



Remember the Insurance!

by

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Rule #1: When you Confront any Unexpected Liability or Loss, Consider Possible Application of Insurance

- Two Basic Types
 - First party—property losses
 - Third party—liability coverage protection against claims by others
 - ❖ “Others” can include government

Coverage Law is a Matter of State Common Law, Judge-Made Law

- Indiana has a Very Policyholder-Friendly Law
 - We are the best state in the country for something besides basketball!
 - Example: Coverage for environmental liabilities
 - ❖ Our firm recovered over \$500 million in such liability costs



Indiana Has Great Rules of Insurance Policy Construction

- “An insurance policy should be so construed to effectuate indemnity...rather than defeat it”
 - *Masonic* (1929)
- Purpose of insurance is indemnification
 - *Lilly* (1985)
- Exclusions subject to close scrutiny
 - *Kiger* (1996)
- Policy term is ambiguous if has more than one reasonable interpretation
 - *Lilly*



- If ambiguous, construed in favor of coverage
 - *Kiger*
- Policyholder need not prove its construction is only possible, or “best” construction, only that it is reasonable
 - *Liggett*
- Reasonable expectation of coverage must be honored
 - *Lilly*
- Not unfair—insurers draft the forms, can make as clear as need be
 - Have antitrust exemption to do so

Typical Liability Insurance Policies

- Two promises—to defend, and to indemnify
 - “[Insurer] shall pay all sums for which the policyholder shall become obligated to pay as damages. [Insurer] shall have the right and duty to defend any suit seeking such damages.”
- Different coverage parts of a policy may apply
 - Part A - Property and bodily injury
 - Part B - “Personal injury” (not same as bodily injury)
 - ❖ Specific “offenses”
 - Part C - Medical treatment



- Different kinds of policies may apply
 - CGL primary
 - Umbrella and excess
 - Malpractice
 - D&O
 - E&O
 - Employment practices
 - Specialty policies
- On first party side, too
 - Property damage extras (such as business interruption)
 - Fidelity

Example of How This Can Work—Pollution Coverage

- Series of cases provides multiple ways such losses or liabilities are covered
 - Pollution exclusions ruled ambiguous and unenforceable
 - ❖ *Kiger* (1996) to *Flexdar* (2012)
 - Administrative actions are “suits” insurers must defend
 - ❖ *Dana, Summit*
 - Covered “damages” include costs of government-ordered cleanups
 - ❖ *Dana, Summit*



- Duty to defend broader than duty to indemnify, and applies even if evidence possible exclusions apply
 - *Seymour*
- Other exclusions do not apply
 - Owned property—*Dana II*
- Coverage for such liabilities under other coverage
 - Coverage B — “personal injury”
 - ❖ “Wrongful entry” or “invasion of the right of private occupancy”
 - ❖ *Summit* (1999) to *FLM* (2013)
- All policies which are “triggered” may be applied (depending upon language)
 - *Dana II*
- A claim is not barred as a “known loss” just because a claim has been made prior to purchase of the insurance
 - *Thomson* (2014)
 - ❖ Where liability reasonably denied, no “known loss”
- Result: nearly all pollution liability claims covered

How Does This Apply to You (Other Than if You Have Pollution Claim)?

- Same principles apply to your claims too
- In Indiana would be foolish not to look closely at any loss or liability for insurance

How to do This?

- Find your policy
- **Rule #2—never, ever throw away an insurance policy!**
 - Insurers do not keep them
- Look at your actual policy (not just at a declarations page)
- Look at all your policies
 - Umbrella can cover what primary does not
 - All years as well as all types
 - ❖ Different policy periods may apply
- Do not accept your broker's analysis of coverage
 - Conflict of interest
 - ❖ Monetary
 - ❖ By industry empathy

- Do not accept the common excuses
 - Insurer will raise our rates
 - Insurers will cancel my policy
 - Should not make claim as it won't exceed my deductible
- Consult an experienced, expert coverage attorney
 - Hope it is us, but someone!
 - A very focused, fluid area of the law
 - ❖ Not governed by “general law” around US
 - Does not have to cost a lot
 - ❖ We offer choices



What Types of Claims Do You Face That Might Be Covered? Many May be Familiar, Some Perhaps Not

- Malpractice
- Injury to patient/abuse or misconduct
 - Conduct or reporting
- Injury to others by patient
- Commitment issues
- Employment issues
 - Hiring, firing, discrimination
 - ADA compliance
- Privacy violation—HIPPA
- Auto use
- Premises liability

- Medicaid audits
 - Billing errors
- Private audits
- FCA claims
- Provides examples of issues
 - Lack of property damage
 - Lack of an occurrence
 - Intentional conduct exclusion
 - Fraud exclusion
 - Penalties
 - Defense
 - ❖ Some policies may be good for defense but not for liability
 - ❖ If just one part of claim is covered, must defend entire case

- As an example, consider FCA claim for inadvertent overcharges
 - CGL?
 - EPL?
 - D&O?
 - ❖ Claim?
 - Likely yes
 - ❖ Arising from “wrongful act?”
 - Usually broad definition
 - ❖ Resulted in a “loss?”
 - Generally okay here
 - ❖ Exclusions?
 - Professional services?
 - * Typically not

- Fraud, dishonesty?
 - * The principal battleground
 - * Indiana law particularly good here
 - * Exclusion may require a judgment or admission of dishonesty
 - So settlement may be covered
 - Reimburse if case lose?
- Make the claim!
 - Notice limitations are common
 - ❖ Claims made coverage common in D&O, E&O
 - ❖ Notice of “occurrence which may lead to a claim” may be required in order to preserve coverage
- One final point—right to control defense if insurer reserves rights to disclaim coverage
 - ❖ *Armstrong*
 - ❖ *Lake Erie Land*



Consider a Coverage Review Prior To Any Claims

- Can then shop for policies with more limited exclusion (some policies may exclude FCA claims expressly)
- Do not just take what renews last year or what non-specialized broker recommends
- **Rule # 3 - Insurance has great potential to help you in any type of loss or liability situation—use it!**



Questions?

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