

Insurance Coverage Disputes and the Agent's Role

A Continuing Education Course

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Agenda

1. **How to Read an Insurance Policy**
2. **The relationship between coverage issues and errors and omissions issues**
3. **Other Coverage Issues**
 - Bad Faith
 - Insured Fraud and Bad Acts
4. **The Seven Hottest Areas for Coverage Disputes**
5. **Conclusion / Questions and Answers**

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How to Read an Insurance Policy

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1. Who is ISO?

- **INSURANCE SERVICES OFFICE**
- Data and statistics provider to the insurance industry
- **Also a forms provider to the industry**
- **Many, many carriers are subscribers to ISO forms**
- American Association of Insurance Services also a significant forms provider (more focus in agriculture and mutual company forms...)

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Who is ISO?

- ISO provides forms in homeowner's, automobile insurance (on the personal lines side)
- ISO also provides forms for
 - Commercial Property
 - **General Liability – the "CGL" form and the "BOP"**
 - Professional Liability
 - Employment Practices
 - Directors and Officers Liability
 - Data Breach

On the commercial lines side

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Who is ISO?

How do I know if I'm looking at an ISO form?

Look here or here

HO 00 03 05 11 CG 20 08 04 13

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Who is ISO?

HO 00 03 05 11 translated:

"HO" means it is a homeowner's insurance form

"00" means it is a base coverage form

"03" is the policy form type

"05 11" is the latest revision date

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Who is ISO?

CG 20 08 04 13 translated:

"CG" means it is in the commercial general liability family of forms

"20" means it is an endorsement regarding additional insureds

"08" specifies the particular endorsement

"04 13" means revision in April of this year

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THE READING PYRAMID

Conditions

Exceptions to Exclusions

Exclusions

Definitions

Insuring Agreement: "We will pay...."

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THE READING PYRAMID

INSURING AGREEMENTS:

- ✦ The baseline obligation of the insurance company to do something for the insured.
- ✦ "A clause which sets forth the type of loss being covered by the insurance policy and the parties to the insurance contract. Describes the intent of the policy, just what insurance coverage is provided by the policy and in what limits." (Federated)
- ✦ Usually will specify indemnity and defense; may specify only indemnity.

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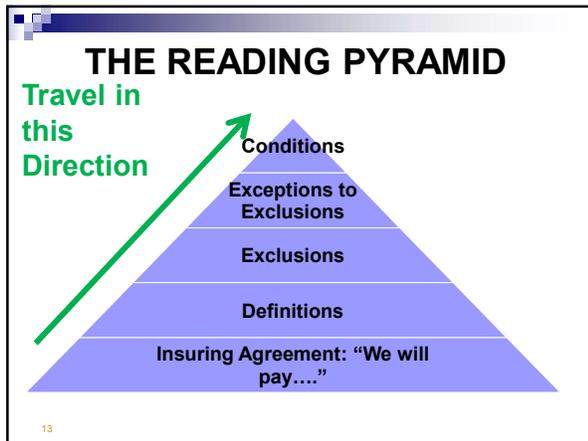
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THE READING PYRAMID

- ✦ **EXCLUSION:** An exclusion is a provision within an insurance policy that eliminates coverage for certain acts, property, types of damage or locations.
- ✦ **EXCEPTIONS TO EXCLUSIONS:** An exception to an exclusion restores coverage the exclusion carves out in certain instances, such as the "hostile fire" exception to the pollution exclusion.

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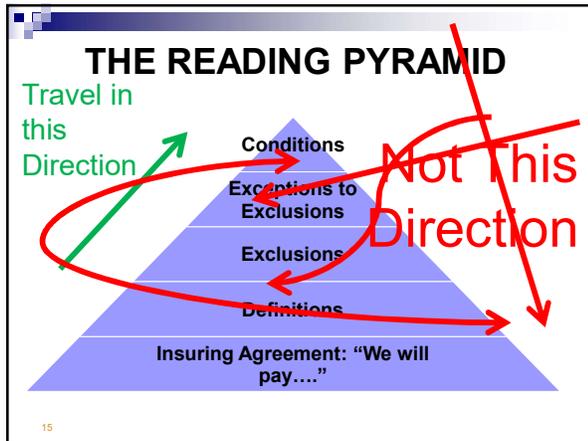
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THE READING PYRAMID

- ✘ In general, an exception to an exclusion cannot create coverage where none exists. Exclusion clauses do not grant or enlarge coverage; rather, they are limitations on the insuring clause.
- ✘ In simplistic terms, the process is such:
 - + if the insuring clause does not extend coverage, one need look no further.
 - + If coverage exists, exclusions must then be considered.
 - + If an exclusion excludes coverage, an exception to the exclusion may re-grant coverage.

Hartford Ins. v. Evansville Vandeburgh Public Library 2007

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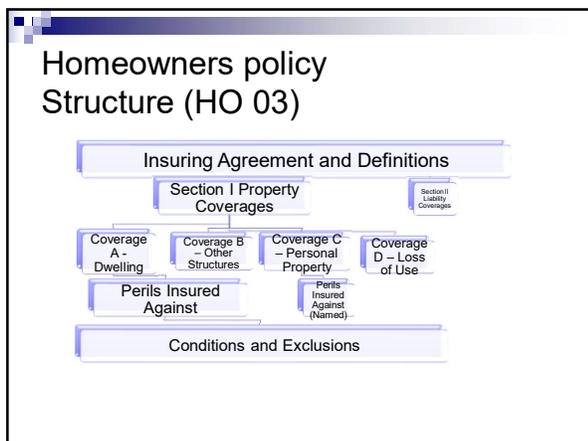
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A Picture is worth 1,000 words...

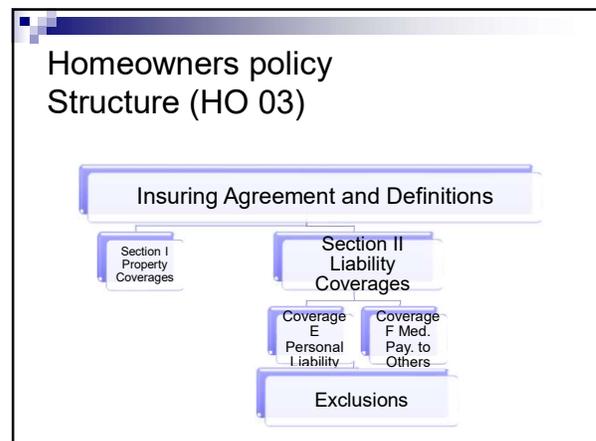
Personal Lines

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BUT SOMETIMES YOU JUST HAVE TO USE 1,000 WORDS

Commercial Lines

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The Commercial General liability policy

5 Sections:

- Section 1 – Coverages
 - Coverage A – bodily injury and property damage
 - Coverage B – personal and advertising injury
 - Coverage C – Medical Payments
- Section 2 – Who is an insured?
- Section 3 – Limits of Insurance

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THE COMMERCIAL GENERAL LIABILITY POLICY

5 Sections:

- Section 4 – Conditions
 - Bankruptcy
 - Reporting requirements
 - Other insurance
- Section 5 – Definitions
 - “products/completed operations hazard”
 - “your product” and “your work”

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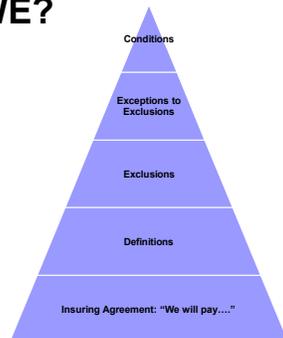
Putting the reading pyramid to use

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WHERE ARE WE?

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages....

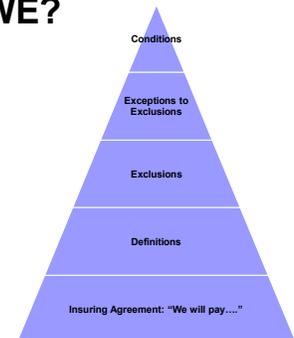


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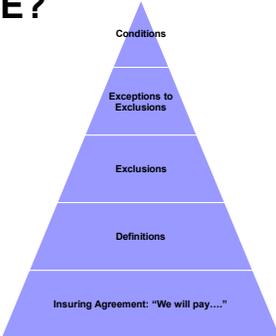
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WHERE ARE WE?

Duties In The Event Of Occurrence, Offense, Claim Or Suit

- ✗ If a claim is made or "suit" is brought against any insured, you must:
 - + (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - + (2) Notify us as soon as practicable.
- ✗ You must see to it that we receive written notice of the claim or "suit" as soon as practicable.



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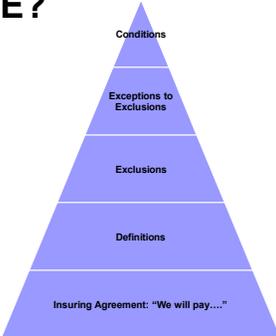
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WHERE ARE WE?

"Advertising injury" means injury arising out of one or more of the following offenses:

- ✗ Oral or written publication of material that slanders or libels...
- ✗ Invasion of privacy...
- ✗ Infringement of copyright, title or slogan...



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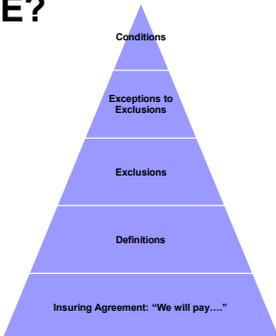


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WHERE ARE WE?

This insurance does not apply to "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location," but this clause shall not be applicable to an "insured" under the age of 21 years involved in a part-time or occasional, self-employed "business" with no employees



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This insurance does not apply to "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location," but this clause shall not be applicable to an "insured" under the age of 21 years involved in a part-time or occasional, self-employed "business" with no employees



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1. How to Read an Insurance Policy

ISO Personal Auto Insuring Clause:

- We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured."

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1. How to Read an Insurance Policy

ISO Personal Auto Insuring Clause:

- We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur.
- Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements.
- We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.

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1. How to Read an Insurance Policy

ISO Management Protective Liability Coverage Coverage A – Executive Liability

- We will pay on behalf of any "insured person" such "loss" which the "insured person" becomes legally obligated to pay as a result of a "claim" first made against that "insured person" during the "policy period" or during the Extended Reporting Period, if exercised, except to the extent that the "organization" has indemnified the "insured person" for such "loss".

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1. How to Read an Insurance Policy

ISO Management Protective Liability Coverage Coverage A – Executive Liability

- ...However, this insurance applies only to a "claim" arising out of a "wrongful act" committed by the "insured person" which occurs on or after the Retroactive Date, if any, shown in the Declarations, and before the end of the "policy period".

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1. How to Read an Insurance Policy

ISO Management Protective Liability Coverage Coverage B – Organization Reimbursement

- We will pay on behalf of the "organization" such "loss" for which the "organization" has indemnified any "insured person", as permitted or required by law, and which the "insured person" becomes legally obligated to pay as a result of a "claim" first made against that "insured person" during the "policy period" or during the Extended Reporting Period, if exercised.

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1. How to Read an Insurance Policy

ISO Management Protective Liability Coverage Coverage B – Organization Reimbursement

- However, this insurance applies only to a "claim" arising out of a "wrongful act" committed by the "insured person" which occurs on or after the Retroactive Date, if any, shown in the Declarations, and before the end of the "policy period".

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1. How to Read an Insurance Policy

A "manuscripted" errors and omissions insuring clause for information technology professionals from Hartford:

- "We will pay on your behalf money in excess of the Retention that you become legally required to pay as damages and claim expenses because of a claim caused by a **glitch** in your performance of technology services."

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1. How to Read an Insurance Policy

"**Glitch**" means the following when actually or allegedly committed by you or on your behalf:

1. negligent: act, error or omission;
2. breach of warranties or representations about the fitness, quality, suitability, performance or use of your technology services;
3. failure of your technology services to perform the function or serve the purpose intended;
4. failure to prevent:
 - a. denial of service; or
 - b. unauthorized access ...
6. infringement of copyright, plagiarism or misappropriation of ideas under implied contract;

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

Bankruptcy

- Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

"You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim...."

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.
- You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

- This insurance is primary except...

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

- This insurance is excess over:
- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work"...
 - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

6. Representations

- By accepting this policy, you agree:
 - a. The statements in the Declarations are accurate and complete;
 - b. Those statements are based upon representations you made to us; and
 - c. We have issued this policy in reliance upon your representations.

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1. How to Read an Insurance Policy

Conditions can have an impact on coverage:

7. Separation Of Insureds

- Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance a. As if each Named Insured were the only Named Insured; and
 - b. Separately to each insured against whom claim is made or "suit" is brought.
 - applies:

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "Insurance contracts are governed by the same rules of construction as other contracts."
- "When interpreting an insurance policy, our goal is to ascertain and enforce the parties' intent as manifested in the insurance contract."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "We construe the insurance policy as a whole and consider all of the provisions of the contract and not just the individual words, phrases or paragraphs."
- "We must accept an interpretation of the contract language that harmonizes the provisions, rather than one that supports conflicting versions of the provisions..."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- Courts will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless.

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "...the power to interpret contracts does not extend to changing their terms and we will not give insurance policies an unreasonable construction to provide additional coverage."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "[i]nsurance companies are free to limit their liability in a manner not inconsistent with public policy as reflected by case or statutory law," and that where "a plainly expressed exception, exclusion[,] or limitation in an insurance policy is not contrary to public policy, [an insurance company] is entitled to construction and enforcement as expressed."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "It is important to note that the rules of construction which govern the interpretation of insurance policy provisions extending coverage to the insured differ from the rules of construction governing policy provisions which exclude coverage."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- "Those provisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction."
- "However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored..."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- This all sounds good....
- Why are there disputes over coverage?
- Where does it all go wrong...from BOTH the insurers' and the insured's point of view?

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- **AMBIGUITY:**
 - "Doubtfulness or uncertainty as regards interpretation..."
 - "Something of doubtful meaning..."

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- Ambiguity means the application of the following principles:
- “[A]mbiguous terms in an insurance policy will be construed against the insurer, particularly where a policy excludes coverage.”
- “Because insurance contracts are contracts of adhesion construed against the drafter, the insurer is bound by the plain, ordinary meaning of the words as viewed from the perspective of the insured.”

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

Well, then, what is an Ambiguity?

- Policy language is unambiguous if reasonable persons could not honestly differ as to its meaning. And....

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- Failure to define a term in an insurance policy does not necessarily make it ambiguous.
- In insurance policies, an “ambiguity is not affirmatively established simply because controversy exists and one party asserts an interpretation contrary to that asserted by the opposing party.”

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1. How to Read an Insurance Policy

How Courts Read Insurance Policies:

- “Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies.”
- “Most are a virtually impenetrable thicket of incomprehensible verbosity...”
- “The miracle of it all is that the English language can be subjected to such abuse and will remain an instrument of communication.”
Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 22-23 (Ky. 1970).

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The Relationship Between Coverage and E&O Issues

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- There is a distinction between the duty to defend and the duty to indemnify.
- The duty to defend is, as it sounds, an obligation on the part of the carrier to defend the insured's interests...usually if a claim or suit is brought.
- The duty to indemnify is the duty pay any legal obligations that the insured might have to a third party.

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- The duty to defend is broader than the duty to indemnify.
- Some courts treat the duty to defend as a separate form of “insurance” like “litigation insurance.”

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- Many insuring clauses say that the carrier must defend even if the suit is “false, groundless, or frivolous.”
- Courts usually will find a duty to defend, even if there is an allegation that would not be covered.

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- When the nature of the claim is obviously not covered by the policy of insurance, there is no duty to defend.
- “The duty to defend is determined solely by the nature of the complaint.”

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- ...However, where an insurer's independent investigation of the facts underlying a complaint against its insured reveals a claim patently outside of the risks covered by the policy, the insurer may properly refuse to defend.

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2. Coverage and E&O issues

Duty to Defend / The first hurdle

- “When a court considers only the complaint it is often referred to as the “four corners rule” (as in a piece of paper), or the “eight corners rule” where the four corners of the complaint are compared with the four corners of the insurance contract.
- “In these jurisdictions, the insurer cannot consider evidence outside of the complaint. The complaint itself is all that may be considered....
- “Other jurisdictions not only permit but may even require the insurer to consider evidence apart from the complaint--extrinsic evidence--to establish a duty to defend.” (FC&S)

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2. Coverage and E&O issues

- According to Blake, follow these rules when documenting a claim situation:
- Don't take sides in favor of the company or the claimant. Example: “Liability is bad; fortunately, we have a way to escape on a coverage issue.”
- Related point – do not insert a subjective view of the claim.

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2. Coverage and E&O issues

- Don't
 - Air the Dirty Laundry
 - Throw a co-worker or colleague "under the bus"
- Example:
 - "I don't know why they didn't authorize the medical exam. That claims department has been known to be asleep at the switch."

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2. Coverage and E&O issues

- Don't overstate the description or effect of any given fact.
- Example:
 - "The claimant walked from the wheelchair to the TV." VERSUS
 - "The fraudulent claimant jumped out of his convenient wheelchair and walked over to the TV just fine."

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2. Coverage and E&O issues

- Don't resort to stereotypes:
- Blake's examples:
 - "Just doesn't want to go back to work."
 - "FLS."
 - Sexist, racist comments.

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2. Coverage and E&O issues

- Zalma, *Claims in a Disaster*, Expert Commentary, IRMI 2005:
- "The insurer may ask you to make available various documents related to the claim, including banking statements, investment reports, receipts, and other personal financial documents."

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2. Coverage and E&O issues

- Zalma, *Claims in a Disaster*, Expert Commentary, IRMI 2005:
- "You are required to produce any documentation reasonably related to the insurer's investigation of the claim that can include tax returns.
 - "In some states, tax returns are considered privileged and the insured cannot be compelled to produce them, while in other states the failure to produce tax returns is sufficient cause to deny the claim."

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2. Coverage and E&O issues

- Agent's obligation is to:
 - Follow the directions of the client in the placement of insurance for the client.
 - Exercise, "[s]uch reasonable skill and ordinary diligence as may fairly be expected from a person in his situation in doing what is necessary to effect a policy, in seeing that it effectually covers the property to be insured, in selecting the insurer and ascertaining that it is of good credit and standing, and in obtaining as good terms as are reasonably possible."

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2. Coverage and E&O issues

- Where a special relationship exists, a broker's duty is broadened to include the duty to advise the client concerning the procurement of insurance.
- In Indiana, this expanded "duty to advise" includes the responsibility to explain unambiguous terms of coverage, to inform the client of the availability or desirability of other types of insurance, and discuss the adequacy of coverage amounts.

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2. Coverage and E&O issues

- FC&S says:
- Remember an insurance agent is an agent of the insurer. It is the insurer that establishes the agency relationship in the agency contract. The agent's first duty of loyalty and fidelity belongs to the insurer.

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2. Coverage and E&O issues

Agent/Broker Role in Coverage Disputes:

- Be a
 - Facilitator,
 - Communicator,
 - Counselor.
 - Expert.
- Keep the insured and the insurer informed of ANY significant events

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2. Coverage and E&O issues

Agent/Broker Role in Coverage Disputes:

- Facilitate face-to-face meetings between the client and adjuster as appropriate.
- Do NOT become the focal point in the process to the detriment of the client or carrier

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2. Coverage and E&O issues

Agent/Broker Role in Coverage Disputes:

- Do NOT deny carrier access to client
- Do NOT deny client access to carrier.
- Follow – to the extent possible – requests for confidentiality
- Do NOT hesitate to enlist counsel.

Source: *Neuschafer, Int'l Risk Management Institute*

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2. Coverage and E&O issues

Agent/Broker Role in Coverage Disputes:

Keep in mind principles of

1. Neutrality – is it fair to both entities?
2. Objectivity – can I refer to a principle?
3. Long-term effects – will this aid in client or carrier relations?

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Other Important Coverage Issues

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3. Other Coverage Issues

A. Bad Faith

- “An insurer owes a duty of good faith to its insured, the breach of which gives rise to a tort action.
- “A new cause of action does not arise every time an insurance claim is erroneously denied.
- “An insurance company has the right to a good faith dispute with its insured with respect to coverage, primarily where the coverage presents an issue of first impression.

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3. Other Coverage Issues

A. Bad Faith

- “Insurance companies may, in good faith, dispute claims, [that] has long been the rule in Indiana.”
- “A finding of bad faith requires evidence of a state of mind reflecting a dishonest purpose, moral obliquity, furtive design, or ill will.”
- “Poor judgment and negligence, therefore, do not amount to bad faith; the additional element of conscious wrongdoing must be present.”

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3. Other Coverage Issues

A. Bad Faith

- “[G]ood faith and fair dealing requires the insurer to refrain from
 - making an unfounded refusal to pay policy proceeds;
 - causing an unfounded delay in making payment
 - deceiving the insured; and
 - exercising any unfair advantage to pressure an insured into a settlement of a claim.”

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3. Other Coverage Issues

B. Insured “Bad Acts”

- Arson
- Criminal Conduct
- Intoxication
- Other “Bad” Behavior
- Those can’t be covered....can they?

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3. Other Coverage Issues

B. Insured “Bad Acts”

- Arson: Economy Fire and Casualty Company v. Warren (Ill.); American Economy Ins. Co. v. Liggett (Ind.).
- “Innocent spouse” not involved in any concealment, misrepresentation, or fraud; therefore, the clauses barring recovery did not apply.

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3. Other Coverage Issues

- B. Insured "Bad Acts"
- Intoxication
- Smith v. Cincinnati Insurance: Deem insured by Cincinnati; was intoxicated; gave keys to Smith (age 15); Smith drives off the road
- Question is permissive use. The Supreme Court said there is a "sound policy" to encourage sober drivers and therefore, "[T]he fact that a would-be driver is extremely intoxicated has no bearing on whether she can nonetheless give her permission for a sober designated driver to drive her car."

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3. Other Coverage Issues

- B. Insured "Bad Acts"
- Criminal Behavior, e.g., fleeing the police
- Usual battleground: exclusion for "bodily injury that was either "expected or intended from the standpoint of the Insured."
- "Expected" does not mean "practically certain"
- A showing of disregard for safety is not enough to warrant exclusion [from insurance coverage]

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3. Other Coverage Issues

- Coy v. National Ins. Ass'n. (1999)
- "No evidence in the instant case permits an inference that Robert's actions were performed with the intent to harm Melissa. While Robert was fleeing from police, he violated numerous traffic laws and drove in a negligent and reckless manner.
- However, driving negligently or recklessly is not a situation where reason mandates that the driver must have intended to harm his passengers. Harm to Melissa was not the intended result of Robert's actions; rather, the harm was an unintended consequence of Robert's intended act..."

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The Seven Hottest Areas for Coverage Disputes

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4. The Seven Hottest Areas for Coverage Disputes

(a) Application Misrepresentations:

- A material misrepresentation or omission of fact in an insurance application, relied on by the insurer in issuing the policy, renders the coverage voidable at the insurance company's option.
- The material misrepresentation prevents a meeting of the minds as to the risk to be insured.

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4. The Seven Hottest Areas for Coverage Disputes

(a) Application Misrepresentations:

- [A] misrepresentation or omission is 'material' if knowledge of the truth would have caused the insurer to refuse the risk.
- [C]overage of the incurred loss would be voided if the misrepresentation affected that risk, but not all coverage would necessarily be voided.

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4. The Seven Hottest Areas for Coverage Disputes

(a) Application Misrepresentations:

- How many losses in the last five years?
 - "None."
 - Actually, 3 fire losses
- Foster v. Auto-Owners (1998)
- What's your medical history?
 - "Normal doctor visits"
 - Actually, functional heart murmur
- Jesse v. Am. Com. Mut. Ins. (2000)

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4. The Seven Hottest Areas for Coverage Disputes

(b) Pollution Exclusion:

- Freidline v. Shelby Ins. (2002)
- Freidlines own commercial building
- Replacing carpet in offices
- Employees become sick from carpet glue fumes / odors

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4. The Seven Hottest Areas for Coverage Disputes

(b) Pollution Exclusion:

- Shelby declines to defend or indemnify, based on the pollution exclusion
- This insurance does not apply to: . . .
 - Bodily injury and property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants . . .
 - Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

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4. The Seven Hottest Areas for Coverage Disputes

(b) Pollution Exclusion:

- The Freidlines contend that fumes emanating from carpet glue are not included in the policy's definition of pollutants, and thus bodily injury arising from those fumes is covered.
- The pollution exclusion is held ambiguous
- The exclusion is construed against insurer, "so as not to exclude coverage for injuries resulting from release of carpet glue fumes."

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4. The Seven Hottest Areas for Coverage Disputes

(c) Anti-Concurrent Causation Clauses:

- "The insurance industry, and I don't mind saying this on the record, flat out lies about what that provision does," said Sen. Julie Quinn, R-Metairie....
- "I don't think it's ambiguous at all," said Jeff Albright, chief exec., IIAB of La. WBZR News, Feb. 23, 2007

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4. The Seven Hottest Areas for Coverage Disputes

(c) Anti-Concurrent Causation Clauses:

- ISO Causes of Loss – Special Form (accompanies Building and Personal Property Coverage Form)
- "We will not pay for loss or damage caused DIRECTLY OR INDIRECTLY by..."
 - "[This exclusion applies] regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

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4. The Seven Hottest Areas for Coverage Disputes

(c) Anti-Concurrent Causation Clauses:

- Louisiana appears to adopt a loss allocation methodology between:
 - wind and wind-driven rain losses (generally covered)
 - and flooding (generally not covered)
- Burden of proof on the insured?
- Other states may be more inclined to use “efficient proximate cause” analysis
- Indiana would likely agree with the other states

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4. The Seven Hottest Areas for Coverage Disputes

(d) Your Work and Faulty Workmanship:

- “CGL policies cover the possibility that the goods, products, or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which injury or damage the insured might be exposed to liability...
RN Thompson & Assoc. v. Monroe Guaranty (1997)

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4. The Seven Hottest Areas for Coverage Disputes

(d) Your Work and Faulty Workmanship:

- “...The coverage is for tort liability for physical damages to others, and not for contractual liability of the insured for economic loss suffered because the completed work is not what the damaged person bargained for.”

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4. The Seven Hottest Areas for Coverage Disputes

(d) Your Work and Faulty Workmanship:

- “[T]he policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.”
- Damage arising from inadequate materials and substandard construction work is generally NOT covered by a CGL insurance policy because they are not
 - “Property damage” or
 - An “occurrence.”Indiana Ins. Co. v. DeZutti (Ind. 1980)

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4. The Seven Hottest Areas for Coverage Disputes

(e) Who is an employee?

- The Workers Compensation Act establishes that one worker may simultaneously have two employers.
- Generally, when two employers associate so that both directly control an employee, and the employee is responsible to both, they are co-employers

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4. The Seven Hottest Areas for Coverage Disputes

(e) Who is an employee?

- Right to discharge
- Mode of payment
- Supplying tools or equipment
- Belief of the parties in the existence of an employer-employee relationship
- Control over the means used in the results reached
- Length of employment
- Establishment of the work boundaries.
Hale v. Kemp (Ind. 1991)

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4. The Seven Hottest Areas for Coverage Disputes

(f) Who is a resident?

- Does it matter whether the question arises under an auto policy or a homeowners policy?

Generally speaking, no.

- Does it matter which court it is?

Generally speaking, no.

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4. The Seven Hottest Areas for Coverage Disputes

(f) Who is a resident?

“[O]n the whole, the person will be a resident if all the facts demonstrate that he or she has maintained a ‘fixed abode’ in the household for some continuous time.”

Allstate Insurance Co v. Shockley (S.D. In. 1991).

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4. The Seven Hottest Areas for Coverage Disputes

(f) Who is a resident?

- The person must maintain more than a mere physical presence at the home.
- The person need not be a permanent member of the household.
- The person must possess the subjective intent to stay for more than a “transitory” period; that subjective intent may be found in objective words and actions.

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4. The Seven Hottest Areas for Coverage Disputes

(f) Who is a resident?

According to FC&S, courts look to:

- 1) subjective or declared intent
- 2) the formality of the relationship between the person and the household members
- 3) whether they live in the same house or premises
- 4) whether the person has another place of lodging.

“Other factors may be considered: 1) what is the person’s mailing address? 2) does the person keep possessions at the insured’s home? 3) what address appears on the person’s driving license? 4) is a separate sleeping place kept for the person? and 5) is the person dependent financially upon the insured?”

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4. The Seven Hottest Areas for Coverage Disputes

(g) The “reasonable expectations” doctrine

- “The reasonable expectations doctrine relieves an insured from “certain clauses of an agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them.” This doctrine, however, requires more than the insured’s “fervent hope” that coverage exists, and therefore only applies under certain limited circumstances.”

State Farm v. Grabowski (Ariz.App. 2007)

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4. The Seven Hottest Areas for Coverage Disputes

(g) The “reasonable expectations” doctrine

- The “reasonable expectations doctrine” provides that the expectations of adherents and beneficiaries to insurance contracts will be honored if their expectations of coverage are reasonable in light of the wording of the policy, even if a more thorough study of the policy provisions would have negated these expectations.

Kellar v. Am. Fam. Mut. (Mo.App. 1999)

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4. The Seven Hottest Areas for Coverage Disputes

(g) The “reasonable expectations” doctrine

- ILLINOIS HAS ADOPTED THE DOCTRINE...sort of.
- Carroll, DCBA, 2005: “[C]ourts have refused to apply the Doctrine where policy language clearly put the insured on notice that a specific coverage was unavailable.”

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