




Getting Your Insurance To Pay What It Owes - Recent War Stories (with some AI and Transactional Tips)

ACC Social Lunch Time CLE
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Steven Brower – Speaker Intro

- Computer programmer before law school
- California Attorney since 1980
- 15 years representing insurance companies (St. Paul Fire & Marine and Reliance National) mostly on Computer E&O claims (coverage)
- Last 30+ years representing policyholders against insurers
- Jury trials, bench trials, appeals, arbitrations, mediations (300+) across the U.S. in technology, cybersecurity, software audits, trade secrets, data breach, e-discovery, intellectual property, contracts, real estate, fraud, shareholder rights, libel, professional liability, product liability, employment, malicious prosecution, embezzlement, construction defect, Lemon Law and appellate, among others


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Brower Law Group, APC

- Founded January 1, 2018
- 6 litigation attorneys (most junior is 5 years experience)
- Significant portion is insurance coverage
- Unusual breadth of practice, including appellate
- ACC sponsor over 15 years
- Represented more than 15 ACC members
- Available for last minute trials

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Presentation Disclaimer

- The information in this presentation is generally based on my understanding of California law, as it existed at approximately the time of the presentation, in combination with some of my personal opinions, and does not reflect the views of any particular client or factual situation.
- The law in other states can be, and often is, materially different.
- Client names are included in this presentation only where the information was previously publicly disclosed (i.e. – pleadings and/or hearings).


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Why talk about insurance?

- Insurance is involved in almost every significant case.
- Insurance coverage is very different from insurance defense. There are far fewer excellent insurance coverage lawyers.
- Insurance is a method of risk transfer, a business decision. Not everything can be insured against, at least not without some complex negotiation, generally on very large risks.
 - Covid has become a leading example.
 - Intellectual property is another example


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War Story – Anaheim v. Security National

- Police death case, leaving father and children
- Matter is submitted to the \$5 million JPA risk pool
- Excess policy requires written notice of 7 deadly sins
 - TIP: Tender every case to every layer in the tower
 - TIP: Don't let your broker tender any important claim
- Written notice provided, adjuster asks for policy number
 - TIP: Email preservation issues
- Field audit of files, identification of the specific file and request for information with response
- AmTrust takes no further action on its own internal reports

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War Story – Anaheim v. Security National

- Case moves to LA, adverse verdict (over \$17 million)
- AmTrust investigates, then denies
 - No access to old email
 - No review of audits
- Files suit saying "no notice" so "no coverage"
 - Assigned to Judge Selna in OC Federal
- Counterclaim for *Brandt* Fees
- Discovery continues for over a year
- Summary Judgment motions go poorly for Amtrust


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War Story – Anaheim v. Security National

- Settlement for Policy Limit \$10,000,000 plus 100% of the attorney fees incurred by Anaheim, \$405,000
- Not confidential because it is a governmental entity


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Drafting of Contracts

- Redaction techniques
 - Learn to use Adobe Acrobat for redaction (second layer)
- Whereas clauses that conflict with the terms of the agreement
- Repeating potentially conflicting phrases – "Purchaser shall have thirty (60) days in which to perform"
- Arbitration clauses that don't say enough
- Provisions which are inconsistent
 - WAR STORY – Malta jurisdiction
- Insurance Clauses that don't make sense


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No Discovery Which Will Prejudice The Insured For A Claim In Progress

- There are two alternatives, depending on what is best for your case.
 - Request a stay of the action, OR
 - Request a stay of discovery by the carriers (while continuing your own)
- Resist all discovery by the carriers into the facts of a continuing underlying claim (*Haskel v. Superior Court*)


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War Story - LAPRAAC

- Referral from Opposing Counsel
- Potentially Tough Judge (Percy Anderson)
- Underlying cases involve sales, by LAPRAAC, of "stolen" guns to LAPD officers who then suffered job-related penalties and health problems
- Plaintiff attorney is a regular against LAPD
- Insurer sought declaration (two years after they began to defend) that they had no duty to defend because no assertion of a covered claim


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War Story - LAPRAAC

- Made motion to stay under authority of *Haskell v. Superior Court*
 - Cited to unpublished Court of Appeal decision (Federal Court allows this)
 - Read prior decisions by the Judge in which he denied similar motions due to lack of proof of prejudice
- Motion granted without a hearing

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Artificial Intelligence – Comments

- Not surprising that AI tools create fake cases
 - Significant cases are encountering this problem
 - Lexis 45 years ago
- How will the "rules" be disclosed to the users?
 - Legal requirements vary from place to place
 - Refusal of ChatGPT to provide political answers
- Where will liability fall for claims "it was too complex to know what we were selling/producing"?
- Where will liability fall for "we didn't know we were engaging in unlawful discrimination"?

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War Story – Misrepresentation in Application Cases

- The prevalence of these cases vary from insurer to insurer
- There are significant problems with Applications
 - The questions are almost always poorly/ambiguously phrased
 - Underwriters don't appreciate nuanced answers, but they often work
 - Underwriters don't even appreciate accurate answers
- Applications are accepted by one insurer from another insurer
- Generally, applications should be reviewed by legal before submission
- Unique risks are particularly tough to handle

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War Story – Misrepresentation in Application Cases

- AMTRUST alleges that policy should be rescinded because our client failed to disclose that one attorney had previously worked at a controversial law firm and may have been under investigation by state bar, as shown by information in the press

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War Story – Misrepresentation in Application Cases

- An insurer can obtain rescission for any material misrepresentation in the application, even if the misrepresentation has no relationship to the claim
- *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (4th Dist. 2007) 156 Cal. App. 4th 1259, 1266-67 "When a policyholder conceals or misrepresents a material fact on an insurance application, the insurer is entitled to rescind the policy. "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract" (*Ins. Code, § 332*.) Concealment, which is the "[n]eglect to communicate that which a party knows, and ought to communicate" (§ 330), "entitles the injured party to rescind insurance" (§331). Similarly, "[i]f a representation is false in a material point ... the injured party is entitled to rescind the contract from the time the representation becomes false." (§ 352.) "[A] rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable." (*Imperial Casualty, supra*, 198 Cal. App. 3d at p. 182.)

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War Story – Misrepresentation in Application Cases

- ▶ The fact that a broker prepared the application does not alter the outcome.
- ▶ *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (4th Dist. 2007) 156 Cal. App. 4th 1259, 1268 "And an insurance broker by definition represents policyholders, not insurers. (§§ 33, 1623.) The LA Sound employee and the broker each testified the broker acted as LA Sound's agent in obtaining the policy from St. Paul. That the broker represented other policyholders in their dealings with St. Paul, as plaintiffs note, does not make him its agent. As a matter of law, "if [an insurance] application was prepared by an insurance broker [the agent of the insured], the application's contents are the insured's responsibility" (Croskey et al., Cal. Practice Guide: Insurance Litigation [The Rutter Group 2006] ¶ 2:83, p. 2-32.1 (rev. #1, 2007); accord, *Imperial Casualty*, supra, 198 Cal. App. 3d at pp. 178-179 [policyholders liable for misrepresentations in broker-prepared application].) LA Sound, not its broker, is responsible for the misrepresentations in the application."

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War Story – Misrepresentation in Application Cases

- ▶ AMTRUST has a very unique definition of Application, which we had dealt with previously:
- ▶ **"Application** means the application for insurance, and any material submitted therewith or incorporated therein, and any other documents submitted, along with all publicly available material published or disseminated by or about any Insured in connection with the underwriting of this Policy or any previous policies issued by the Insurer of which this Policy is a direct or indirect replacement or renewal. All such applications, attachments and materials are deemed attached to, and form a part of this Policy, as if physically attached"


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War Story – Misrepresentation in Application Cases

- ▶ We served discovery, including a Notice of Deposition for a PMK
- ▶ Deposition notice stated that the deposition would be in person, anywhere in the United States that was near the designee's regular business location
 - ▶ Arguing over the location can cost more than the travel
 - ▶ Asking for an immediate deposition, without documents, is a good way to get real information early in the case
 - ▶ Taking a PMK deposition does not preclude taking an individual deposition
- ▶ Written discovery and depo discovery asked for a copy of the "complete application" which would include, by the definition, a copy of everything published by or about the named insured, along with information about who is responsible for gathering that information on behalf of the insurer, etc.


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Cybersecurity

- Short timeframes for reporting claims
- Claims are becoming so common that there may be pressure on scope of coverage and restrictions
 - Jeweler's Block??
- Cybersecurity Addons to Policies
- Scope of coverage for things related to computers are going to become more and more difficult
- AT&T SFO mistake

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Kidnap and Ransom

- A condition of the coverage is that its existence is supposed to be kept secret
 - Often referred to by counsel and brokers as "special risk" coverage
- Provides immediate access to experts
- Provides kidnap coverage for "regular" employees
- Provides coverage for many types of extortion

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