

Key Coverage Decisions and Market Trends Every California In-House Counsel Should Know and Why

Understanding and Maximizing the Current
Insurance Landscape in California

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Presentation Agenda

- Spotlight on Four Recent Decisions Under California Law
- Practical Risk Mitigation Guidance in Response
- Update from the Insurance Marketplace: Trends and Takeaways



Recent Decisions Under California Law, Why They Matter to You, and What You Should Do In Response....

Gordon v. Continental Casualty Co.**Citation: 107 Cal. App. 5th 89, 327 Cal. Rptr. 3d 79****Court: California Court of Appeal, Second District**

Gordon v. Continental Casualty Co.

Coverage Issues

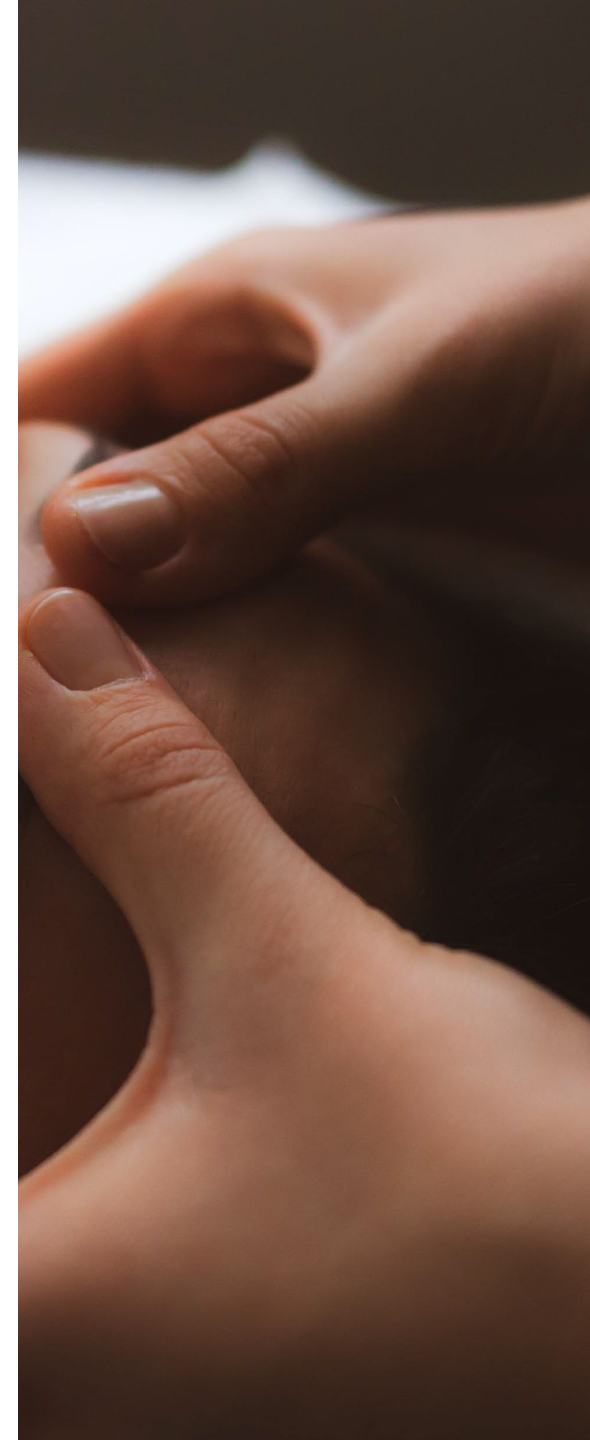
- What constitutes “care, custody, or control”?
- Can a negligent training claim trigger an abuse/molestation exclusion if the word training is absent from the exclusion?

Relevant Policy Language

- The abuse or molestation exclusion barred coverage for:
- (a) “Actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured.”
- (b) “Negligent employment, investigation, supervision, reporting, or retention of a person whose conduct would be excluded by (a).”

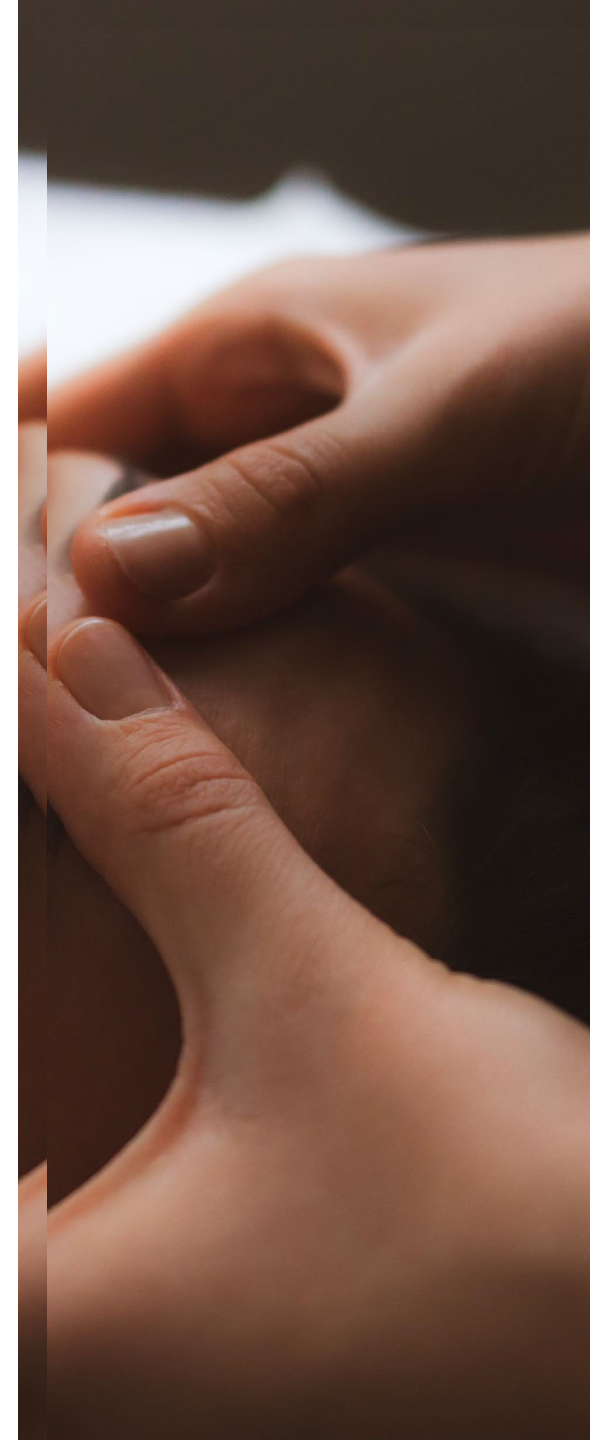
Holding

- Massage therapist’s clients were in the insured’s “care, custody or control”
- Negligent employment includes negligent training, even if not in policy



Gordon v. Continental Casualty Co.

- **Why Does This Matter?**
- Broad view of “care, custody or control”
 - Disjunctive
 - Does not require complete control
 - No longer limited to property, persons can now be included
- Broad view of abuse/molestation exclusions even in cases of indirect liability
- **Who Does This Impact?**
 - Any organization providing a custodial service to a person....
 - Healthcare Providers: Patient care
 - Educational Institutions: Student supervision
 - Hospitality & Wellness: Any and all physical contact services
 - Nonprofits: Volunteer and youth programs



Gordon v. Continental Casualty Co.

Risk Mitigation Strategies

- **Review Scope of Abuse/Molestation Exclusions:**
 - Especially if your business involves personal services or vulnerable populations.
- **Clarify “Care, Custody or Control” in Contracts and Policies:**
 - Consider negotiating narrower definitions or endorsements that preserve coverage.
- **Strengthen Vendor Screening & Training Protocols and Maintain Documentation**



Hiscox Insurance Co., Inc. v. Seven Safe Services, Inc.
Case No.: 2:24-cv-01155-MCS-AS (December 27, 2024)
Court: U.S. District Court, Central District of California



Hiscox Insurance Co., Inc. v. Seven Safe Services, Inc.



Coverage Issues

- What constitutes a “professional service”?

Relevant Policy Language

Professional Services Liability

The Professional Services Policy covers wrongful acts in the performance of professional services. (Id. ¶¶ 34–40.)

“Professional services” is defined as “Technology Services or Information Technology (IT) Consulting Services.”

General Liability

This insurance does not apply to: Professional Services “Bodily injury”, “property damage” or “personal and advertising injury” caused by the rendering or failure to render any professional service.

**Holding: Security guard = professionals.
Neither coverage applies!**

Hiscox Insurance Co., Inc. v. Seven Safe Services, Inc.

Why Does This Matter?

- Frequent Outsourcing of Prof. Services = High Risk of Exposure
 - IT support (data breaches)
 - Marketing (defamation, IP disputes)
 - Customer Service (privacy violations)
 - Payroll (wage and hour violations)
 - Billing (HIPPA, PPP violations)
- Be Vigilant as to Common Gaps in Coverage
 - Professional Services are excluded under CGL & D&O
 - Professional Services can be defined too narrowly
 - Subcontractors not covered unless endorsed
 - Narrow definition of professional services



Hiscox Insurance Co., Inc. v. Seven Safe Services, Inc.

Risk Mitigation Strategies

- Audit Vendor Contracts For Indemnity And Insurance Requirements And Scope.
- Require Proof Of E&O Coverage From Consultants, Advisors, And Service Providers.
- Negotiate Additional Insured Status Where Possible.
- Coordinate With Brokers To Ensure Your Company's Own Policies Fill Gaps.



Nat'l Foam, Inc. v. Zurich Am. Ins. Co.
Court: U.S. District Court, Northern District of California
Citation: 768 F. Supp. 3d 1009 (N.D. Cal. 2025)



Nat'l Foam, Inc. v. Zurich Am. Ins. Co.

Coverage Issues

- Can direct exposure to PFAS be covered under a CGL policy with a pollution exclusion?
- Does one potentially covered claim in an MDL trigger defense coverage for all?

Relevant Policy Language

- The policies do not apply where the alleged injuries “would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’ at any time.”
- Pollutants means “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”

Holding

- Yes, direct exposure to PFAS can be covered under CGL despite pollution exclusion.
- No, one potentially covered claim in an MDL does not trigger coverage for all.



Nat'l Foam, Inc. v. Zurich Am. Ins. Co.

Why Does This Matter?

- **Bolstering Earlier Policyholder Friendly High Court Precedent**
 - Look to both the
 - class of substances (“smoke...chemicals...waste) AND
 - mechanism of harm (direct or indirect).
 - All harms from chemicals/PFAS are not a form of pollution excluded under standard CGL policies.
- **New trend?**
 - In past years courts have expanded the pollution exclusion to cover any alleged harmful substance (by classifying it as a pollutant).
 - This goes in a policyholder-favorable direction.
- **Mixed claims did not give rise to a defense duty for the entire MDL.**



Nat'l Foam, Inc. v. Zurich Am. Ins. Co.

Risk Mitigation Strategies

Audit Liability Policies: Factor language needs into renewal discussions

Be Litigation Ready: Build a claims triage protocol, and identify and elevate likely covered claims early on to maximize defense costs coming in the door early

Track Insurer Positions: Factor into renewal discussions



Truck Ins. Exch. v. Kaiser Cement

Citation: 549 P.3d 781 (Cal. 2024)

Court: California Supreme Court (June 17, 2024)



Truck Ins. Exch. v. Kaiser Cement

Coverage Issues

When does a first-level excess insurer's indemnity obligations attach in the context of a continuous injury that triggers multiple policy periods?

Holding

Upon the exhaustion of the underlying primary policy.

Illustration

Tort claim spans 1980-1990. 1985's primary is exhausted. Now you can access 1985's excess even if other primary policies surround it remain intact.



Truck Ins. Exch. v. Kaiser Cement

Why Does This Matter?

- **Faster Access to Excess Coverage:** Reduces indemnity delays caused by long tail claims.
- **Policyholder Choice:** Target most favorable policy years/language.
- **Lower Out of Pocket Exposure:** Shifts burden to excess insurers sooner.
- **Stronger Contribution Claims:** Primary insurers may recovery from excess layers sooner, incentivizes insurer cooperation early on.



Truck Ins. Exch. v. Kaiser Cement



Risk Mitigation Strategies

- Review Notice and Claims Handling To Ensure Timely Notice To Excess Insurers
- Audit Existing and Future Insurance for “Vertical Exhaustion” Language

Vertical

- “Coverage under this policy shall apply **only after exhaustion of the limits of liability of the underlying insurance** listed in the Schedule of Underlying Insurance.”
- Drop Down: “In the event **the underlying insurance is exhausted** by payment of claims, this policy shall apply as if it were primary insurance.”
- Defined Attachment Point: “This policy **attaches only after the underlying insurance has been exhausted by payment** of claims to which this insurance applies.”

Horizontal

- “If **other valid and collectible insurance** is available to the insured covering a loss also covered by this policy, the insurance afforded by **this policy shall be excess of** and shall not contribute with such other insurance.”
- “This policy shall apply only after **all underlying insurance** available to the insured has been exhausted by payment of claims.”
- “Coverage under this policy shall not attach until the limits of liability of **all primary insurance applicable to the loss have been exhausted.**”

Update from the Insurance Marketplace: Trends and Takeaways

Litigation Trends



Market Shifts



Market Missteps



FIZZ QUIZ

[Boring Insurance Edition]



What does the term 'vertical exhaustion' mean in the context of insurance coverage?

- A. All primary policies must be exhausted before excess coverage applies.
- B. Only the directly underlying primary policy must be exhausted to trigger excess coverage
- C. Excess coverage applies immediately upon claim filing
- D. Excess coverage applies only after litigation concludes
- E. I love Yo-Yo Ma!

[4 OTHER SIMILAR QUESTIONS TO BE POSED]



Presenters



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