[m]aking known to any person or organization covered material that violates a person's right of privacy"
- What does "publication" mean?
  - *Hartford Casualty Ins. Co. v. Corcino & Associates et al.*, CV 13-3728 GAF (JCx) (Oct. 7, 2013 C.D. Cal.)
  - *Zurich Am. Ins. Co. v. Sony Corp. of Am., et a*l., Case No. 651982/2011 (Sup. Ct. of N.Y., App. Div., 1st Dept)
  - *Recall Total Info. Mngt, Inc. v. Federal Ins. Co.*, 317 Conn. 46 (2015)
  - *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, L.L.*C., No. 14-1944 (4th Cir. Apr. 11, 2016)
  - *St. Paul Fire & Marine Ins. Co. v. Rosen Millennium Inc.*, No. 6:17-cv-00540 (M. Fl. Sept 28, 2018) (settled after appellate argument)

Invasion of Privacy (cont'd)

- What kind(s) of invasion of privacy are covered?
  - Violation of the right to secrecy only, or also the right to seclusion?
    - *ACS Systems, Inc. v. St. Paul Fire and Marine Ins. Co*., 53 Cal. Rptr. 3d 786 (Cal. App. 2d Dist. 2007) (no coverage for fax blasting claim under TCPA because no disclosure of private information)
    - *State Farm General Ins. Co. v. JT's Frames, Inc*., 181 Cal. App. 4th 429 (2d Dist. 2010) (same)
    - *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017) (TCPA violations are invasion of privacy (seclusion) for purposes of "invasion of privacy" exclusion in D&O policy)
    - *Evanston Insurance Co. v. Versa Cardio, LLC*, 2018 WL 4860176 (C.D. Cal. Mar. 21, 2018) (coverage for claims alleging TCPA violations despite prior cases, and relying Lakers)
    - *Yahoo! Inc. v. National Union Fire Insurance Co. of Pittsburgh*, PA, Case No. S253593 in the CA Supreme Court (question whether TCPA claims covered as invasion of privacy certified from Ninth Circuit Court of Appeals)

Invasion of Privacy (cont'd)

- Right of publicity violations and misappropriation of likeness claims covered?
  - Privacy right or intellectual property right?
    - For example, in Massachusetts, New York, Rhode Island, Utah and Wisconsin, the right to one's likeness is not descendible, which is a key characteristic of a privacy right. See Mass. Gen. Laws ch. 214; N.Y. Civil Rights Law §§50-51; R.I. Gen. Law §9-1-28; Utah Code Ann. §45-3-3; Wis. Stat. §995.50(2)(b). In contrast, intellectual property rights are descendible. See, e.g., 17 U.S.C. § 201(d)(1) ("The ownership of copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").
  - Does it make a difference whether the plaintiff is a celebrity?
  - Caselaw
    - *Aroa Marketing, Inc. v. Hartford Ins. Co. of the Midwest*, 198 Cal. App. 4th 781 (2011) (IP exclusion barred coverage for misappropriation of likeness claim)
    - *Alterra Excess & Surplus Ins. Co. v. Snyder*, 234 Cal.App.4th 1390 (2015)

Risk Scenario Examples

- An insured's Google ad shows up alongside an offensive YouTube video
- An insured's website or Facebook page which allows public comments
  - The insured may or may not respond to or timely remove inappropriate content
- Social media influencers
  - Influencer is paid by the insured to post positively about its products
  - Insured has little to no control over the content of the post
- Third parties post infringing content on hosted website or page

Claims of Unfair Competition - The Canadian Experience

2020 Annual Meeting

Historical Roots: Tort of "Passing Off"

- As in some US jurisdictions, Canadian common law claims involving unfair business practices were initially limited to tort of "passing off"
- Supreme Court of Canada discusses history of the tort in *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65:

> This tort has a long history. At a very early point in its development, the common law became concerned with the honesty and fairness of competition. For that reason, it sought to ensure that buyers knew what they were purchasing and from whom. It also sought to protect the interest of traders in their names and reputation. As far back as the 17th century, the courts started to intervene. Actions based at first on some form of deceit were allowed. The modern doctrine of passing off was built on these foundations and became a part of Canadian law. Its principles now inform both statute law and common law (para 63).

- Common law tort of "passing off" remains distinct from statutory remedy

Expansion of tort: protecting the community from unfair competition

- Tort of "passing off" has expanded "to take into account the changing commercial realities in the present day community": *Atkinson & Yates Boatbuilders Ltd. v. Hanlon*, 2003 NLSCTD 113 (CanLII) at paras 75-76
- No longer addresses solely one trader deceitfully selling goods of another. Now encompasses protecting community from consequential damages of unfair competition and trading: S*harp Electronics of Canada Ltd. v. Continental Electronic Info. Inc*., 1988 CanLII 3340 (BC SC) at para 9
- Sphere of business torts in Canada has grown over time, increasing the number of practices which may constitute "unfair competition"

Statutory claims for Unfair Competition: An Overview

- While “passing off” remains a stand-alone tort at common law, statutory claims for unfair competition can be brought under the federally enacted *Competition Act*, R.S.C., 1985, c. C-34 (as amended)
- Purpose is codified in section 1.1, mirroring rationale for expanding common law tort of “passing off”.

Parliamentary intent focuses on ensuring:

- businesses have an “equitable opportunity” to participate and
- consumers are protected from anti-competitive practices

Statutory claims for Unfair Competition: Offenses and Standing

- Part VI of the *Act* lists and prohibits certain anti-competitive conduct
- harming competitors and/or
- consumers including misleading advertising (s. 52)

The *Act* provides a statutory cause of action (s. 36) allowing

- "any person" suffering loss or damage
- "as a result of" conduct contrary to Part VI
- to sue for damages

Statutory Cause of Action: Further expansion due to class proceedings?

- "Any person" wording in s. 36 has yet to be restricted to competitors
- Section 36 permits damages to be calculated on an aggregated rather than individualized basis… contemplating a consumer class?

Two Canadian decisions have concluded consumer class actions

- involving misleading advertising (s. 52) and seeking damages under the *Act* (s. 36) disclosed a viable cause of action
- See: *Evans v. General Motors of Canada Co.*, 2019 SKQB 98 at paras 41-43 and *Rebuck v. Ford Motor Company*, 2018 ONSC 7405 at para 32-36, 51, 53, 71-72
- Question remains: will s. 36 claims by certified consumer classes further expand scope of unfair competition in Canada?

Broad Interpretation of PAI Coverage Grant Terms

- Recent duty to defend decision supports broad scope of unfair competition: *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters*, 2019 BCCA 240
- Underlying US action for misappropriation of trade secrets breaching Washington *Uniform Trade Secrets Act.* Court asked to determine whether allegations fell within PAI coverage grant
- CGL "advertising liability" definition included "Piracy or unfair competition or idea misappropriation under an implied contract"
- Was duty to defend engaged by alleged misappropriation of trade secrets in breach of the *UTSA* – was this a species of unfair competition falling within the PAI coverage grant?

Broad Interpretation of PAI Coverage Grant Terms (Cont'd)

- Yes. BC Court of Appeal affirmed trial level decision, concluding suit for misappropriation of trade secrets was species of "unfair competition" triggering PAI coverage
- Panel noted CGL definitions of "advertising liability" and "advertising injury" were broad and referred to forms of conduct rather than "technical elements or legal labels" (para 57)
- For duty to defend purposes, unfair competition was "an aspect of the true nature and substance of the statutory claim", engaging the insurer's duty to defend (paras 59, 65)

Implications for Coverage?

- Gradual expansion of unfair competition claims in realm of both tort and statute under Canadian law
- Broad interpretation of undefined term “unfair competition” in PAI coverage grant (referring to forms of conduct rather than technical elements or legal labels)
- A Canadian court could conclude a class proceeding under s. 36 of the *Competition Act* falls within the PAI coverage grant given the undefined term “unfair competition” – which is likely construed more narrowly in US

Covered Damages?

- GL policies cover amounts the insured becomes legally obligated to pay as "damages"
- Does the plaintiff seek damages?
  - Is there a monetary demand or only a demand for injunctive relief?
    - *Feed Store v. Reliance Ins. Co.*, 774 S.W.2d 73 (Tex. App. 1989) (carrier had no duty to defend underlying service mark infringement action because complaint sought only injunctive relief, not damages).
    - *Certain Underwriters at Lloyd's London, Subscribing to Certificate No. LPK 0848 v. 2-Up, Inc.*, 2000 WL 245862 (E.D. La. Mar. 3, 2000) (policyholder could not recover for expenses incurred to comply with injunction in underlying action alleging, in part, violations of the Lanham Act because such costs were not damages the policyholder was obligated to pay).

Covered Damages? (cont.)

- Are amounts sought restitution/disgorgement?
  - Claims under state unfair trade practices acts brought by an attorney general typically do not request damages

    - *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992) ("It is well established that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired. Such orders do not award 'damages' as that term is used in insurance policies.").

Covered Damages? (cont.)

- Are statutory damage awards covered?
  - *Limelight Productions, Inc. v. Limelite Studios, Inc.,* 60 F.3d 767 (11th Cir. 1995) (ill-gotten profits recovered under the Lanham Act in underlying trademark infringement action qualified as "damages" covered by policies).
  - *Am. Emps.' Ins. Co. v. DeLorme Pub. Co., Inc.*, 39 F. Supp. 2d 64 (D. Maine 1999) (underlying claim seeking an equitable accounting of lost profits, as permitted by the Lanham Act, sought "damages" under policies).

Insureds in Media/Internet Type Businesses

Standard Wording

Insureds In Media and Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web-sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **21. a., b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

Insureds in Media/Internet Type Businesses

- Limited judicial consideration of this exclusion in Canada
- Concern over scope of "insured whose business is…" wording

The exclusion applies to insureds whose business is advertising

- Q: Is a company like Facebook which generates revenue predominantly through advertising still a social media company or is its business advertising?

Some U.S. jurisprudence seems to ask whether insured's business is primarily focused on any of the enumerated activities such as advertising

See: *Ace Am. Ins. Co. v. Dish Network, LLC*, 173 F. Supp. 3d 1128, 1130 (D. Colo. 2016); *State Auto Property and Casualty Insurance Co. v. Travelers Indemnity Company of America*, 2016 WL 4487998 (6th Cir., 2016)

Infringement of copyright, patent, trademark or trade secret

Source material with minor updates from “Coverage B in Canada” (2014) by ACCC Fellow Heather A. Sanderson,

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Standard Wording

i. Infringement Of Copyright, Patent, Trademark or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

Potential Coverage Issues

- Exclusion is plainly worded, save for technical legal words to describe coverage: “infringement”, “copyright”, “patent” and “trademark”
- In Canada, wording is interpreted using its usual, everyday meaning and not in technical, legal sense: *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., [1980] 1 S.C.R. 888
- But Canadian courts are likely to apply the technical legal meaning because these ARE technical, legal words: “infringement”, “copyright”, “patent” and “trademark”
- – so what do these mean in Canada?

What is Copyright?

- Copyright means the sole right to produce or reproduce all or a substantial part of a protected work and
- allows reproduction only by the owner (usually the author or creator) of dramatic, musical, artistic and literary works (including computer programs), performances, communication signals and sound recordings
- This right exists for the lifetime of the author + 50 years

What is a Patent?

- A patent is a right that can be sold or licensed, granted by the Canadian government
- to prevent others from making, using or selling an invention
- Must be new and inventive in order to be granted

Trademarks

- A TM is a “Badge of Origin”. Can be words/designs or non-traditional marks (colours/sounds) and can be registered or unregistered
- Common-law (unregistered) trademarks are protected by the common law tort of “passing off” and by s.7(b) of the federal *Trademarks Act,* R.S.C., 1985, c. T-13 (as amended)
- Trade-marks registered with the Canadian Intellectual Property Office (CIPO) or proposed for registration are protected by ss. 19-22 of the *Trademarks Act*

What is a Trademark in Canada?

The *Trademarks Act* defines different categories of trademarks including:

- "Ordinary" Marks (e.g. logos);
- Certification Marks (e.g. certifying wares/services have met a prescribed standard re safety or production)
- Distinguishing Guise (shape of wares or containers or the mode of wrapping of packing, e.g. corporate colours)

<u>But NOT</u> trade/corporate names

“Trade Dress” as a “distinguishing guise”

- Canadian Courts deciding whether IP rights have been infringed regularly use the term “trade dress” even though it is not statutorily defined in the *Trademarks Act*
- Canadian Courts have no difficulty concluding that “trade dress” is “distinguishing guise” as one of the types of trade-mark recognized under the *Trademarks Act* see: *Crocs Canada Inc. v. Holey Soles Holdings L*td., 2008 FC 188

Application to Coverage Law

Trademark violations in advertising are excluded BUT:

- I/A wording usually *covers* “trade dress” infringement in advertising
- “Trade dress” in Canada could mean the appearance or “get up” of product packaging, or a trade-mark that is a “distinguishing guise”

Trademark violations in advertising are excluded BUT:

- I/A wording usually *covers* infringement of “slogan” in advertising
- Canadian law treats a “slogan” as a “trade-mark” or “trade-mark expression” see: *1429539 Ontario Ltd. v. Café Mirage Inc.*, 2011 FC 1290

Application to Coverage Law (Cont'd)

- The use of US terms in the Canadian industry advisory or standard form of exclusionary wording means
- although allegations of trademark infringement in advertising are generally excluded in Canada,
- "trade dress" and "slogans" are two forms of trademarks under Canadian law which are likely to be construed as *covered*

Thus Canadian wording imports more

- Canadian advisory exclusion applies to “personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights
- The usual exception for copyright, trade dress or slogan infringement in the Named Insured’s advertisement
- Is required, as “personal and advertising injury” is specifically defined to include copyright, trade dress and slogan infringement in the Named Insured’s advertisement – coverage would otherwise be illusory…

Additional CGL Exclusions

- "'Personal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"
- "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the insured's] advertisement"
  - Total Call Int'l, Inc.v. Peerless Ins. Co., 181 Cal. App. 4th 161 (2010) (holding exclusion unambiguous)

Media Liability Insurance

- The proportion of advertising dollars spent on online advertising versus traditional forms of advertising is increasing exponentially
- Policyholders are seeking coverage for online risks
- The standard CGL PAI coverage is usually inadequate to address the risks of present-day online advertising
- The types of risks are continuously evolving with the increasing popularity of new apps and other online platforms
  - Existing policy terms quickly become outdated (i.e. bulletin boards, chatrooms)
- Can be purchased in a standalone policy, or as part of a Cyber or Tech E&O Policy
- Canadian insurers are responding by modifying the standard CGL PAI coverage and by issuing new products

IP Coverage in Media Liability Policies

Covers some or all of the following acts arising out of the Insured's Media Activities or use of Media Material:

- disparagement or harm to the reputation or character of any natural person or entity, defamation, libel, slander, product disparagement, trade libel, negligent infliction of emotional distress, outrage or outrageous conduct;
- invasion of or interference with the right of privacy or publicity, including eavesdropping, intrusion upon seclusion, false light, invasion of privacy, public disclosure of private facts, and misappropriation of name or likeness;
- false arrest, detention or imprisonment or malicious prosecution;
- infringement of any right to private occupancy, including trespass, wrongful entry, or eviction;
- plagiarism, piracy or misappropriation of ideas;
- infringement of copyright, or the dilution or infringement of trademark, trade dress, service mark, service name, trade name, title or slogan;
- negligence regarding the content of any Media Communication, including harm directly resulting from reliance or failure to rely upon such content;
- software copyright infringement, cyber-squatting violations, moral rights violations, any act of passing off or any misappropriation of formats, characters, trade names, character names, titles, plots, musical compositions, voices, slogans, graphic material or artwork; or
- unfair competition in connection with some of the above.

Some Key Exclusions . . .

- Inaccurate, incomplete or inadequate description of goods, products or services;
- Cost guarantees or representations;
- Failure to conform with any represented performance or quality standards;
- Failure to remove publications after a complaint or notice within a reasonable period;
- Prior knowledge and claim exclusions.

Risk Scenario Examples

- An insured's Google ad shows up alongside an offensive YouTube video
- An insured's website or Facebook page which allows public comments
  - The insured may or may not respond to or timely remove inappropriate content
- Social media influencers
  - Influencer is paid by the insured to post positively about its products
  - Insured has little to no control over the content of the post
- Third parties post infringing content on hosted website or page

Infringement Liability Policies

- Cover third-party patent, trademark, copyright, or other infringement claims against the insured
- May cover claims against licensees, customers or others with whom the insured has contractual IP indemnities
- Coverages vary widely - some limit coverage to certain scheduled products
- May provide for more modest defense protection
- High SIRs

Infringement Abatement Policies

- Small businesses, or those whose assets consist primarily of intellectual property, may not have the funds to sue infringers
- Left with few options:
  - Allow infringement
  - Negotiate a license
  - Settle at a low value
- Insurance can enhance bargaining power

Infringement Abatement Policies (cont.)

- Claims-made coverage
- All covered intellectual property must be scheduled
- Premiums are based on each patent
- Provides coverage to:
  - Enforce patents, trademarks and copyright
    - Covers defense costs for counterclaims challenging validity
    - May cover costs to reexamine patent in Patent Office

Infringement Abatement Policies (cont.)

- Coverage Conditions
  - Opinion by independent outside counsel that court is likely to find:
    - Intellectual property is being infringed upon
    - Patent is valid
    - Policy may require insured to use panel counsel for opinion
  - Insurer may be entitled to share in award of attorney's fees and costs, plus damage awards and settlements
- Exclusions include:
  - Amounts awarded against insured
  - Pre-litigation expenses
  - Anti-competitive claims

Looking for IP Coverage: What's In or Out for CGL, Excess & Specialty Policies?

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