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
- 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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