What are *you* doing here?

Coverage counsel in third-party litigation: When to bring them in and what to expect

By Michael E. Gatto and Demián Oksenendler

Almost all of us have to deal with insurance companies in civil litigation. They fund the defense to pay the settlements and judgments in the overwhelming majority of our cases. In underinsured motorist claims, the same insurer will sometimes defend and pay twice: once for the underlying defendant, and again in the underinsured motorist arbitration. Many plaintiff-side litigators have asked themselves this question: "Do I need coverage counsel in this case?" As lawyers who work on a contingency basis, it literally pays to know the answer. This article provides some insight on when to ask that question, and when the answer should be "yes."

Pre-litigation/Pre-claim

Looking for coverage issues before we file suit or before we make a claim should be part of our checklist. We can often see ahead of time that the defendant is likely to have a problem: the bar patron or party guest who might have intentionally knocked the plaintiff down; the driver who caused a crash while driving someone else's car; the landlord who poisoned a plaintiff with mold spores or carbon monoxide.

Seek to get any applicable insurance policies in advance of filing the Complaint. Coverage counsel can assist drafting the Complaint to implicate coverage. If you cannot get a copy of defendant's policy, coverage counsel will likely have boilerplate policies and be versed in tactics to ensure covered claims are asserted.

If possible, speak to the defendant, or better yet his counsel, to assist in marshaling evidence to implicate coverage. You may persuade defendant's counsel to protect him by providing information to establish coverage. Where such cooperation is forthcoming, coverage counsel can aid in identification of necessary evidence as well as avoid perpetuation of adverse testimony. Also, a defendant may be able to provide information to establish liability of another and perhaps better insured or more liquid defendant.

When we spot a coverage issue early, getting coverage counsel involved can be invaluable. Most experienced coverage lawyers have dealt with these situations before. They know the statutes, regulations, and case law, and often have their own libraries of insurance policies and claims handling guidebooks from various carriers. At this early stage, we can make use of coverage counsel's experience and resources in a variety of different (and cost-effective) ways.

For instance, coverage counsel can act as consultants, helping us edit a demand letter or complaint. Sometimes a weak coverage situation can be turned around with a few keystrokes: changing words that convey intentional acts such as "shoved" to "bumped" in a demand letter, or deleting the cause of action for battery from a complaint.

Early consultations with coverage counsel can also leave us with guidance that comes into play later, such as what discovery questions we should avoid, when to suggest to the defense that they need *Cumis* counsel, and what to include in a verdict form. Getting coverage counsel involved early helps us put a case on the best trajectory to either get a defendant's insurance company to indemnify their insured, or suffer the consequences of a bad-faith lawsuit down the road.

An old adage among contingent fee lawyers is that "we make our money on the cases we turn down." That saying, of course, refers to the time and resources we lose on cases where there is little-to-no chance of a recovery – and are best turned down. We commonly think of it as applying to cases with weak liability or low damages, but it applies just as forcefully to cases with coverage problems. In addition to helping us put cases with coverage challenges in the best position, coverage counsel can also tell us when a case is borderline or cannot be saved. That can be hard to hear, but it is better to know sooner than later.

Restitution hearings

One special pre-litigation situation where coverage advice is important is the criminal restitution hearing. There are many kinds of crimes that carry both civil and criminal liability, but one of the most common we see is the drunk driving accident. Although gross numbers are on the decline, it is a disheartening statistic that our nation suffers well over 100 traffic collisions every day where alcohol is a factor, with as many as 36 of those involving at least one fatality.[1] Often, those cases result in criminal prosecution of whoever was behind the wheel. As part of those prosecutions, district attorneys will seek restitution for the same victims that we represent in the civil litigation arising out of those crashes. Why should we care about this, and how can coverage counsel help?

Civil litigators can appear and conduct Restitution hearings in Criminal Courts, and Restitution Orders are powerful tools to ensure timely and appropriate settlements. Restitution Orders can also lay the groundwork for a bad-faith action when an insurer fails in its duties to an insured. Restitution hearings establish a criminal defendant's responsibility for a victim's economic loss. Criminal judges, not juries, then determine causation and reasonableness of future medical

care needs and other economic loss. After such determination by a judge, many typical defense arguments fall flat.

When we represent a crime victim in a civil case after a restitution hearing, our client has collateral estoppel against the defendant for not only liability for the criminal act, but also economic damages and the absence of comparative fault. That puts our client in position to make a demand upon the defendant's insurer to resolve the case. If the insurer fails to do so, our client has significant leverage. We can immediately commence enforcement of the restitution order against the defendant's personal assets and community property without waiting for a civil judgment. This can be the first step towards a bad-faith lawsuit.

Plaintiffs may offer up Restitution Orders as a negotiating chip where the insurance company denies its duty to defend or indemnify as well as when the amount of the Restitution Order exceeds the policy limits. This is because in offering to settle the civil case, we can include defendant's personal obligation of the Restitution Order, which is non-dischargeable in bankruptcy.[2] If the insurer balks, we can proceed with enforcement. Depending on how recalcitrant the insurer is, we can then try to reach a resolution with the defendant directly (including taking an assignment of rights) to pave the way for a bad-faith lawsuit. The plaintiff can argue that the insurer's failure to resolve the case to protect its insured now exposes the insurer to the full value of the Restitution Order as well.

Coverage counsel fits into this process at every stage. Having someone paying specific attention to the policy language from restitution hearing through settlement talks improves the chances of the insurer accepting a reasonable settlement demand. Coverage counsel can also help us better approach the restitution hearing and Order, as well as our subsequent settlement demands. Savvy insurers know the dangers of a restitution order and will send defense counsel to these hearings to help argue on behalf of either the defendant or the insurer. When insurers sue their insureds and our clients for declaratory relief, coverage counsel can respond.

Denial of coverage/failure to defend

This is the classic scenario for getting coverage counsel involved and usually arises early on. Soon after sending a demand letter or serving a complaint, we receive a phone call or letter advising that the defendant's insurer has declined coverage and will not be defending or indemnifying its insured. Sometimes this occurs later on, when an insurer that has been defending under a reservation of rights (more on this below) decides that there is no possibility of coverage. It then withdraws its defense (that requires defense counsel to withdraw, and their motion is sometimes the first time we learn of the insurer's decision) and/or files a declaratory relief lawsuit against its insured and our client to avoid responsibility for the claim. Sometimes, the insurer will even demand that its insured reimburse it for defense costs.

When this happens, getting coverage counsel involved is essential. In these situations we have to assess the insurer's coverage position, and make a long-term strategy decision. Do we want to bring the defendant's insurer into the case with the indemnity dollars needed to resolve it? Or do we want to let the insurer go, take an assignment of rights from the defendant,[3] and pursue a bad-faith claim down the road? This is a huge decision in terms of both time and money. A successful effort to bring an insurer back in to defend and indemnify its insured likely means a faster resolution of the case, but also increases the likelihood that the settlement or verdict will be lower than it might be otherwise.

On the other hand, letting the insurer stop defending, and proceeding to trial against a pro per or defaulted defendant can produce a much larger judgment, but is a longer and more delicate process. It may require an amendment to the complaint or taking several other steps[4] to ensure that the insurer knows there is a possibility of coverage and, often, cajoling the defendant into giving our client an assignment of rights. Navigating this process is faster, smoother, and has a higher chance of success[5] when we bring in coverage counsel. Although it can lead to a significantly higher recovery, this path is also a longer road for our clients because it almost always requires a second lawsuit, this time against the insurer.

Reservation of rights

Often, we read a defendant's answer to Form Interrogatory 4.1 and it says there is a reservation of rights. This means that the defendant's insurer is defending the lawsuit and acknowledging that the claims against the defendant might be covered, but has also warned (or attempted to warn) its insured that it might withdraw and/or might refuse to pay some or all of whatever judgment might result.

Sometimes it is easy to figure out why an insurer is reserving its rights, such as in a DUI car crash case where we've included a prayer for punitive damages,[6] or in a bar fight case where we have alleged the defendant injured our client both negligently and intentionally.[7]

Sometimes the nature of a reservation of rights is not so clear. A defendant has to produce copies of the relevant insurance policies pursuant to Code Civ. Proc., § 2017.210, but not the reservation of rights letter.[8] Some defendants have cheap insurance policies that cost less, but restrict coverage. Some defendants have exotic policies issued by "nonadmitted" insurers.[9] Sometimes – especially when we have a good relationship with defense counsel – we are able to informally obtain a copy of an insurer's reservation of rights letter, but it is poorly written or does not make sense.

This is where coverage counsel can help. Coverage counsel can decipher the reservation of rights letter (if we

have it) and review the defendant's policy to help us determine what is going on. Like in cases of failure to defend, coverage counsel will offer guidance on whether to amend the complaint or take other steps to protect coverage. Depending on the specifics, coverage counsel can help us avoid pitfalls in discovery – there are certain questions we do not want to ask. Importantly, coverage counsel can help us pressure the defendant's insurer in various ways. This can include things like discovery designed to force the insurer to concede a coverage issue, or even a letter pointing out the need for *Cumis* counsel.[10]

Other situations

There are many additional situations where the need for coverage counsel can arise. Although it would be impossible to cover them all in this space, here are two common ones.

Mediation

Many of us have lived this before: We have a contested liability case, we've spent months (sometimes years) litigating, taken and defended numerous depositions, slogged through multiple rounds of written discovery, and finally get the case into a mediation. The defense has agreed to someone we trust, and we've given our client (and ourselves) hope that the case will resolve. Then, when we get the defendant's mediation brief (or worse, when we arrive at the mediation), the playing field changes: Instead of addressing liability and damages, the defense only wants to talk about coverage. Sometimes we see it coming, but other times it comes as a surprise. What is the best way to handle this?

In cases involving thorny coverage issues, coverage counsel can assist with preparation of the mediation brief and/or attend the mediation session. In the briefing, coverage counsel can knock out the insurer's defenses so they do not take up time at the mediation. When we bring coverage counsel to mediation, they can address the insurer's arguments in real time. When an insurer argues that we should accept an unreasonably low offer because it will never have to pay whatever judgment we might win at trial, coverage counsel can respond. In addition, when we come to mediation with coverage counsel in tow, it forces the insurer and its representatives to recognize our diligence and preparation. When coverage counsel is in the room, the specter of the bad-faith case leaves the realm of the theoretical and is staring the insurer in the face.

Before substituting in

It probably goes without saying that insurers who sense that a plaintiff's attorney is inexperienced or undercapitalized will try to take advantage. They will do this by making unreasonably low offers and perhaps even by trying to intimidate inexperienced counsel with motions, multiple depositions or other efforts to force "low ball" settlements. With the help of coverage counsel, we can embrace the insurer's hubris and turn the tables on the defense.

These opportunities frequently arise in traumatic brain injury cases and spine injury cases. In the former, the defense will claim it was merely a concussion. In the latter, the defense will claim little to no future care needs are necessary. Where damages warrant it, make an early Offer to Compromise or other written settlement demand within the policy limits (be sure to give the defense plenty of time to consider the demand), then hope the defense fails to pay it. That can "take the lid off" of the insurance policy, exposing the insurer to liability much greater than the policy limits.[11] If the lid is off, that is the moment to bring in experienced trial counsel.

As either referring counsel or the attorney stepping in for trial, coverage counsel can give us the information we need to make a decision on when to reveal a change. After reviewing all correspondence with the insurer, settlement communications, and Offers to Compromise in the case, coverage counsel can give us the "green light" by telling us the policy is open, or, tell us we need to make one more offer within the policy limits.

Wrap-up

It is clear that there are many situations when we should consider seeking the advice of coverage counsel. Insurers do it all the time. It pays when we do the same.


Gatto

Michael E. Gatto is a Trial Team Leader at Rains Lucia Stern, PC. *He has tried over 100 jury trials and specializes in cases involving complex liability and medical issues. Michael has practiced for over 20 years and is licensed in both California and Arizona. Mgatto@rlslawyers.com.*


Oksenendler

Demian Oksenendler is an attorney at Mannion & Lowe in San Francisco. He represents policyholders in litigation involving various lines of insurance, including property casualty, liability, disability and life. In addition to SFTLA, he an active member of AAJ, CAOC, The Western Trial Lawyers Association, and the Inns of Court.

Endnotes

[1] The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised), U.S. Department of Transportation, National Highway Traffic Safety Administration (May 2015); available on the Internet at https://crashstats.nhtsa.dot.gov/ Api/Public/ViewPublication/812013

[2] 11 U.S.C. § 1328(a)(3).

[3] It is not necessary to obtain a judgment before taking an assignment. Hamilton v. Maryland Cas. Co. (2002) 27 Cal.4th 718, 732.

[4] For more on this, see Mannion, Lowe, & Oksenendler, When the Insurer Denies Coverage and Refuses to Defend, Plaintiff Magazine (August 2015); available on the Internet at http://plaintiffmagazine.com/Aug15/Mannion_Mannion_Oksenendler_When-the-insurer-denies-coverage-and-refuses-to-defend_Plaintiff-magazine.pdf

[5] A cautionary tale is Lipson v. Jordache Enterprises, Inc. (1991) 9 Cal.App.4th 151, 154-156. There, after an insurer refused to defend, the plaintiff waited until four days before trial to amend his Complaint to add a covered cause of action. By the time the insurer received the amended complaint, trial was

already over (it only lasted 25 minutes) and judgment entered in the plaintiff's favor. On the insurer's motion, the Court of Appeal vacated the judgment, made findings about coverage that were adverse to the insured, determined that the insurer had acted in good faith, and remanded the case for further proceedings.

[6] Punitive damages are almost never covered. PPG Indus., Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 313.

[7] An insured's "willful" conduct is not insurable. Cal. Ins. Code § 533.

[8] A party is entitled to know generally whether there is a dispute over coverage, "but not as to the nature and substance of that dispute." C.C.P. § 2017.210.

[9] A nonadmitted insurer is "an insurer not licensed or admitted to engage in the business of insurance in this state." Cal. Ins. Code § 1760.1(n). It is prohibited from transacting business in California other than though a special type of broker (called a "surplus lines broker"), and its policies are not approved by the California Department of Insurance. Cal. Ins. Co. §§ 47, 700, 1760.1(m).

[10] Named for the Court of Appeal decision that popularized their use, Cumis counsel are additional attorneys that an insurer has to provide for its insured when there is a conflict of interest between the insurer and its insured, and the existing defense counsel can control how those conflicts resolve. Cal. Civil Code § 2860; San Diego Navy Federal Credit Union, et al. v. Cumis Ins. Society, Inc., 162 Cal.App.3d 358 (1984). California's appellate courts have yet to determine the consequences of an insurer's refusal to appoint Cumis counsel.

[11] The elements of this are set forth in CACI 2334.