

How an Insured's Lawyer Looks at Insurance Coverage Issues

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Introduction

- This presentation sets out, in broad terms, how one lawyer reviews and analyzes his clients' insurance coverage issues
- The goal of the presentation is to help clients and others outside the legal industry understand why lawyers do what they do—the method behind what might sometimes appear to be just madness
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First Encounters

- In most instances, the lawyer's first encounter with a client's insurance program is after the loss has occurred or the claim has been made
- No chance to pick the policies in advance—the client has what it has
- The hope is that a coverage issue won't arise, but the assumption is that coverage disputes are common
- Usually, the lawyer approaches the claim as if it will be denied—plan for the worst, hope for the best

The Gathering/Notice Phase

- The first step is usually the Gathering and Notice Phase
- Find all the policies and acquire copies of the declarations and forms ASAP—make sure the forms listed in the declarations match the forms in the policy
- Gather the claim/loss materials from the clients to determine the details and contours of the claim/loss and where coverage is likely to exist
- Make sure notices are sent to all pertinent insurers ASAP

The Gathering/Notice Phase Cont.

- **Key question:** if the client is one company in an intermingled family of companies, do I have the policies for all of the companies and do I understand how those companies relate to each other (this question requires me to know who the named insureds are and the definitions of, e.g., “insured persons”)?
- **Key question:** are there any contractual or similar relationships with any other companies/persons that would lead to coverage under those other companies/persons’ policies (e.g., a contractor might be an additional insured on a subcontractor’s policy)?
- **Key question:** what are the dates of the occurrence or claim and do I have all prior policies that might apply?

The Matching Phase

- The second step is the Matching Phase, where I match the claim/loss with the most likely policy
- **Basic questions:** (1) is it a first party loss (i.e., property owned by my client has been damaged) or third party claim (i.e., some third party has claimed that my client did something that caused damage to the third party) (or both)? (2) are there specialized policies that could apply (e.g., pollution, employment liability, motor carrier, inland marine, millwright or fidelity bond coverages)? (3) Does the entity that suffered the loss/claim have coverage if the policy was written in the name of an affiliated company?

The Matching Phase, Cont.

- Review the deductibles or self-insured retentions and the limits of insurance—and know how the limits are calculated, whether defense costs exhaust the limits, what the impact is of claims against multiple insureds on the same policy, etc.

Key Considerations

- In disputes involving third party liability coverage (i.e., insurance that covers my client when it's sued by someone else, such as a general liability policy), who is at fault is not a question that needs to be answered in my coverage analysis
- Instead, the key question is what the other side (i.e., the “third party”) claims my client did to cause damage – e.g., a homeowner might be claiming that my contractor client negligently installed defective building materials that damaged non-defective parts of the home
- The coverage issue is not whether the homeowner is right about the claim. The coverage issue is this: if it turns out the homeowner is right, would a judgment against my client in favor of the homeowner be covered by the terms of the policy?

Key Considerations, Cont.

- Of course, in disputes involving first party coverage (such as a property insurance policy that covers my client for damage to buildings it owns from storms or fire, or a fidelity bond or employee theft policy that covers my client if an employee steals from it), the focus is different
- In first party cases, I actually need to know how and why the damage/theft occurred to determine whether coverage exists

Key Considerations, Cont.

- Bottom line:
- Third party cases = who is actually at fault or who truly caused the loss is secondary to what the claimant alleges my insured client did wrong
- First party cases = who is actually at fault or who or what truly caused the loss is a primary consideration in the coverage analysis

Basic Coverage Analysis: Step 1

Review the Policy Language

- After I've gathered the facts and policies, the insurance company has been notified, and I've completed the basic initial matching phase, the next step is the coverage analysis
- As a general rule, insurance policies are divided into two main components: 1) the "insuring clause" and its associated provisions, and 2) the exclusions.
- The insuring clause tells my client what kinds of events are covered
- For example, the insuring clause in most third party general liability policies says the policy will cover "loss" that an "insured" is "legally obligated" to pay for damage caused by an "occurrence" in the "coverage territory" within the "policy period."
- In first party property policies, the insuring clause is often summarized by describing these policies as "all risk" policies – without belaboring the details, this essentially means that they cover damage to property the insured owns that happens within the policy period, so long as the damage or the risk causing the damage (e.g., an earthquake) is not excluded

Basic Coverage Analysis: Step 1

Review the Policy Language

- To be covered, my client's claim or loss has to fit each element of the insuring clause of the policy.
- Sometimes, I need more facts from the client to answer whether one of the elements has been met
- Sometimes, I need to do some legal research (which is discussed below)
- But if I can't fit the facts of the claim or loss into the insuring clause, there is no coverage
- On the other hand, if I can fit the facts into the insuring clause, my analysis is not over yet
- Next, I need to review the exclusions in the policy to determine whether or not any of those exclusions will bar the claim or loss, even though the facts would fit into the insuring clause of the policy

Basic Coverage Analysis: Step 1

Review the Policy Language

- Exclusions, in theory, can apply to almost anything.
- There are pollution exclusions, mold exclusions, nuclear exclusions, lead paint exclusions, contractual liability exclusions, work product exclusions, terrorist act exclusions, earthquake exclusions, defective design exclusions, flood exclusions, and on and on
- I have to make sure I review the entire policy very carefully – it's common for exclusions to be included in an addendum or endorsement tacked on to the policy and not in the body of the general policy form
- If the claim or loss falls into an exclusion, then it won't be covered

Basic Coverage Analysis: Step 1

Review the Policy Language

- **Key Consideration:**
- The insured (i.e., my client) has the responsibility to show that its claim or loss fits within the insuring clause of the policy
- However, the insurance company has the responsibility to show that an exclusion applies to bar the claim
- Prior to litigation, this distinction may not play a major role in the analysis – if litigation occurs, it can be a key issue in the case

Basic Coverage Analysis: Step 2

Research Key Authority

- After I finish my review of the insuring clause and the exclusion, I next move to researching key authority
- What do the major insurance treatises say about the kinds of policies I'm reviewing?
- Given what the treatises say, did I miss anything important in my initial review of the policy language?
- Are there additional facts that I need from my client to fill in any gaps in the coverage analysis?

Basic Coverage Analysis: Step 2 Cont.

Research Key Authority

- I also need to know which state's law will apply to any coverage dispute, because different states interpret the same policy language differently.
- If the dispute is filed in a Virginia court, the law of the state where the policy is delivered to the insured will usually apply.
- What have courts in the proper state said about the policy provisions that I have identified as areas of concern?
- What have courts in the proper state said generally about the kinds of policies and fact patterns that my client is facing?
- Did I miss anything important in my review of the policies in Step 1?
- Do any terms have unusual meanings that I didn't catch in my initial review?
- Given what I learned in my review of major insurance treatises, do courts in the applicable state interpret the policies different than courts in other states?

Basic Coverage Analysis: Step 2 Cont.

Research Key Authority

- Complicating Issues:
- Often, the applicable state has no authority on the provision at issue. This requires research regarding how other states have decided the issue.
- If different states have decided the issue differently, further analysis is needed to determine why the differences exist and which state's authority will be more persuasive to the court in which the coverage battle is being fought (e.g., a NC decision could be more persuasive to a VA court than a CA decision).

Basic Coverage Analysis: Step 2 Cont.

Research Key Authority

- More Complicating Issues:
- Also, even though state law applies to the coverage analysis, very often coverage dispute cases are filed in federal court
- Federal courts, when analyzing a coverage issue, are supposed to follow state law as set forth by the highest courts in the state

Basic Coverage Analysis: Step 2 Cont.

Research Key Authority

- More Complicating Issues Cont.:
- But if a state's appellate courts have not decided an issue, a federal court is free to make its own analysis and, in essence, "predict" what the state's appellate courts would decide if presented with the issue
- Thus, there are numerous federal court decisions on coverage issues, many of which will be persuasive or, in the case of a federal appellate court decision, controlling

Basic Coverage Analysis

Rules to Remember

- **Courts > Industry Publications:**
- The most important consideration is what the courts have said about a policy provision, not what the insurance industry thinks about that provision
- Courts often will ignore outside evidence of industry statements about particular policy forms and instead apply their own interpretation to the policy or follow what other courts have said about it

Basic Coverage Analysis

Rules to Remember

- **Duty to Defend vs. Duty to Indemnify:**
- In situations where my client has been sued and is seeking coverage under a third party liability policy, the duty to defend and the duty to indemnify are two separate issues.
- The insurer's duty to defend the client exists if *any* claim made in the suit could result in a judgment that would be indemnified by insurance, even if most of the claims would not be covered
 - The classic example is a case that involves an allegation of negligence and an allegation of intentional acts ... if the verdict/judgment is based on negligence, then the GL insurer would be required to pay it. If the verdict/judgment is based on an intentional act, then the insurer would not be required to pay it.
 - In such a case, the insurer must provide a defense because there is a chance that a judgment would be entered against the client for negligence, which would be covered. If, however, the case only includes an allegation of an intentional act, the GL insurer would not be required to provide a defense, because a judgment entered against the client for an intentional act would not be covered.
- Review the suit carefully to determine every potential kind of claim and recovery that the plaintiff is seeking to determine if the policy would cover any one of them

Basic Coverage Analysis

Rules to Remember

- **Ambiguous Policy Terms:**
- In most states, including Virginia, ambiguous policy terms are supposed to be interpreted in favor of coverage
- A term is ambiguous if it has two different, reasonable meanings
- The ambiguity usually must appear on the face of the policy—in other words, outside evidence of conversations, etc. will very often not be considered in determining whether a term is ambiguous

Basic Coverage Analysis

Rules to Remember

- **The “Allegation” Rule vs. the “Actual Adjudication” Rule:**
- There is a difference in how GL policies treat intentional acts vs. how Directors & Officers policies treat intentional acts
- In a GL policy, if the only allegation in a suit is that the insured acted intentionally (as opposed to negligently) then there is no coverage and, as discussed previously, no requirement to provide a defense
- In a D&O policy, a simple allegation isn’t enough—there is coverage for defense of the suit unless the insured is “actually adjudicated” (sometimes referred to as adjudicated “in fact”) to have acted intentionally
- This critical difference can mean the difference between coverage and no coverage for the client

Strategic Considerations

- I want to know where any coverage lawsuit is most likely to be filed so I can educate myself on that court's views on the issues
- I want to know which coverage issues are clear losers, which are clear winners, and which are somewhere in between
- I want to know whether I have a chance to have a jury decide the case (which usually would only happen if the dispute involved factual issues instead of purely interpretation of policy terms)
- I want to hire the right professionals (e.g., engineers, etc.) early so that I have solid analysis on matters like construction and causation issues
- If there is a denial of coverage, I want it to be clearly communicated in writing by the insurer

How Much Will It Cost?

- Reviewing the facts of the loss/claim and policies at issue is surprisingly economical—often, this work can be done very inexpensively, particularly when compared to the amounts in dispute
- Litigating coverage disputes is the expensive part, although it is often necessary, particularly when the amounts in dispute are large
- The client provides guidance on how far the dispute goes
- Bottom line: cost is not an all or nothing calculation. The engagement can begin and end with relatively little fees incurred. Yet even that effort can lead to the discovery of a line of cases or other authority that is the key to unlocking the coverage issue

R. Johan Conrod, Jr. Bio

- Johan is a partner in the litigation section of Kaufman & Canoles' Norfolk office
- His practice focuses on insurance disputes, shareholder/fiduciary duty disputes, tax litigation, business torts, defamation, municipal law issues and other complex business cases
- Johan is a 2001 graduate of the University of Virginia School of Law, where he served on the Managing and Editorial Boards of the Law Review
- Johan clerked for the Hon. B. Waugh Crigler in the United States District Court for the Western District of Virginia from 2001-2002. He has practiced at K&C since 2002.
- Johan currently serves as president of the Tidewater Chapter of the Federal Bar Association, is a faculty member for the Virginia State Bar's mandatory professionalism course and is co-chair of the business interruption subcommittee for the ABA's Insurance Coverage Litigation committee.
- Johan has litigated cases involving a number of different insurance issues, including GL coverage, D&O coverage, fidelity bond claims, first party property coverage and guaranty association reimbursement disputes.