The Commercial General Liability Policy: An Examination of The Grant of Coverage, Policy Exclusions and The Insurer's Duty to Defend Its Insured

Seminar Topic: This course explores the contractual creation of an insurer's duty to defend its insured. It examines the insurer and insured relationship created through the contract of insurance. It focuses upon the rights and obligations as they pertain to the insurer's duty to defend the insured in a suit. Topics covered include the identification of the insured, the grant of coverage provided by the policy, policy exclusions, the defense obligation within a commercial general liability and the burden upon the insurer to avoid a defense obligation.

The course materials will provide the attendee with the knowledge and tools necessary to determine the rights and obligations of the insurer and insured and identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

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The Commercial General Liability Policy: An Examination of The Grant of Coverage, Policy Exclusions and The Insurer's Duty to Defend Its Insured

Course Description

This course explores the insurer and insured relationship created through the contract of insurance. It focuses upon the rights and obligations as they pertain to the insurer's duty to defend the insured in a suit. Topics covered include the identification of the insured, the grant of coverage provided by the policy, significant policy exclusion and the defense obligation within a commercial general liability policy. The course explores the burden upon an insurer that seeks to avoid a defense obligation. The course examines what is a "suit" as defined by a policy, how policy provisions grant insurance coverage, various exclusion to coverage and how to identify a conflict of interest between the insurer and insured.

The course materials will provide the attendee with the knowledge and tools necessary to determine the rights and obligations of the insurer and insured and identify the current legal trends with respect to these issues.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

- Participants will explore the insurer and insured relationship created through the contract of insurance.
- Participants will learn to recognize the the rights and obligations as they pertain to the insurer's duty to defend the insured in a suit
- Participants will learn to recognize the identification of the insured, the grant of coverage provided by the policy, the defense obligation within a commercial general liability and the burden upon the insurer to avoid a defense obligation.
- Participants will learn to examine what is a "suit" as defined by a policy, how policy provisions grant insurance coverage and how to identify a conflict of interest between the insurer and insured.
- Participants will learn to determine the rights and obligations of the insurer and insured and identify the current legal trends with respect to these issues.
- Participants will gain skills to understand how to identify commercial general liability policy coverage, insurance coverage nuances and
- Participants will gain skills to examine coverage defenses.
- Participants will learn about insurance coverage investigation, duty to defend and duty to provide independent counsel in a conflict-of-interest situation.

Timed Agenda:

Presenter Name: Peter G. Bora

The Commercial General Liability Policy: An Examination of The Grant of Coverage, Policy Exclusions and The Insurer's Duty to Defend Its Insured

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The Commercial General Liability Policy: An Examination of The Grant of Coverage, Policy Exclusions and The Insurer's Duty to Defend Its Insured

The relationship between an insurer and the insured has been described as ranging from a contract of adhesion to one of a fiduciary nature. Courts have, at times, determined that an insured was sophisticated and therefore not in need of protection to unsophisticated in need of court intervention. Public policy has recognized that an insurer occupies a unique position within contract law. The insurance company may not simply claim arms-length negotiations and abandon its insured at any moment it selects.

A typical commercial general liability ("CGL") policy contains a grant of coverage for those sums the "insured" is "legally obligated to pay as damages" because of "bodily injury," "property damage," "personal injury" and/or "advertising injury" covered by the policy. The injury or damage at issue typically must be caused by an "occurrence," which takes place during the relevant policy period, and within a specified coverage territory.

Each of these "elements" within the insuring agreement of a policy provides an area ripe for interpretation and litigation. This program reviews the duty to defend an insured under a typical CGL policy.

Insurance Policy Construction And Direct Actions Against An Insurer

The construction of an insurance policy provisions is a question of law[1] which is reviewed de novo.[2]In construing an insurance policy, the court's main objective is to ascertain and give effect to the contracting parties' intent.[3] To do so, the court must examine the policy as a whole with regard to the risk undertaken, the subject matter insured, and the contract's purposes. Unambiguous words must be given their plain, ordinary, and popular meaning.[4] On the other hand, words that are susceptible to more than one reasonable interpretation are ambiguous and will be construed in favor of the insured and against the insurer that drafted the policy.[5] However, courts "`will not strain to find ambiguity in an insurance policy where none exists.'"[6] The legal method to obtain an interpretation of a policy is through a declaratory judgment action, usually filed within the county circuit court or chancery court.

Illinois public policy prohibits a direct action against an insurance company because of the negligence of its insured prior to obtaining a judgment against the insured.[7] According to Garcia v. Lovellette,[8]the prohibition against direct actions is neither a completely mandatory nor inflexible prohibition against "third party practice."[9] The prohibition against direct actions applies where "the issue of the insurer's liability would be intermingled with that of the insured and with the assessment of damages."[10]

In a declaratory action against an insurer to determine the duty to defend, the issue arises from the contractual relationship between the insurer and the insured and does not violate the prohibition on direct actions against an insurer. It is neither based upon the negligence of the insured nor does a third party bring it. It is a first party action based upon contract.

[1] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 108 (1992).
[2] Federal Deposit Insurance Corp. v. O'Malley, 163 Ill. 2d 130, 142 (1994)." Pekin Insurance Co. v. State Farm Mutual Insurance Co., 305 Ill. App. 3d 417, 419 (1999).
[3] Eljer Manufacturing, 197 Ill.2d at 292, 258 Ill.Dec. 792, 757 N.E.2d 481. [4]

Outboard Marine Corp., 154 Ill.2d at 108, 180 Ill. Dec. 691, 607 N.E.2d 1204. [5]

Outboard Marine Corp., 154 Ill.2d at 108-09, 180 Ill.Dec. 691, 607 N.E.2d 1204.

[6] Eljer Manufacturing, 197 Ill.2d at 293, 258 Ill. Dec. 792, 757 N.E.2d 481, quoting McKinney v. Allstate Insurance Co., 188 Ill.2d 493, 497, 243 Ill.Dec. 56, 722 N.E.2d 1125 (1999).

[7] Pekin Insurance Co. v. Cincinnati Insurance Co., 157 Ill.App.3d 404, 407, 109 Ill.Dec. 656, 510 N.E.2d 524 (1987), citing Richardson v. Economy Fire & Casualty Co., 109 Ill.2d 41, 47, 92 Ill. Dec. 516, 485 N.E.2d 327 (1985), and Marchlik v. Coronet Insurance Co., 40 Ill.2d 327, 332-34, 239 N.E.2d 799 (1968); Garcia v. Lovellette, 265 Ill.App.3d 724, 730-31, 203 Ill.Dec. 376, 639 N.E.2d 935 (1994), citing Zegar v. Sears Roebuck & Co., 211 Ill.App.3d 1025, 1028, 156 Ill.Dec. 454, 570 N.E.2d 1176 (1991) (The rationale for this "policy is to prevent the jury in the claimant's personal injury action against the tort-feasor from becoming aware that the defendant tort-feasor is insured and thus to avoid larger awards under a `deep pockets' theory").

[8] Garcia v. Lovellette, 265 Ill.App.3d 724, 730-31, 203 Ill.Dec. 376, 639 N.E.2d 935 (1994).

[9] Garcia, 265 Ill.App.2d at 731, 203 Ill.Dec. 376, 639 N.E.2d 935, citing Gianinni v. Bluthart, 132 Ill.App.2d 454, 460-61, 270 N.E.2d 480 (1971).

[10] Garcia, 265 Ill.App.3d at 731, 203 Ill.Dec. 376, 639 N.E.2d 935, citing Reagor v. Travelers Insurance Co., 92 Ill.App.3d 99, 47 Ill.Dec. 507, 415 N.E.2d 512 (1980).

Estoppel Against An Insurer And Timeliness Of A Declaratory Judgment Action – The Reasonable Time Test

When an insurer believes that its policy does not cover a claim, it may not simply refuse to defend the insured. Instead, the insurer must either:

(1) defend the suit under a reservation of rights or

(2) seek a declaratory judgment that no coverage exists.[11]

An insurer that does not take either of these steps and is subsequently found to have wrongfully denied coverage is estopped from raising policy defenses to coverage.[12] The insurer must file the declaratory judgment action in a timely manner to avoid application of the estoppel doctrine.[13] The Illinois Supreme Court has not created a definitive framework for determining what constitutes a timely filed action, but two of its decisions provide some guidance. In Employers Insurance of Wausau, the Illinois Supreme Court held that a declaratory judgment action filed by an insurer after the underlying action had been resolved was untimely as a matter of law.[14] A few months later, the Supreme Court held that an insurer will not be estopped from denying coverage solely because the underlying case was resolved before the declaratory judgment action was completed.[15]

One line of opinions has required only that the declaratory judgment action be filed before the underlying lawsuit is resolved.[16]

A second line of opinions has looked to whether a trial or settlement was imminent at the time the insurer sought declaratory relief.[17]

[11] Employers Insurance of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 150, 237 Ill.Dec. 82, 708 N.E.2d 1122 (1999).

[12] Employers Insurance of Wausau, 186 Ill.2d at 150-51, 237 Ill.Dec. 82, 708 N.E.2d 1122.

[13] L.A. Connection v. Penn-America Insurance Co., 363 Ill.App.3d 259, 262, 300 Ill.Dec. 169, 843 N.E.2d 427 (2006).

[14] Employers Insurance of Wausau, 186 Ill.2d at 157, 237 Ill.Dec. 82, 708 N.E.2d 1122.

[15] State Farm Fire & Casualty Co. v. Martin, 186 Ill.2d 367, 374, 238 Ill.Dec. 126, 710 N.E.2d 1228 (1999).

[16] Pekin Insurance Co. v. Allstate Insurance Co., 329 Ill.App.3d 46, 50, 263 Ill.Dec. 451, 768 N.E.2d 211 (1st Dist.2002); Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co., 309 Ill.App.3d 694, 700-01, 243 Ill.Dec. 159, 722 N.E.2d 1228 (4th Dist.2000).

[17]. See Aetna Casualty & Surety Co. v. O'Rourke Bros., Inc., 333 Ill.App.3d 871, 880, 267 Ill.Dec. 216, 776 N.E.2d 588 (3d Dist.2002); Westchester Fire Insurance Co. v. G. Heileman Brewing Co., 321 Ill.App.3d 622, 634, 254 Ill. Dec. 543, 747 N.E.2d 955 (1st Dist.2001).

The estoppel doctrine is meant to enforce the duty to defend.[18] Any test that requires only that an insurer file a declaratory judgment action before the underlying suit is resolved or a trial or settlement is imminent contravenes this goal and potentially gives an insurer free license to abandon its insured until the underlying case is almost complete or well underway.[19] There is no incentive to the insurer to resolve coverage issues as soon as possible.

A third line of opinions focused on whether the insurer filed its action within a reasonable time of being notified of the underlying suit.[20]

The prevailing line of opinions is the "reasonable time" test. The "reasonable time" test is a more flexible approach that allows the court to decide each case according to its own facts and circumstances[21] and encourages the prompt filing of declaratory judgment actions.[22]In applying the "reasonable time" test, the status of the underlying suit can still be a factor in determining whether the insurer timely filed the declaratory judgment action.[23]

In a 2022 case reviewing estoppel, the court found that where an insurer does not receive any notice of a lawsuit, no duty to defend is triggered because the insurer has "no opportunity to defend." Absent a duty to defend, estoppel does not apply.[24]

Excess Coverage

There is a distinction between primary and excess coverage. In a 2022 opinion, a court reviewed whether estoppel could be raised against a policy written on an excess basis when that policy properly denied coverage. The court found that the

[18] Employers Insurance of Wausau, 186 Ill.2d at 154, 237 Ill.Dec. 82, 708 N.E.2d 1122. [19] State Auto. Mut. v. Kingsport Development, 846 N.E.2d 974 (Ill. App., 2006)

[20] See L.A. Connection, 363 Ill.App.3d at 265-66, 300 Ill.Dec. 169, 843 N.E.2d 427 (3d Dist.2006); West American Insurance Co. v. J.R. Construction Co., 334 Ill.App.3d 75, 86, 267 Ill.Dec. 807, 777 N.E.2d 610 (1st Dist.2002); Employers Reinsurance Corp. v. E. Miller Insurance Agency, Inc., 332 Ill.App.3d 326, 341-42, 265 Ill.Dec. 943, 773 N.E.2d 707 (1st Dist.2002); Korte Construction Co. v. American States Insurance, 322 Ill. App.3d 451, 458, 255 Ill.Dec. 847, 750 N.E.2d 764 (5th Dist.2001). State Auto. Mut. v. Kingsport Development, 846 N.E.2d 974 (Ill. App., 2006)

[21] (see L.A. Connection, 363 Ill.App.3d at 265-66, 300 Ill.Dec. 169, 843 N.E.2d 427)

[22] State Auto. Mut. v. Kingsport Development, 846 N.E.2d 974 (Ill. App., 2006)

[23] State Auto. Mut. v. Kingsport Development, 846 N.E.2d 974 (Ill. App., 2006); See also Employers Insurance of Wausau, 186 Ill.2d at 157, 237 Ill.Dec. 82, 708 N.E.2d 1122 (holding that a declaratory judgment action brought after the resolution of the underlying action was untimely as a matter of law). Finding that a seven-month delay in seeking a declaratory judgment was not unreasonable.

[24] Bd. of Managers of Roseglen Condo. Ass'n v. Harleysville Lake States Ins. Co., 2022 IL App (1st) 210265, ¶ 63, appeal denied, 199 N.E.3d 1200 (Ill. 2022) Not released for publication as of February 9, 2023.

estoppel doctrine was not relevant when the excess policy properly denied coverage.[25]

The Insured Under A CGL Policy

An insurance policy applies only to an entity or person qualifying as an "insured." An insured can exist by virtue of being named as an insured on the declarations page; an insured by definition under the policy; or by an act of the insured creating an additional insured relationship.

The Named Insured

The "named insured" is usually defined within a policy as the person or organization whose name appears on the declarations page. A policy often defines "you" and "your" as the person or organization shown as the named insured in the declaration.[26]If a policy names a corporation as the only named insured, a shareholder, president, and chief operating officer of the corporation is not considered the named insured.[27]If a live person is listed as a named insured along with a corporation, then the natural person qualifies as a named insured.[28]

The Additional Insured

It is common within the construction industry for a general contractor to shift the liability risk for injuries and accidents to a subcontractor by requiring that the subcontractor purchase liability insurance naming the general contractor as an additional insured on the subcontractor's own insurance policy.[29] Less likely is the requirement that the subcontractor purchase a policy with the general contractor as a named insured.

[25] Capitol Constr. Sols., Inc. v. Selective Ins. Co. of S.C., 2022 IL App (1st) 200808-U, ¶ 61 (IL Rule 23 UNPUBLISHED OPINION).

[26] Stark v. Illinois Emcasco Insurance Company, No. 1-05-2370 (Ill. App. 1 Dist., 2007).

[27] Polzin v. Phoenix of Hartford Insurance Cos., 5 Ill. App. 3d 84 (1972), (the plaintiff had not established that he was an insured in the policy but instead, was charged with knowledge that the corporation was the only insured so named.); Stark v. Illinois Emcasco Insurance Company, No. 1-05-2370 (Ill. App., 2007).

[28] Pekin Ins. Co. v. Estate of Goben, 707 N.E.2d 1259, 303 Ill.App.3d 639 (Ill.App. 5 Dist., 1999).

[29] State Auto. Mut. v. Kingsport Development, 846 N.E.2d 974 (Ill. App. 2 Dist., 2006).

When the subcontractor adds the general contractor as an additional insured, the proof of the insured status is evidenced by a Certificate of Insurance. In the alternative, a a bit risker for the general contractor is a reliance upon the policy terms defining the general contractor as an insured. A CGL policy may contain an additional insured endorsement, which provides in part that:

In order for the general contractor to be considered an insured under the policy, there must be at least two elements satisfied:

- The written contract[30] or agreement must be effective during the policy, and
- The written contract or agreement must be executed before the injury or damages.[31]

One of the first steps in an insurance coverage analysis is determining who qualifies as an insured under the policy. The insured will include the Named Insured, Additional Insureds pursuant to an endorsement, parties defined as an insured by the terms of the contract and may include parties within a certificate of insurance. But note, a certificate does not generally confer insured status upon a party, it is evidence of the insurance.

[30] Cincinnati Insurance Company v. Gateway Construction Company, Inc. 372 Ill. App. 3d 148, 865 N.E. 2d 395, 310 Ill. Dec. 71 (Ill.App. 1 Dist., 2007); An oral promise to add a party as an additional insured wais insufficient when the terms of a policy required a written agreement; United States Fire Insurance Company v. Hartford Insurance Company, 312 Ill.App.3d 153, 726 N.E.2d 126, 244 Ill. Dec. 530 (Ill.App. 1 Dist., 2000); policy required written agreement for party to qualify as additional insured.

[31] This topic is only summarized here to introduce the concept of the additional insured. The policy may also contain limitations on liability and there may be other issues raised such as what constitutes a "written agreement." American Country Insurance Company v. Cline, 309 Ill.App.3d 501, 722 N.E.2d 755, 242 Ill. Dec. 971 (1st dist. 6th div. 1999); No duty to defend owner or general contractor under an additional insured endorsement that limited coverage to liability specifically resulting from conduct of the named insured and imputed to the additional insureds; L.J. Dodd Construction, Inc. v. Federated Mutual Insurance Company, 365 Ill. App. 3d 260, 848 N.E. 2d 656, 302 Ill. Dec. 357 (Ill.App. 2 Dist., 2006); no duty to defend an additional insured where coverage was not provided for injuries due to the additional insured's sole negligence and complaint did not indicate that anything other than the additional insured's sole negligence was responsible for the injuries.

The Grant of Coverage

The typical CGL policy provides coverage for all damages that the insured is legally obligated to pay. The duty to defend analysis must review whether there are "damages" alleged within the complaint that are potentially covered under the policy. It the complaint alleges damages that are potentially covered under the complaint, a duty to defend may exists. Damages typically require a tangible or physical manifestation.[32] Economic loss does not typically satisfy this requirement.[33] Likewise, intellectual property claims may not be covered.[34]

Almost universally courts have agreed that breach of contract claims are not covered under a CGL policy.[35]

Bodily Injury

A CGL policy typically defines “bodily injury” as:

If the complaint alleges damages due to intangible injury such as emotional distress, coverage will not typically arise. This depends on the jurisdiction and the specific definition within the policy.[36]

[32] Crawford Laboratories, Inc. v. St. Paul Insurance Company of Illinois, 306 Ill.App.3d 538, 715 N.E.2d 653, 239 Ill. Dec. 899 (1st dist. 4th div. 1999) No duty to defend found where the underlying suit sought only civil penalties, restitution, and injunctive relief; O’Brien & Associates, P.C. v. Tim Thompson, Inc., 274 Ill.App.3d 472, 653 N.E.2d 956, 210 Ill. Dec. 761 (2nd dist. 1995); the cost of complying with an injunction was not sums payable “as damages” under a CGL policy.

[33] Diamond State Insurance Company v. Chester-Jensen Company, Inc., 243 Ill.App.3d 471, 611 N.E.2d 1083, 183 Ill. Dec. 435 (1st dist. 5th div. 1993) a claim for economic loss which resulted from the failure of a product to perform was not covered; Tobi Engineering, Inc. v. Nationwide Mutual Insurance Company, 214 Ill.App.3d 692, 574 N.E.2d 160, 158 Ill. Dec. 366 (1st dist. 6th div. 1991); no duty to defend found in a breach of contract action where the damages alledged were intangible and purely economic.

[34] Intex Plastics Sales Company v. United National Insurance Company, 23 F.3d 254 (9th Cir. 1994); no duty to defend patent infringement allegations.

[35] Travelers Insurance Company v. P.C. Quote, Inc., 211 Ill.App.3d 719, 570 N.E.2d 614, 156 Ill. Dec. 138 (1st dist. 6th div. 1991); contract claims not covered; Whitman Corporation v. Commercial Union Insurance Company, 335 Ill.App.3d 859, 782 N.E.2d 297, 270 Ill. Dec. 103 (1st dist. 2nd div. 2002); No duty to defend under a CGL policy where the allegations of breach of an asset purchase agreement did not constitute property damage caused by an occurrence.

Property Damage

“Property damage” is typically defined as:

Intangible claims for loss of business profit, business opportunities or similar are not “tangible property” and therefore do not meet the definition of “property damage.” This depends on the jurisdiction and the specific definition within the policy.

Personal Injury

A typical CGL policy provides coverage for “personal injuries” due to certain enumerated offenses. Typically a CGL policy provides coverage for claims such as slander, malicious prosecution and false arrest. Various definitions are in use and vary from policy to policy. For example, a “personal injury” can be defined as an “injury, other than ‘bodily injury’ arising out of one or more of the following offenses:

(1) false arrest, detention or imprisonment;

(2) malicious prosecution;

(3) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;

(4) 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; or

(5) oral or written publication of material that violates a person's right of privacy."

Additional definitions include:

Personal injuries must arise out of the insured's business operations. The breach of a fiduciary duty is not malicious prosecution.[37] "Wrongful Detention" within personal umbrella policy applies only to the wrongful detention of a person, not to detention of property.[38] Pollution from gasoline can constitute a covered cause of action for trespass.[39] But, if the trespass occurred after the policy expired, there will be no coverage.[40] The alleged misappropriation of a competitor's customer list is not "slander" or "libel" within the personal injury coverage.[41] Also, the filing of a frivolous appeal is not covered as malicious prosecution.[42]

[36] HPF, L.L.C. v. General Star Indemnity Company, 338 Ill.App.3d 912, 788 N.E.2d 753, 273 Ill. Dec. 162 (1st dist. 6th div. 2003), a claim that a distributor misled the public in representing that its products were proven safe was not "bodily injury" as defined in aCGL policy; University of Illinois v. Continental Casualty Company, 234 Ill.App.3d 340, 599 N.E.2d 1338, 175 Ill. Dec. 324 (4th dist. 1992); mental anguish does not constitute bodily injury.

[37] Aetna Life & Surety Company v. Northern Trust Company, 169 Ill.App.3d 678, 523 N.E.2d 1043, 120 Ill. Dec. 132 (1st dist. 4th div. 1988)

[38] Allstate Insurance Company v. Amato, 372 Ill. App. 3d 139, 865 N.E. 2d 516, 310 Ill. Dec. 192 (1st dist. 3rd div. 2007).

[39] Millers Mutual Insurance Association v. Graham Oil Company, 282 Ill.App.3d 129, 668 N.E.2d 223, 218 Ill. Dec. 60 (2nd dist. 1996).

[40] National Fire and Indemnity Exchange v. Ali & Sons, Company, 346 Ill.App.3d 107, 803 N.E.2d 636, 281 Ill. Dec. 232 (1st dist. 6th div. 2004).

[41] Western States Insurance Company v. Wisconsin Wholesale Tire, Inc., 184 F.3d

699 (7th Cir. 1999).

[42] Spiegel v. Zurich Insurance Company, 293 Ill.App.3d 129, 687 N.E.2d 1099, 227 Ill. Dec. 617 (1st dist. 6th div. 1997).

Advertising Injury

As with personal injury, advertising injury is limited to specifically enumerated offenses within the policy. These include:

- Oral or written publication of material that slanders or libels a party or disparages a person's or organization's goods, services or products.
- Oral or written publication that violates a person's right of privacy. Misappropriation of advertising ideas or style of doing business.
- Infringement of copyright, title or slogan.

The insuring agreement is also subject to exclusions specifically applicable to advertising injury liability coverage. These are too numerous to analyze in detail in this program but, for purposes of issue spotting, the practitioner must be aware that they exist.[43]

There are numerous cases addressing advertising injury and each jurisdiction must be reviewed in order to determine the specific interpretation of a definition. For example, decisions have addressed trade infringement as misappropriation.[44] In-house procedure alleged to be advertising activity in an anti-trust suit.[45] Patent infringement within the course of advertising not covered.[46] Misappropriation of advertising ideas or style of doing business as encompassing claims of trade dress.[47] Theft of trade secrets not advertising injury.[48] Damage to a business reputation is not an advertising injury.[49] Fax blasting may be covered as "advertising injury" under a commercial liability policy.[50]

Each jurisdiction must be reviewed on the specific issue facing the insured.

[43] Those contained in a typical CGL policy may include exclusions or limitations for breach of contract, other than misappropriation of advertising ideas under an implied contract; offenses that result from the failure of goods, products or services to comply with the advertised criteria; damages as the result of an incorrect description of the price of goods, products or services; or, offenses by insureds in the business of advertising, broadcasting or publishing.

[44] B.H. Smith, Inc. v. Zurich Insurance Company 285 Ill.App.3d 536, 676 N.E.2d 221, 221 Ill. Dec. 700 (1st dist. 3rd div. 1996)

[45] International Insurance Company v. Florists Mutual Insurance Company, 201 Ill.App.3d 428, 559 N.E.2d 7, 147 Ill. Dec. 7 (1st dist. 4th div. 1990)

[46] Konami (America) Inc. v. Hartford Insurance Company of Illinois, 326 Ill.App.3d

874, 761 N.E.2d 1277, 260 Ill. Dec. 721 (2nd dist. 2002)

[47] Lexmark International, Inc. v. Transportation Insurance Company, 372 Ill.App.3d 128, 761 N.E.2d 1214, 260 Ill. Dec. 658 (1st dist. 3rd div. 2001)

[48] McDonald's Corporation v. American Motorists Insurance Company, 321 Ill.App.3d 972, 748 N.E.2d 771, 255 Ill. Dec. 67 (2nd dist. 2001)

[49] Tobi Engineering, Inc. v. Nationwide Mutual Insurance Company, 214 Ill.App.3d 692, 574 N.E.2d 160, 158 Ill. Dec. 366 (1st dist. 6th div. 1991)

[50] Valley Forge Insurance Company v. Swiderski Electronics, Inc., 223 Ill. 2d 352, 860 N.E. 2d 307, 307 Ill. Dec. 653 (2006).

Duty to defend broader than the duty to indemnify

An insurer's duty to defend its insured is much broader than its duty to indemnify.[51]In determining whether an insurer must defend its insured, the court must compare the allegations of the underlying complaint to the relevant policy provisions[52] and liberally construe both in the insured's favor.[53]If any of the complaint's allegations fall within or potentially fall within a policy's coverage, the insurer is obligated to defend its insured.[54] This rule applies even if the allegations are groundless, false, or fraudulent.[55] The duty to indemnify arises only if the insured's activity and the resulting loss or damage actually fall within a policy's coverage.[56] The insurer may rely on an exclusionary provision to deny coverage only if the provision clearly applies.[57]

However, if it is clear from the face of the complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage, an insurer may properly refuse to defend.[58] Where the language of an insurance policy is clear and unambiguous, it will be applied as written.[59]

This rule continues to apply equally today, in 2023 as it did in 1909 where the court found that ***"under the rules governing the construction of contracts, we must, so long as it is possible, adopt such construction as will give effect to every word within the four corners of the instrument."***[60]

[51] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill.2d 90, 125, 180 Ill.Dec. 691, 607 N.E.2d 1204 (1992).

[52] Outboard Marine Corp., 154 Ill.2d at 125, 180 Ill.Dec. 691, 607 N.E.2d 1204)

[53] Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons, 315 Ill.App.3d 552, 560, 248 Ill.Dec. 342, 734 N.E.2d 50 (2000))

[54] Outboard Marine Corp., 154 Ill.2d at 125, 180 Ill.Dec. 691, 607 N.E.2d 1204.

[55] General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co., 215 Ill.2d 146, 155, 293 Ill.Dec. 594, 828 N.E.2d 1092 (2005).

[56] Outboard Marine Corp., 154 Ill.2d at 128, 180 Ill.Dec. 691, 607 N.E.2d 1204. [57]

Atlantic Mutual Insurance Co., 315 Ill. App.3d at 560, 248 Ill.Dec. 342, 734 N.E.2d 50.

[58] SBC Holdings, Inc. v. Travelers Casualty and Surety Company, No. 1-05-0883 (Ill. App. 5/29/2007) (Ill. App., 2007).

[59] United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 144 Ill. 2d 64, 73 (1991), quoting State Farm Fire & Casualty Co. v. Hatherley, 250 Ill. App. 3d 333, 336 (1993).

[60] Monahan v. Fid. Mut. Life Ins. Co., 148 Ill. App. 171, 175 (1st Dist. 1909), aff'd, 242 Ill. 488, 90 N.E. 213 (1909)

The "Four Corners" "Eight Corners" Test

Courts begin the coverage analysis by comparing the allegations in the complaint with the language of the insurance policy. This is referred to as the "four corners" rule (because the insurance company's duty is defined by the allegations in the "four corners" of the complaint) or "eight corners" rule (the insurance company or trial court compares the "four corners" of the complaint with the "four corners" of the insurance policy.) The court will not normally look past the four corners of the policy and the complaint in order to determine if there is a duty to defend the policy holder. The insurance company's duty to defend the insured is determined primarily by the pleadings in the underlying lawsuit, without regard to their veracity, what the parties know or believe the alleged facts to be, the outcome of the underlying case, or the merits of the claim."

Be Wary of the Provisional Four Corners Rule

Some courts have been unable to curtail their curiosity which has given rise to the "provisional four corners rule" or as it is known to some practitioners that abhor the practice, the "quick peek." In practice, this is little more than boot strapping. The court reviews extrinsic evidence in order to determine if there is a possibility that the contract is ambiguous which opens the door to more extrinsic evidence. One Illinois court held that a trial court erred by not provisionally considering admissions found within depositions. The appellate court of went beyond the four corners of the policy and considered objective extrinsic evidence to determine whether there were any latent ambiguities in the insurance contracts. However, the trial court error was harmless.[61]

A trial court may consider evidence beyond the underlying complaint only if such evidence does not tend to determine an issue crucial to the underlying lawsuit.[62] Extrinsic evidence may be considered in determining duty to defend if factual determinations do not impact or resolve issues factual issues in the underlying case.[63] Extrinsic facts may also be considered in order to negate the duty to defend.[64]

[61] Cincinnati Insurance Company v. River City Construction Company, 325 Ill.App.3d 267, 757 N.E.2d 676, 258 Ill. Dec. 987 (3rd dist. 2001).

[62] Royal Insurance Co. of America v. Insignia Financial Group, Inc., 323 Ill. App. 3d 58, 64 (2001).

[63] Fremont Compensation Insurance Company v. Ace-Chicago Great Dane Corporation, 304 Ill.App.3d 734, 710 N.E.2d 132, 237 Ill. Dec. 709 (Ill.App. 1 Dist., 1999).

[64] Millers Mutual Insurance Association v. Ainsworth Seed Company, Inc. , 194 Ill.App.3d 888, 552 N.E.2d 254, 141 Ill. Dec. 886 (4th dist. 1990).

[65] National Union Fire Insurance Co. of Pittsburgh v. Glenview Park District, 158 Ill.2d 116, 198 Ill.Dec. 428, 632 N.E.2d 1039 (Ill. 1994).

Duty To Defend Exists For Mixed Actions of Covered and Non-Covered allegations

In National Union Fire Insurance Co. of Pittsburgh v. Glenview Park District,[65]the Illinois supreme court addressed an exclusion in an insurance endorsement for "`damages arising out of the negligence' of the additional insured" and held that the insurer had a duty to defend.[66] Glenview Park District (Glenview) entered into a contract with National Decorating Services (NDS) for NDS to paint portions of an ice center. NDS had a policy with the plaintiff insurer (National Fire Insurance). The policy included Glenview as an additional insured and an endorsement that excluded coverage for "damages arising out of negligence of the Additional Insured [Glenview]."[67] An employee of NDS was injured on the job and filed a complaint against Glenview under both the Structural Work Act and common law negligence. The insurer refused to defend Glenview in the injured worker's action based on the exclusion in the endorsement. The supreme court found that the term "negligence" in the exclusion clause did not encompass actions based on alleged violations of the Structural Work Act and, therefore, the insurer of NDS had a duty to defend the additional insured, Glenview, with respect to the allegations of Structural Work Act violations. In turn, the supreme court held that since the insurer had a duty to defend Glenview for the Structural Work Act claim, the insurer also became obligated to defend Glenview on the remaining counts of the underlying complaint. The supreme court observed that "exclusionary provisions such as that found in the instant cause are to be construed narrowly rather than broadly."[68]

If several theories of recovery are alleged in the underlying complaint against the insured, the insurer's duty to defend arises even if only one of several theories is within the potential coverage of the policy.[69]

Burden Of Proof Upon The Insurer To Deny A Duty To Defend

The burden is on the insurer to show that a claim falls within a provision that limits or excludes coverage.[70]

Third-Party Complaint Raising The Duty To Defend

In West Bend Mutual Insurance Co. v. Sundance Homes, Inc.,[71] Ronald Bass, a carpenter employed by Lenny Szarek, Inc., a subcontractor, was injured on a construction site. Bass filed a complaint against the general contractor, Sundance Homes.

[66] National Union Fire Insurance Co. of Pittsburgh v. Glenview Park District, 158 Ill.2d 116, 198 Ill.Dec. 428, 632 N.E.2d 1039 (Ill. 1994).

[67] National Union Fire Insurance Co. of Pittsburgh v. Glenview Park District, 158 Ill.2d 116, 198 Ill.Dec. 428, 632 N.E.2d 1039 (Ill. 1994).

[68] National Union Fire Insurance Co. of Pittsburgh v. Glenview Park District, 158 Ill.2d 116, 198 Ill.Dec. 428, 632 N.E.2d 1039 (Ill. 1994).

[69] Hartford Fire Ins. v. Everest Indem. Ins., 861 N.E.2d 306, 308 Ill.Dec. 241 (Ill. App., 1 Dist., 2006) citing United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 144 Ill.2d 64, 73, 161 Ill.Dec. 280, 578 N.E.2d 926 (Ill. 1991).

[70] American Alliance Insurance Co. v. 1212 Restaurant Group, L.L.C., 342 Ill. App. 3d 500, 505 (2003), as cited in, American Economy Insurance Company v. Holabird and Root, No. 1-05-0403 (Ill. App. 5/30/2006) (Ill. App., 2006)

[71] West Bend Mutual Insurance Co. v. Sundance Homes, Inc., 238 Ill. App. 3d 335

At the time of the accident, Sundance was insured under a general liability policy by Great American Insurance Companies, and a West Bend policy purchased by Szarek named Sundance as an additional insured. West Bend declined to provide a defense to Sundance, "maintaining that the complaint contained no allegation imputing liability to Sundance as a result of the actions or conduct of Szarek." West Bend filed a declaratory judgment action against Sundance and Bass, and Great American sought a declaration of rights between itself and West Bend. In granting Great American's motion for summary judgment, the trial court found that based on the Szarek policy, West Bend did have the duty to defend Sundance in the action.[72]

In determining whether West Bend had a duty to defend Sundance, the reviewing court considered Sundance's third-party complaint against Szarek for contribution as well as statements by coworkers. The court found that this evidence "raise[d] the possibility that Szarek may also have been at fault." The West Bend court concluded that the allegations in the underlying action were within the coverage of the Szarek policy.

Looking at a third-party complaint is in line with the general rule that a trial court may consider other evidence if it does not determine an issue critical to the underlying action

The Duty To Defend Within Various Jurisdictions

The Duty To Defend Under California Law

A defense obligation is triggered when there is a "suit" brought against the insured claiming damages because of "bodily injury" or "property damage."

An insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.[73] This duty, which applies even to claims that are "groundless, false, or fraudulent," is separate from and broader than the insurer's duty to indemnify. Id. Conversely, where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability.[74]

In a "mixed" action, where some claims are potentially covered and others are not, the insurer has a duty imposed by law to defend the action in its entirety,

[72] West Bend Mutual Insurance Co. v. Sundance Homes, Inc., 238 Ill. App. 3d 335, 336-37 (1992),

[73] Waller v. Truck Ins. Exchange, Inc., 900 P.2d 619, 627, 44 Cal.Rptr.2d 370, 378 (Cal. App. 1995).

[74] Id., P.2d at 628, Cal.Rptr. at 379.

because "[t]o defend meaningfully, the insurer must defend immediately," and "[t]o defend immediately, it must defend entirely.[75]

California Courts review personal injury coverage by the nature of the claims made against the insured instead of by reviewing the damages. Coverage under the policy is triggered by the offense, not the injury or damage which a plaintiff suffers.[76] In Martin v. Marietta,[77]the court held that pollution migrating on to real property potentially triggered coverage under the "personal injury" portion of a commercial general liability policy. The court noted that the policy before it did not contain a pollution exclusion and therefore there was potential coverage under the "personal injury" portion of the policy. If there had been a pollution exclusion within the policy the court may have held in favor of the exclusion and found no potential for coverage under the policy.

The Duty To Defend Under Illinois Law

Under Illinois law, as in most jurisdictions, "the question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions.

An insurance company's duty to defend its policyholder is much broader than its duty to indemnify that same policyholder.[78] To determine whether an insurance

company has a duty to defend, the court must compare the allegations in the underlying complaint to the language of the insurance policy at issue.[79]In so doing, the court must give the allegations in the complaint a liberal construction in favor of the insured.[80]. Further, the court must liberally construe the provisions of the insurance policy in favor of coverage.[81]

After giving both the allegations in the complaint and the provisions of the policy a liberal construction in favor of the insured having coverage, the court must determine if the "allegations fall within, or potentially within, the policy's coverage."

[75] Golden Eagle Ins. Corp. v. Rocky Cola Café, Inc.,94 Cal.App.4th 120, 125, 114 Cal.Rptr.2d 16, 19 (Cal.App. 2 Dist.2001).

[76] Martin, Marietta Corp. v. Insurance Company of North America, 40 Cal.App.4th 1113, 1125, 47 Cal.Rptr. 2d 670,677 (Cal. App. 2d Dist. 1995).

[77] Martin, Marietta Corp. v. Insurance Company of North America, 40 Cal.App.4th 1113, 1125, 47 Cal.Rptr. 2d 670,677 (Cal. App. 2d Dist. 1995).

[78] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992), as cited in Country Mutual Insurance Company v. Carr, No. 4-06-0589 (Ill. App. 3/19/2007) (Ill. App., 2007).

[79] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992).

[80] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992).

[81] State Sec. Ins. Co. v. Burgos, 145 Ill.2d 423, 583 N.E.2d 547, 164 Ill.Dec. 631 (Ill.,

[82]If the court finds this to be so, "the insurer has a duty to defend the insured against the underlying complaint."[83]. Even if only one of several theories of recovery put forward by a plaintiff is within the potential coverage of the policy, the insurer has a duty to defend the insured on all theories of recovery.[84] However, even if an insurer has a duty to defend, whether the insurer will have a duty to indemnify the insured will only be ripe for determination after the insured has incurred liability in the underlying claim against it.[85]

Conflicts Of Interest

The many variations and resulting outcomes of potential conflicts of interest are addressed in depth another program but we will touch upon a few of them at this time.

Common Law Right to Independent Counsel

There is a contractual right of an insurer to select counsel for the insured in the tender of a defense under reservation of rights, it is well settled that the insured must

have the right to reject this tender.[86] "When a reservation of rights is made, however, the insured may properly refuse the tender of defense and pursue his own defense." Where the insured refuses to enter into an agreement permitting insurer to defend with reservations, and communicates to the insurer a denial of the latter's right to so defend with reservation... and thereafter the insurer fails to withdraw and continues to represent the insured in defense of the suit, the law is clear that the insurer has waived its right to withdraw, and will be estopped to later assert such right when sued by the insured for failure to properly defend.[87]

In many jurisdictions, the insured retains the right to refuse to accept a defense under a reservation of rights. In Safeco Ins. Co. of America v. Rogers,[88]the insured retained the right to reject defense counsel supplied by the insurer. The court stated that the Missouri rule provides that the insurer forfeits the right to participate in the defense if it wishes to reserve its rights.

[82] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992).

[83] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992).

[84] National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Glenview Park District, 158 Ill. 2d 116, 124, 632 N.E.2d 1039, 1042-43 (1994).

[85] Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 125, 607 N.E.2d 1204 (1992).

[86] Rhodes v. Chicago Ins. Co., 719 F.2d 116, 120 (5th Cir.1983).
[87] Yuen Shee v. London Guar. & Accident Co., 40 Haw. 213, 232 (1953).

[88] Safeco Ins. Co. of America v. Rogers, 968 S.W.2d 256 (Mo.App. W.D.,1998).

Statutory Right to Independent Counsel

In California, pursuant to the decisions in San Diego Navy Fed. Credit Union v. Cumis Ins. Soc. Inc.,[89] an insured has a right to select its own counsel when a conflict with the insurer arises. The California legislature codified the Cumis decision in the California Civil Code Section 2860.

In summary, the California statute requires that the insurer offer the right to the insured to select its own counsel when a conflict arises. The insured can waive this right and continue with the counsel selected by the insurer. The conflict addressed by the statute can arise in many forms. Circumstances that may create a conflict of interest requiring a liability insurer to provide independent counsel to the insured include the following:

(1) the insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the insurer's retained counsel

(2) the insurer insures both the plaintiff and the defendant

(3) the insurer has filed suit against the insured, whether or not the suit is related

to the lawsuit the insurer is obligated to defend

(4) the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties; and

(5) any other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her representation of the one is rendered less effective by reason of his or her representation of the other.[90] A sample Cumis letter is attached as an Appendix.

Under California law, "Cumis counsel" is appointed when an insured has a right to be provided independent counsel by an insurance carrier when a conflict of interest exists between the insured and the carrier.[91]

[89] San Diego Navy Fed. Credit Union v. Cumis Ins. Soc. Inc., 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (Ca. App. 1985) superceded by CA Civil Code Section 2860.

[90] James 3 Corp. v. Truck Ins. Exchange, 111 Cal.Rptr.2d 181, 91 Cal.App.4th 1093 (Cal.App. 2001).

[91] First Pacific Networks, Inc. v. AtlanticMut. Ins. Co., N.D.Cal.1995, 163 F.R.D. 574. ©

Reservation Of Rights Letters

The contents of a reservation of rights letter are expanded upon in another CLE program but we will touch upon a reservation of rights letter at this time. When an insured is sued, typically it tenders the suit to its insurance carrier and requests a defense and indemnification. The insurer will evaluate the suit to determine whether there is a potential for coverage under an insurance policy. The insurer will then take the position that the matter is covered and assign defense counsel; or

determine that the matter is not covered under the policy and deny coverage for the suit; or, as is often the case, take the position that there is insufficient information to determine the status of coverage upon its initial evaluation of the complaint and policy. Under the last scenario, the insurer needs a mechanism to notify the insured that it may not indemnify the insured for the claims asserted within the complaint.

A reservation of rights notice is a declaration by an insurer, delivered to an insured stating that the insurer reserves the right to contest liability under a policy. Insurers generally use reservation of rights notices to preclude inferences that might otherwise be drawn by an insured or by a court from the conduct of the insurer.[92] This notice suspends operation of waiver and estoppel when coverage issues exist.

Where there are facts that might exclude coverage, the insurer cannot always defend with complete fidelity. There must be a proceeding at which the insurer and the insured are each represented by counsel of their own choice to fight out their differences. Such a testing of the insurer's liability may take the form of a declaratory judgment. If the insurer refuses to defend and awaits the determination of its obligation in a subsequent proceeding, it acts at its peril, and if it guesses wrong it must bear the consequences of its breach of contract.[93]

A Reservation Of Rights Letter Must Be Issued Timely

Within most jurisdictions, a reservation of rights letter must provide the policyholder with reasonable notice of the reservation within a reasonable time. Delays such as 13 months or as little as 90 days have been held to be unreasonable.[94] Failure to issue a reservation within 12 months has given rise to estoppel against an insurer.[95] Absent a specific statute of restrictive court decision, courts generally appear willing to allow 60 - 90 days for the issuance of a reservation of rights letter provided, no prejudice has resulted to the insured.

Several Jurisdictions Have Enacted Specific Statutes Regarding Reservation of Rights Letters

New York Statute Addressing Reservation of Rights

New York has enacted Insurance Law §3420(d) which requires that the insurer notify the insured of any basis for denying coverage "as soon as reasonably possible." This statute provides in part as follows:

[92] Keeton & Widiss, Insurance Law, Reservation of Rights and Nonwaiver Agreements, § 6.7(a).

[93] Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 509 P.2d 222 (1973).

[94] U.S. Liability Ins. Co. v. Staten Island Hospital, 162 A.D.2d 445, 556 N.Y.S. 2d 153 (NYSUP. Ct. App. Div. 1990); Mohawk Miden Ins. Co. v. Ferry, et al., 251 A.D.2d 846, 764 N.Y.S.2d 512 (Sup. Ct. App. Div. 1998). A delay of 10 ½ months is not timely. Insurance Co. of North America v. Kyla, Inc., 388 S.E.2d 530 (Ga.App.,1989).

[95] First United Bank of Bellevue v. First American Title Ins. Co., 496 N.W.2d 474 (Neb., 1993).

(d) If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Appendix 1 General Reservation of Rights Letter Prior To The Filing of A "Suit"

RESERVATION OF RIGHTS

CERTIFIED MAIL - RETURN RECEIPT

January 1, 2060

Re: Claimant(s): Names of claimants

Insured: Named Insured(s) and Alleged Insured(s)

Policy No.: Policy number and Policy Terms

Claim No.: Insurer's Claim File Number

Dear Named Insured or Alleged Insured:

(Third Party Claims Administrator if appropriate or Insurer) is authorized to handle the above referenced matter on behalf of Insurer. Insurer has received the tender in the matter of [Claim Matter] on behalf of [Insured or Potential Defendant]. This tender was directed to Insurer under [Policy No.] issued to [Named Insured].

Insurer is conducting additional investigation regarding the insurance coverage provided by the policy issued to [Named Insured] and the coverage status of [Any Alleged Insureds]. At this time, Insurer is investigating whether [Potential Defendant] is an insured under the above referenced policy. The policy was issued to [Named Insured]

It is our understanding that no civil matter or formal allegations are currently filed against [Potential Defendant] in relation to this matter. As discussed below, no obligation on the part of Insurer arises under the policy until a "suit" is brought against an insured. **Therefore, Insurer has no present obligation to provide any coverage for the allegations brought against Insured under the policy.** Although no present obligation exists to provide coverage under the policy, Insurer has the right to investigate any "occurrence" and settle any claim that exists. Insurer is exercising this right and we request that all information regarding this claim continue to be supplied to Insurer

This letter is not a denial of coverage, nor does it in any way abrogate any rights that you may have as an insured under the terms and conditions of the above referenced policy.

Please be advised that the policy contains the following definition: "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

No request has been made and no consent has been given by Insurer for any

insured to submit to alternative dispute resolution in regards to the claim. Further, no civil proceeding is presently filed against an insured in regards to the claim. Therefore, there is no "suit" as defined by the policy currently filed against an insured in regards to the claim.

Without waiving any right to later deny coverage on the basis that [Potential Defendant] is not an insured under the policy and for purposes of this letter only, assuming that [Potential Defendant] is an insured under the policy, we wish to inform you that since no proceeding satisfying the definition of a "suit" under the policy is pending, Insurer is exercising its right to investigate this matter. No obligation on the part of Insurer arises under the policy unless a "suit" is filed against the insured. Therefore, Insurer has no present obligation to provide any coverage for the claims brought against [Potential Defendant] under the policy in this claim. Although no present obligation exists to provide coverage under the policy, Insurer has the right to investigate any "occurrence" and settle any claim that exists. We request that all information regarding this claim continue to be supplied to us. In particular, we ask that you provide us with the information requested at the end of this letter. This letter is not a denial of coverage, nor does it in any way abrogate any rights that [Potential Defendant] may have under the terms and conditions of the above referenced policy.

Notice of this claim has been provided to [ins co] under the commercial general liability policy referenced above. Should your records indicate the existence of any other [ins co] policies which you believe may apply to this claim, it is imperative that you notify us immediately, furnishing the policy numbers, insurers and asserted effective dates of such policies.

Without waiving the right to rely upon any other term, condition or provision within the policy, in the event a "suit" is filed against [Potential Defendant], Insurer wishes to advise you that the policy issued to [Named Insured] contains the following provision(s):

[The insurer may insert provisions that are potentially applicable to the claim based upon the information in its possession at the initial investigation stage.]

The facts surrounding the claim at issue must be reviewed in conjunction with the terms and provisions of any policy which may be deemed applicable. Insurer reserves the right to assert that there has been no "bodily injury", "property damage", "personal injury" or advertising injury" as those terms are defined in the policy. Insurer reserves the right to assert that there has been no "occurrence", as that term is defined in its policy.

In order to evaluate the tender in this matter, we ask that you please supply us with the following information at your earliest opportunity:

1) Copies of any all contracts entered into by [Potential Defendant], relative to the above referenced claim under which [Potential Defendant] alleges it is an insured under any policy,

2) Copies of all certificates of insurance relative to the claim identified above, in

particular, all certificates allegedly evidencing that [Potential Defendant] was named an insured under any policy,

3) Copies of all policy endorsements related to [Potential Defendant] and the claim identified above, in particular, all endorsements allegedly evidencing that [Potential Defendant] was named an insured under any policy,

4) Copies of all other documents evidencing that [Potential Defendant] was named an insured under any policy relating to the claim identified above,

5) Any suit papers, complaints, petitions, notices of claim, documentation of claim or other documentation relating to the above referenced claim.

This letter is not intended as a comprehensive statement of each and every potential applicable term, condition, exclusion, limitation, defense or right that Insurer may have under the policy. Insurer specifically reserves all of its rights and defenses pursuant to the terms, provisions, conditions and exclusions of the policies, applicable law or otherwise. Please be advised, that nothing within this correspondence should be construed as, nor is meant to be construed by you or your company as, a waiver of any term, provision, condition, definition or exclusion which may now or hereafter apply to coverage afforded under the policy.

Insurer reserves all of its rights under the terms, conditions, and provisions of the above referenced policy. No actions heretofore or hereafter taken by or on behalf of Insurer, its attorneys or representatives in the investigation of this matter or in connection with this matter shall constitute an admission of liability or an admission of coverage under the policy, nor be deemed a waiver of any right to disclaim liability or coverage under any policy for any reason or to refuse to defend the alleged [Insured or Potential Defendant] at any future time. Insurer will require you to comply with all of the terms, provisions and conditions of the policy.

Further, Insurer reserves the right to a review, amend or modify its position and assert any additional or alternative basis for denial of coverage or reservation of rights under the policy after reviewing any additional documents, suit papers or any other additional information without prejudice to any other rights it may have under the above referenced policy.

We will advise you further regarding our position after receipt of the documents requested above. If you have any additional facts or information that we should consider, please forward that information to the undersigned immediately.

Very truly yours,

Claims Analyst

Insurer or Third Party Administrator

cc: [Named Insured]

Appendix 2 General Reservation of Rights Letter After the Filing of A "Suit"

RESERVATION OF RIGHTS

CERTIFIED MAIL - RETURN RECEIPT

January 1, 2060

Re: Claimant(s): Names of claimants

Insured: Named Insured(s) and Alleged Insured(s)

Policy No.: Policy number and Policy Terms

Claim No.: Insurer's Claim File Number

Dear Named Insured or Alleged Insured:

(Third Party Claims Administrator if appropriate or Insurer) is authorized to handle the above referenced matter on behalf of Insurer. Insurer has received the tender in the matter of [Claim Matter] on behalf of [Insured or Potential Defendant]. This tender was directed to Insurer under [Policy No.] issued to [Named Insured].

Insurer is conducting additional investigation regarding the insurance coverage provided by the policy issued to [Named Insured] and the coverage status of [Any Alleged Insureds]. At this time, Insurer is investigating whether [Potential Defendant] is an insured under the above referenced policy. The policy was issued to [Named Insured]

It is also our understanding that no civil matter or formal allegations are currently filed against [Potential Defendant] in relation to this matter. This letter is neither an acknowledgment of insurance coverage nor is it a denial of insurance coverage.

Please be advised that the policy contains the following definition:

16. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

No request has been made and no consent has been given by Insurer for any insured to submit to alternative dispute resolution in regards to the claim. Further, no civil proceeding is presently filed against an insured in regards to the claim. Therefore, there is no "suit" as defined by the policy currently filed against an insured in regards to the claim.

Without waiving any right to later deny coverage on the basis that [Potential

Defendant] is not an insured under the policy and for purposes of this letter only, assuming that [Potential Defendant] is an insured under the policy, we wish to inform you that since no proceeding satisfying the definition of a "suit" under the policy is pending, Insurer is exercising its right to investigate this matter. No obligation on the part of Insurer arises under the policy unless a "suit" is filed against the insured. Therefore, Insurer has no present obligation to provide any coverage for the claims brought against [Potential Defendant] under the policy in this claim. Although no present obligation exists to provide coverage under the policy, Insurer has the right to investigate any "occurrence" and settle any claim that exists. We request that all information regarding this claim continue to be supplied to us. In particular, we ask that you provide us with the information requested at the end of this letter. This letter is not a denial of coverage, nor does it in any way abrogate any rights that [Potential Defendant] may have under the terms and conditions of the above referenced policy.

Notice of this claim has been provided to [ins co] under the commercial general liability policy referenced above. Should your records indicate the existence of any other [ins co] policies which you believe may apply to this claim, it is imperative that you notify us immediately, furnishing the policy numbers, insurers and asserted effective dates of such policies.

Without waiving the right to rely upon any other term, condition or provision within the policy, in the event a "suit" is filed against [Potential Defendant], Insurer wishes to advise you that the policy issued to [Named Insured] contains the following provision(s):

[The insurer may insert provisions that are potentially applicable to the claim based upon the information in its possession at the initial investigation stage.]

The facts surrounding the claim at issue must be reviewed in conjunction with the terms and provisions of any policy which may be deemed applicable. Insurer reserves the right to assert that there has been no "bodily injury", "property damage", "personal injury" or advertising injury" as those terms are defined in the policy. Insurer reserves the right to assert that there has been no "occurrence", as that term is defined in its policy.

In order to evaluate the tender in this matter, we ask that you please supply us with the following information at your earliest opportunity:

1) Copies of any all contracts entered into by [Potential Defendant], relative to the above referenced claim under which [Potential Defendant] alleges it is an insured under any policy,

2) Copies of all certificates of insurance relative to the claim identified above, in particular, all certificates allegedly evidencing that [Potential Defendant] was named an insured under any policy,

3) Copies of all policy endorsements related to [Potential Defendant] and the claim identified above, in particular, all endorsements allegedly evidencing that [Potential Defendant] was named an insured under any policy,

4) Copies of all other documents evidencing that [Potential Defendant] was

named an insured under any policy relating to the claim identified above,

5) Any suit papers, complaints, petitions, notices of claim, documentation of claim or other documentation relating to the above referenced claim.

Insurer reserves all of its rights under the terms, conditions, and provisions of the above referenced policy. No actions heretofore or hereafter taken by or on behalf of Insurer in connection with this shall constitute an admission of liability or an admission of coverage under the policy, nor be deemed a waiver of any right to disclaim liability or coverage under any policy for any reason or to refuse to defend the alleged [Insured or Potential Defendant] at any future time. Further, Insurer reserves the right to a review, amend or modify its position and assert any additional or alternative basis for denial of coverage or reservation of rights under the policy after reviewing any additional documents, suit papers or any other additional information without prejudice to any other rights it may have under the above referenced policy.

We will advise you further regarding our position after receipt of the documents requested above. If you have any additional facts or information that we should consider, please forward that information to the undersigned immediately.

Very truly yours,

Claims Analyst

Insurer or Third Party Administrator

cc: [Named Insured]

Appendix 3 General Denial Letter After the Filing of A "Suit"

RESERVATION OF RIGHTS

CERTIFIED MAIL - RETURN RECEIPT

January 1, 2060

Re: Claimant(s): Names of claimants

Case Name: Name and Case Number of Suit

Insured: Named Insured(s) and Alleged Insured(s)

Policy No.: Policy number and Policy Terms

Claim No.: Insurer's Claim File Number

Dear Named Insured or Alleged Insured:

(Third Party Claims Administrator if appropriate or Insurer) is authorized to handle the above referenced matter on behalf of Insurer. Insurer has received the tender in the matter of [Claim Matter] on behalf of [Insured or Potential Defendant]. This tender was directed to Insurer under [Policy No.] issued to [Named Insured].

Insurer acknowledges receipt of the summons and complaint naming [Insured] as a defendant in the above referenced matter. Notice has been provided to Insurer under the policy listed above. Should your records indicate the existence of any other policy that you believe may apply to this claim, it is imperative that you notify us immediately, furnishing the policy numbers and effective dates of such policies.

Insurer has reviewed the plaintiffs' complaint in this suit and the terms, conditions and provisions contained within the policy. Insurer wishes to advise you that Insurer denies any and all liability under the policy issued to [Named Insured] for the allegations within the suit brought against [Named Insured]. In rejecting the claim for coverage, Insurer specifically denies any liability for sums that may be owed by Insurer by reason of any award, judgment or settlement entered in the aforesaid lawsuit. This denial is based upon the following:

The Complaint: *The letter should identify the suit, case name and location of the action.*

The suit, in summary, alleges: *The letter should provide a complete review of the factual allegations from the complaint and any other documents on file relied upon by the insurer.*

The Policy states in part as follows: *The letter should quote the specific policy provisions that the insurer is relying upon.*

The insurer may insert a catch-all reservation of rights statement. Jurisdictions treat this provision differently.

Please be advised that the foregoing enumeration of defenses and policy provisions is not meant to be nor are to be construed by you as a waiver of any term, provision, condition, definition or exclusion which may now or hereafter apply to coverage afforded under the policy. Insurer expressly reserves all rights and all defenses available under the policy and at law to deny coverage on the foregoing bases or to deny coverage or rescind the policy on additional and alternative bases as other terms, conditions, statements, representations or warranties in connection with the policy are found to apply. Insurer's position as to coverage in this matter is based upon the allegations within the suit and presently known facts. Insurer also reserves the right to supplement its coverage position based upon the disclosure or discovery of facts or evidence not presently in Insurer's possession.

If [Named Insured] believes that Insurer's position is incorrect or if it has any additional information that would indicate that Insurer's position is incomplete or incorrect, factually or legally, please provide Insurer with that information within thirty (30) days. Should your records indicate the existence of any other policies which you believe may apply to this claim, it is imperative that you notify us immediately, furnishing the policy numbers, named insured and asserted effective dates of such policies. In the event that [Potential Insured] does not respond within thirty (30) days, Insurer will assume that [Potential Insured] agrees with the decision set forth herein with respect to the suit.

If you have any questions regarding Insurer's coverage position in this matter, please do not hesitate to contact us.

Very truly yours,

Claims Analyst

Insurer or Third Party Administrator

cc: [Named Insured]

Appendix 4 California Cumis Waiver Letter

RESERVATION OF RIGHTS

CERTIFIED MAIL - RETURN RECEIPT

January 1, 2060

Re: Claimant(s): Names of claimants

Case Name: Name and Case Number of Suit

Insured: Named Insured(s) and Alleged Insured(s)

Policy No.: Policy number and Policy Terms

Claim No.: Insurer's Claim File Number

Dear Named Insured or Alleged Insured:

(Third Party Claims Administrator if appropriate or Insurer) is authorized to handle the above referenced matter on behalf of Insurer. Insurer has received the tender in the matter of [Claim Matter] on behalf of [Insured or Potential Defendant]. This tender was directed to Insurer under [Policy No.] issued to [Named Insured]. As you are aware, Insurer acknowledged receipt of the Summons and Complaint naming [Insured] as a defendant in the above-captioned matter. Insurer has agreed to provide a defense to [Insured] under a reservation of rights.

Insurer has issued a reservation of rights pursuant to the terms and conditions within the policy. Insurer has agreed to participate in the defense of [Insured] subject to a full and complete reservation of its rights under the Insurer policy identified above. Pursuant to San Diego Navy Fed. Credit Union v. Cumis Ins. Soc. Inc., 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (Ca. App. 1985) superseded by CA Civil Code Section 2860, you have the right to select defense counsel of your own choosing. Insurer has selected (counsel's name) as your defense counsel. You have the right to continue with this selection or select counsel of your choice.

If you would like to continue with the counsel currently selected by Insurer, please sign this letter in the space below and return it to the address stated above. If you elect to have different counsel represent you, please provide us with the name, address and phone number of that attorney at your earliest opportunity. Please also have that attorney contact the undersigned at their earliest opportunity. If you have any questions regarding this matter, please contact the undersigned.

Very truly yours,

Analyst

I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit.

_____

On Behalf of Insured