



Primer: Insurance law for every plaintiff's attorney



Don't be the bull in a china shop, litigating PI cases aggressively with no regard for the impact of insurance issues on your case

BY EDWARD SUSOLIK

Knowledge of insurance law is critical to successful personal-injury litigation. All personal-injury lawyers should acquire a baseline understanding of insurance principles. You do not want to be the bull in a china shop, litigating personal-injury cases aggressively with no regard for the impact of insurance issues on your case.

By way of example, virtually every settlement of personal-injury litigation involves insurance and insurance issues. In fact, of the hundreds of personal-injury matters which this author has litigated, virtually every case has either settled using insurance money or the judgment after trial was paid by insurance proceeds. An expertise in insurance coverage has helped maximize the ultimate recoveries in these cases.

In the big picture, insurance coverage, bad faith, duty to defend, and other insurance coverage issues are frequently integral to personal-injury litigation and function as the catalysts for settlement. Insurance controls settlement dynamics of personal-injury litigation, and the ultimate decisions regarding the timing and amount of settlements are virtually always made by insurance companies.

This article surveys and summarizes the fundamental insurance issues that affect personal-injury litigation, and provides specific advice and strategies for dealing with such insurance issues. My goal is that this article will provide a roadmap for plaintiff's lawyers to settle more cases and achieve greater recoveries for their clients.

The complaint and insurance issues: pleading into coverage

The first step in any litigation is the filing of the complaint. To trigger insurance coverage, a plaintiff must plead facts and assert claims that are at least potentially covered by insurance under defendant's liability policies. Generally, the claim would be for negligence proximately causing plaintiff's injuries. But this covered claim could also be for negligent maintenance, hiring and training, entrustment of a vehicle or other dangerous objects, or any other act or omission that arguably constitute a breach of duty to act reasonably and refrain from injuring others.

Given the egregiousness of certain conduct, plaintiff's attorneys will often plead a claim for intentional torts with the strongest possible and inflammatory



language. But intentional torts (i.e., “willful” acts) are generally excluded under liability policies, and in fact, Insurance Code section 533 prohibits indemnification for intentional tortious acts. Section 533 says, “An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.” Hence, in the context of obtaining insurance proceeds from a carrier, adding inflammatory allegations of intentional wrongdoing is a hindrance, not a help.

There is, however, often a good-faith basis to plead negligence as an alternative cause of action even for acts that appear to be intentional torts – thereby triggering access to insurance money. In recent years, I have handled numerous cases where the wrongful act causing injury or death would seem to have been caused by intentional acts. Those include a notorious shooting at an Orange County hair salon that killed eight people, where the defendant has since pled guilty to murder and potentially faces the death penalty. I represented several families of the victims slain in that incident. In that case, the good-faith basis for asserting a cause of action for negligence was defendant’s possible state of mind at the time of the shooting.

Mental illness, impairment, or incapacity may serve to vitiate intent, thereby turning a seemingly uncovered “willful” act into a non-intentional “occurrence” that is covered. (*Jacobs v. Fire Ins. Exch.* (1995) 36 Cal.App.4th 1258, 1269 [if insured was legally insane, actions cannot be deemed “willful”]; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) [evidence that insured lacked sufficient mental capacity to control his own conduct is admissible to show that there could be no “voluntary act” of any kind].) As a result, the clients’ claim for negligence successfully triggered insurance coverage and ultimately, resolution of the case.

Obtaining a defendant’s insurance information pre-discovery

After the complaint has been filed, the first step in addressing insurance issues is

to learn what coverage the defendant may or may not have, including the policy limits. In instances where the defendant promptly tendered the claim to its carrier, often the first response received by a plaintiff’s lawyer to the demand letter or the filing of suit will be made by defense counsel appointed by the carrier. In those cases, appointed defense attorneys may be cooperative in sharing information concerning insurance policy, since they themselves know that the handling and ultimate outcome of the litigation will depend greatly on the availability of insurance.

In fact, an insurer faces significant risk if it does not seek authority from its insured to disclose to a claimant the limits of a policy. In *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, the plaintiff’s attorney asked the insurer to disclose the policy limits applicable to a car accident where his client was seriously injured. The insurer responded that it had a policy of declining to disclose policy limits, as a result of which plaintiff did not make a settlement demand before or after filing suit. Five months after the litigation commenced, the insurer offered to pay the policy limit of \$100,000, which plaintiff rejected. The case went to trial and plaintiff obtained a judgment for almost \$3 million. The insured assigned to plaintiff his claim for bad faith against the carrier in exchange for a contract not to execute on the judgment.

The claimant sued the carrier for bad faith, based on, among other things, the allegation that plaintiff would have demanded and taken the policy limit of \$100,000 had it been disclosed before the filing of suit. The carrier moved for summary judgment on the ground that the insurer had not favored its own interests over the interests of its policyholder (the premise of a bad-faith claim) because plaintiff had not made a settlement demand.

The Court of Appeal reversed. It held that the insurer’s blanket policy not to seek authorization from its insured to disclose the limits raised material issues of fact about whether the insurer did act

in its own interests at the expense of the policyholder’s; i.e., engaged in bad faith. The court reasoned that, among other things, failure to disclose limits gives the carrier an advantage over plaintiff’s attorneys but disadvantages the policyholder because it prevents or discourages settlement demands, thereby increasing the risk that the insured would be hit with judgment in an amount much greater than the policy limit. Accordingly, when faced with an adjuster or defense counsel who resists disclosing the policy limits, remind them of the *Boicourt* decision and specifically inform them that continued refusal to disclose such limits shall be among the grounds for a bad faith claim against the insurer.

Discovery of defendant’s coverage

Formal discovery is a powerful weapon for obtaining full and complete disclosure of insurance information. For example, in many cases, the defendant has not tendered the claim for whatever reason, or its insurer has failed to respond to a tender. In those instances, it is the responsibility of the plaintiff’s lawyer to ascertain any and all insurance policies and coverage that defendant may have. Aside from the fact that an insurance policy will ultimately provide a source of recovery, insurance information is important because it may affect the strategies of plaintiff’s attorneys. For instance, if the policy has burning limits (i.e., defense fees and costs are deducted from the policy limit), a plaintiff’s strategy that minimizes defense fees and costs would ultimately benefit the client plaintiff, while also being more efficient for plaintiff’s lawyers.

As a result, it is critical to obtain all insurance information from a defendant in formal discovery. Included among the first set of document requests served on defendant should be requests that call for the production of any and all policies that may cover plaintiff’s claims. Since defendant and its attorneys may not know what policies maintained that may cover plaintiff’s claims, such requests should



enumerate the different insurance policies potentially available and applicable to plaintiff's claims, such as homeowners, errors and omissions, commercial general liability, professional liability, primary, and excess. Plaintiff should also make a catch-all request for any and all policies, as it is better to be overinclusive than underinclusive.

As part of the First Set of Form Interrogatories, plaintiff's attorneys should check the boxes for Form Interrogatories 4.1 and 4.2, which ask for information concerning any policies that cover or may cover plaintiff's claims, as well as any self-insurance.

If it appears necessary to inquire further on defendant's insurance coverage (for instance, if the above requests for production and Form Interrogatories yield unsatisfactory or unclear information), a plaintiff's lawyer should also ask about insurance coverage through special interrogatories, as well as in the depositions of defendant and its principals.

If attempts to obtain discovery on defendant's insurance coverage are resisted, a plaintiff would have strong grounds to make a motion to compel and for an award of sanctions. California statute expressly provides that insurance information is discoverable. (See Code Civ. Proc., § 2017.210 ["A party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. This discovery may include the identity of the carrier and the nature and limits of the coverage. A party may also obtain discovery as to whether that insurance carrier is disputing the agreement's coverage of the claim involved in the action, but not as to the nature and substance of that dispute..."])

Case law also supports discovery of defendant's insurance information, on the ground that insurance policies are directly relevant because they may assist in resolution of the case. (See *Laddon v. Superior*

Cl. (1959) 167 Cal.App.2d 391, 395-396 ["plaintiff's 'discoverable interest' in defendant's liability insurance arises with the 'very pendency' of the action against the assured. The conclusion is inescapable that ... the insurance policy is relevant to the subject-matter..."]; accord *Irvington-Moore, Inc. v. Superior Ct.* (1993) 14 Cal.App.4th 733, 739-40; *Pettie v. Superior Ct.* (1960) 178 Cal.App.2d 680, 688-689.) Therefore, it would be an unusual circumstance in which a defendant could properly refuse to disclose its insurance information in response to proper discovery requests served by plaintiff.

The timing of insurance issues in litigation: Settlement and Mediation

In most personal-injury cases, the first time that insurance issues come to the surface is during the settlement process, especially if a formal mediation is conducted. Settlements can be attempted and reached at any time, including before filing suit or very shortly after the filing of a complaint. However, in cases that involve substantial sums and/or complex issues of fact and law, it is unlikely that a carrier would agree to a favorable settlement so early or easily. It is uncommon for an insurance company to pay top money for settlement without going through the litigation process. In light of this reality, in order to have a meaningful mediation yielding maximum value, the mediation should, in almost all cases, be held in the later stages of litigation. Insurance adjusters deal with facts, not just allegations. Most carriers will not provide a true bottom line until they have completed all or most of discovery and have conducted an analysis of plaintiff's experts.

Fundamental issues encountered in mediation

There are many critical insurance issues that a plaintiff's attorney may face at mediation, especially in high-value cases where there are multiple defendants and multiple policies. While it is difficult to

address all such possibilities, the following are some of the key issues that should be considered and understood by plaintiff's lawyers.

In cases involving a continuous loss that has occurred over a number of years, it is important to make sure that all insurers that insured the defendant from the time the loss began be given notice of the claim. California applies the "continuous injury" trigger of coverage in the context of a third-party liability policy; thus, "bodily injury" or "property damage" that is continuous or progressively deteriorating is potentially covered by all policies in effect during the period when the injury or damage occurred. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 685-689.) Under the "all sums" rule adopted in *Aerjet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55-57, an insurer on the risk when continuous or progressively deteriorating property damage or bodily injury first manifests itself is required to indemnify the insured for the whole of the ensuing damage or injury.

The prospect of "continuous injury" highlights the importance of obtaining all defendant's potentially applicable policies for all potentially applicable policy years, and not just the most recent policy, because there may have been significant changes that have been made in coverage, even if the policies have been issued by the same insurer.

In cases involving intentional acts by an insured which would not be covered because of an intentional acts exclusion or Insurance Code section 533, it is important to emphasize the separate liability of innocent co-insureds. *Minkler v. Safeco Insurance Co. of America* (2010) 49 Cal.4th 315, 319 held that under a policy containing a "separate insurance" clause, each insured's coverage should be analyzed separately. (See also discussion in Section 2 *supra* regarding coverage for seemingly willful acts.)

If there are excess and/or umbrella policies involved, it is important to determine what underlying policies need to



be exhausted in order for each excess/ umbrella policy to come into play. The “horizontal exhaustion” rule requires all primary insurance to be exhausted before an excess insurer must drop down to defend an insured, including in cases of continuing loss. The “vertical exhaustion” rule allows an insured to seek coverage from an excess insurer as long as the specific underlying insurance policy or policies identified in the excess have been exhausted. Under California law, unless the excess insurance company has agreed to cover a claim when only one, specific underlying insurance policy is exhausted, the horizontal exhaustion rule applies and all primary insurance must be exhausted before an excess insurer must defend and/or indemnify, especially in cases of continuing loss. (*Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 986-987.)

If one or more of the defendants is an additional insured on another defendant’s policy, there may be issues arising out of attempting to settle out only the named insured or only the additional insured. An insurance company cannot settle out one insured without obtaining a release of the other insured, without the other insured’s consent. (*American Med. Int’l, Inc. v. National Union Fire Ins. Co.* (9th Cir. 2001) 244 F.3d 715, 720-721.)

One way to settle out only the named insured or only the additional insured is to try to attempt to persuade the insurance company, with the consent of both the named insured and the additional insured, to offer a portion of the policy limits to settle out the named insured or additional insured.

In cases with “burning limits,” i.e., limits that are eroded by defense fees and costs, by the time of mediation, the remaining limits of the policy will be less than stated policy limits, and a policy-limits demand would have to be less than the stated policy limits. One way to make a policy limits demand on a “burning limits” policy is to demand the remaining limits of the policy, as long as the amount

of the remaining limits is over a specified amount (i.e., “we demand the remaining policy limits, in an amount not less than \$1 million”).

Insurance bad-faith principles and settlement of personal-injury cases

Often, the lever that provides the best chance for settlement of cases that involve an insurance company is the threat of extra-contractual liability, or bad faith. This possibility arises when, among other things, the insurer has refused to offer the policy limit, and the case proceeds to trial with the insured being assessed a judgment vastly greater than the policy limit. Being able to open the policy limits significantly increases plaintiff’s potential recovery and is the occurrence most feared by every insurance company. The following are some of the critical principles that govern bad faith in the context of settlement discussions.

Under California insurance law, an insurer owes a good faith duty to settle claims made against their insureds, within the policy limits. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 40 [insurer has an implied duty to accept reasonable settlement demands on covered claims within policy limits]; *accord Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d 843, 848; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689; *Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 906.) In addition to case law providing for such duty, California Insurance Code section 790(h)(5) requires insurers to attempt “in good faith to effectuate . . . settlements of claims in which liability has become reasonably clear.”

In deciding whether or not to settle a claim, the insurer must take into account the interests of the insured. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658-661.) An insurer that breaches its duty of reasonable settlement is liable for all of the insured’s damages

proximately caused by the breach, regardless of policy limits. (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725.)

The only thing an insurer can consider in determining the reasonableness of a settlement demand is “whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the settlement offer.” (*Johansen v. California State Auto. Assoc. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16.) An insurer’s good faith but incorrect belief there is no coverage is not a defense to liability for its refusal to accept a reasonable settlement demand. (*Id.* at 15-16.)

Given those principles, the most powerful strategy that a plaintiff can follow at mediation is to make a policy-limits settlement demand. In fact, at best the law is uncertain on whether an insurance carrier has an affirmative duty to initiate settlement discussions in the absence of a settlement demand by plaintiff or plaintiff’s initiation of settlement discussions.

In *Yan Fang Du v. Allstate Insurance Co.* (9th Cir. 2012) 681 F.3d 1118 (“*Du I*”), the Ninth Circuit held that under California law, an insurer has the duty to initiate settlement discussions, failure to which may constitute bad faith. In a subsequent rehearing of the matter, the court withdrew (but did not vacate) the foregoing conclusion on the ground that it was unnecessary. *Yan Fang Du v. Allstate Ins. Co.* (2012) 697 F.3d 753, 758-59. A federal district court has nevertheless cited *Du I* as persuasive to find such duty. *Travelers Indem. of Conn. v. Arch Specialty Ins. Co.*, 2013 U.S. Dist. LEXIS 169453 (E.D. Cal. Nov. 26, 2013). In contrast, a California Court of Appeal has held that the insurer’s duty to settle did not include initiating settlement efforts. (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 277-78.) In any case, a plaintiff’s attorney can avoid the matter by initiating settlement discussions and making a settlement demand supported by adequate law and facts establishing liability and damages.



A plaintiff must make sure that the carrier has all the facts and information to reasonably consider such a policy limits demand, and the demand must be kept open a reasonable time. But if the carrier fails to reasonably settle a case within policy limit under those circumstances, it may be exposed to bad-faith liability.

Finally, the mediation privilege is broad, in that communications made in mediation are considered confidential and inadmissible. Accordingly, to guarantee that policy limits settlement demands are admissible in a later bad-faith trial, they should be formally made (in writing) outside of the mediation context as well, even if they are substantively identical to what was discussed during mediation.

Strategies for dealing with denial of coverage

In many cases where defendants have insurance policies, their carriers have denied coverage, including refusing to defend. Under those circumstances, a plaintiff's attorney can take aggressive steps in obtaining a default judgment or assignment of the insured's bad-faith rights. That would give plaintiff significant leverage against the carrier in mediation and other attempted settlement of the bad-faith case, assuming the underlying personal-injury case is significant, and the case for coverage is strong. The following are some of the principles

involved when the carrier denies coverage to defendant.

If defendant's insurer has denied coverage, it may be worthwhile to either settle with defendant by agreeing to a stipulated judgment, with a covenant not to execute and an assignment of the insured's claims against the insurer, or obtain a default judgment against the defendant and then attempt to get an assignment. (*Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 833 [insurer is liable for full amount of default judgment as damages caused by insurer's bad-faith denial of coverage, regardless of whether there is coverage for judgment].) A possible complication that could arise in the case of a default judgment is that the insurer could seek to set aside the default and default judgment and move to intervene.

After obtaining the stipulated judgment or default judgment (assuming the policy in question is one (that) is subject to the judgment creditor statute, which all policies covering bodily injury and property damage are), plaintiff can bring an action against the insurer as a judgment creditor under California Insurance Code section 11580, subdivision (b)(2), and as an assignee of any claims assigned by the insured.

In obtaining an assignment of rights from the insured, the plaintiff should consider the fact that the right to attorney's fees and costs incurred in obtaining

coverage is assignable, but claims for punitive damages and emotional distress damages are not. A partial assignment of the insured's assignable rights would allow the insured to keep the claims for punitive damages and emotional distress damages. Plaintiff's counsel could then seek a conflict waiver and represent both the insured and the plaintiff in one suit against the insured.

Conclusion

Virtually all personal-injury litigation involves insurance and insurance issues, especially during the mediation and settlement phases of the case. For a plaintiff's lawyer, an extensive understanding of insurance law and insurance principles is an extremely powerful weapon.



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