Young Trial Lawyers

Insurance and personal injury cases: A crash course for young lawyers

by Sean A. Sherlock

There is much you do not learn in law school. Some things (like how to interact with actual clients) cannot really be taught in the classroom. Others (like the requirement that a Friday civil motions hearing *Praecipe* be filed on yellow paper) are too esoteric to be of use until you are in practice. But as a new lawyer practicing personal injury law, you soon realize that law school taught you next to nothing about one of the most important aspects of tort law: insurance.

The problem this creates for the young lawyer is twofold. On the one hand, the ways in which insurance affects personal injury litigation are incredibly complex. On the other hand, there is no easy reference, no local rules, to consult for answers. In a busy practice, you just have to take the issues as they come and try to assimilate as much knowledge as you can along the way. It is with that in mind that I offer these lessons.

First, a caveat. In no way is this article intended as an exhaustive survey of the ways insurance law, policy, and business practices can affect a personal injury case. Rather, this article grows out of my experience as a first-year associate in a boutique personal injury firm. The hope is that this article might help shorten the learning curve for the next class of plaintiffs' lawyers.

Coverage counts

The ways in which insurance coverage can affect a personal injury case go way beyond simply fighting for the policy limits. Identifying and understanding all the potential coverage involved, and how your client can access it, is an essential first step which can and should drive case strategy.

For the plaintiff's lawyer (who would probably have "Collateral Source Rule" tattooed across his knuckles, if only he had enough fingers) openly admitting this goes against the grain. We spend much of our time arguing – rightly – that compensation is based on the plaintiff's injuries, not on what coverage happens to be available. But there are completely valid reasons, having nothing to do with greed, for why the attorney and the client need to keep one eye fixed on the available policy limits at all times.

A personal injury case is like a chair with four legs: liability, causation, damages, and "pockets." Take away any one, and the whole chair collapses. In the absence of insurance, the vast majority of defendants are judgment-proof. While plaintiffs do have ways of collecting against a defendant's personal assets to satisfy a judgment, these are typically difficult to pursue and inefficient, not to mention defendants have powerful ways of thwarting such efforts.[1] Which is why, without coverage, most of the time the chair falls over.

Find all the policies

To ensure the maximum recovery for the client, the successful plaintiff's lawyer should leave no stone unturned in searching out all policies of insurance which may cover the loss. The defendant's policy is of course at play, as is their employer's if they

caused the injury while acting in the scope of their employment. Significant coverage can also be found on the other side of the "v."

In an automobile accident case, an important source of recovery may be the client's uninsured/underinsured motorist coverage. Every policy of automobile liability insurance issued in the Commonwealth of Virginia must include coverage for accidents caused by uninsured or underinsured motorists.[2] Uninsured motorist insurance ("UM") provides coverage for accidents caused by drivers who do not have insurance.[3] Underinsured motorist insurance ("UIM") provides coverage in cases where the tortfeasor's insurance is inadequate – meaning, where the plaintiff's UIM coverage is greater than the at-fault driver's insurance.

In practice, there is much more to recovering from a plaintiff's UM/UIM coverage.[4] For the new plaintiff's lawyer, the point is simply that the search for available coverage can never end with the defendant.

Understand the policy

The nature of the potential coverage, what it covers, how it interacts with other potential coverage, and even how you can plead yourself out of it, are all intricate questions that need to be answered. Doing this will allow you to communicate to the client in concrete terms the range of possible outcomes of the case. It will free you to focus on building your case, instead of worrying about having the rug pulled out from under you at the eleventh hour. Contract law principles are the foundation for understanding the policy, and therefore, the coverage.

Insurance policies are contracts, and courts will apply contract principles when interpreting a policy's provisions. This can be to the insured's benefit.[5] Other times, this cuts against the insured, as when courts apply the principle that an insurance contract be enforced according to its plain meaning to the greatest extent possible.[6]

The practice of strictly construing insurance policies according to their plain language can have a profound effect on the client's recovery.[7] A recent decision of the Supreme Court of Virginia offers a dramatic example. In *AES Corp. v. Steadfast Ins. Co.*, the plaintiffs sought to recover from a commercial general liability (CGL) insurance policy for damages they alleged were caused by intentional acts, or were the "natural or probable consequence of [an] intentional act."[8] The Court looked to the "eight corners" of the complaint and the insurance policy, and held that the plaintiffs could not recover because the complaint failed to allege an "accident" or "occurrence" as those terms were defined in the CGL policy.[9] While the lasting impact of this decision remains open for debate, the case is at least a stark example of the importance of paying close attention to policy language when drafting pleadings.

Read the entire policy

Like any other contract drafted by a sophisticated actor, insurance policies tend to be long, complex documents. The "policy" itself usually consists of several distinct documents, including declaration pages, endorsements, amendments, and addendums. It is important to carefully read everything. This is especially true for newer lawyers who may be unused to some common conventions of insurance policies. For example, a policy of umbrella (or excess) liability insurance could include as an "Amendatory Endorsement" the following language:

> EXCLUSIONS
>
> Exclusion 10., which reads as follows, is deleted.
>
> > 10. **loss** sustained while an **automobile** or **recreational motor vehicle** is driven or operated by an **insured**, other than **you**, who is excluded by a named driver or operator exclusion of any similar exclusion under any **required underlying insurance**, even if coverage is provided by another policy; (emphasis in original).[10]

The effect of this language is actually to broaden coverage. Yet this provision appears on a separate, loose piece of paper, sandwiched among several other "Amendatory Endorsements." A less than careful reading could easily miss those two words, "is deleted" and so misconstrue the entire policy.

Statutes matter, so read them too

Liability insurance is heavily regulated by statute, therefore understanding the statutory framework of insurance is critical to identifying sources of recovery for the client. To take just one example: the Omnibus Clause in Va. Code §38.2-2204 requires that automobile liability policies provide coverage for the negligence of people, other than the named insured, who use the covered vehicle with the "expressed or implied consent of the named insured." The statute further specifies:

> Provided that, when one accident or occurrence involves more than one defendant who is covered by the policy, the plaintiff may recover the per person limit of the policy against each such defendant, subject to the per accident or occurrence limit of the policy. Va. Code Ann. §38.2-2204.

So what is the significance of this statute? A brief hypothetical will demonstrate the answer. Suppose Ned is the named insured on a policy of automobile liability insurance with limits of $100,000 per person, and $300,000 per accident. Ned lends his car to his friend Dan, whom Ned knows is a notorious drunk. Sure enough, Dan

becomes intoxicated, gets behind the wheel of Ned's car, and negligently runs into Vince. Vince is seriously injured as a result. In this hypothetical, Vince has a claim for negligence against Dan, and a claim for negligent entrustment against Ned.[11] The effect of the Omnibus Clause in this scenario is to double the available coverage for Vince's injuries. Because Dan was a permissive driver of the covered auto, he is covered under Ned's policy. And because negligent entrustment is a separate tort from negligent driving (a separate "occurrence" under the policy), Vince can recover the per person limit of $100,000 against Ned for negligent entrustment, and another $100,000 against Dan for negligent driving.[12] Great news for Vince.

Understand the players

In a typical third-party-liability case, defense counsel represents the alleged tortfeasor. That is her client, and regardless of who is footing the bill for her services, it is the defendant to whom defense counsel owes her ethical duty.[13] At the same time, the defendant does not decide when and for how much to settle the case. He contracted away that right in exchange for a legal defense and indemnification against a judgment (to the policy limits).[14]

It is the "Home Office," or more specifically the claims adjuster, who holds the purse strings. So understanding the adjuster's motivations is important to settling any case where there may be insurance available to your client. The possibility of an excess judgment, and the attendant bad faith implications for the insurance company, may be one motivating factor for the adjuster to settle the case.[15] But that is a tough claim for the insured to win, since it requires proof by clear and convincing evidence.[16]

A more present danger for the claims adjuster is the risk of "under-reserving" the case. A "claim reserve" is money set aside by the insurance company to cover future payment of a claim. One of the duties of the claims adjuster is establishing this claim reserve. Claim reserves are classified as liabilities on the company's balance sheet, and when the company doesn't set aside enough money to cover its liabilities, it hurts the company's bottom line.[17]

By being transparent with the adjuster early in the case – before suit is even filed – you can empower him to more accurately evaluate the case, and to set a more appropriate claim reserve. For example, give the adjuster the documents he (reasonably) needs to evaluate the insured's liability and your client's injuries. If there is a reason you do not want the adjuster to see your client's medical records for claimed treatment, then that is probably a case you will have to try anyway. Otherwise, it does no good to make a monetary demand without substantiating it. Remember that the adjuster answers to someone, and he will eventually have to justify his decision to pay your demand. Empower him by giving him the tools to do it.

Conclusion

This article barely scratches the surface of all the important ways insurance affects personal injury litigation. Hopefully, what these lessons do make clear for new trial lawyers is the need to think critically about what coverage may be available to compensate the client, and how best to access it. By recognizing the issues, knowing the motivations of the actors involved, and being diligent, it is possible to maximize the likelihood that your client will be able to recover just compensation for their injuries.

Endnotes

1. Significant protections are available through the Virginia Homestead Exemption, Va. Code Ann. §34-4 *et seq*. A judgment debtor can also halt all attempts at collection by filing for bankruptcy. And finally, when all else fails, they might always resort to good, old-fashioned concealment of assets.
2. *See* Va. Code §38.2-2206(a); and *Hackett v. Arlington County*, 247 Va. 41 (1994) (applying the requirement to self-insurance as well). *But see* Va. Code §38.2-2206(j) (exempting excess or "umbrella" policies from the requirement).
3. A driver is also "uninsured" if he has insurance but is denied coverage for some reason. *See Allstate Ins. Co. v. Jones*, 261 Va. 444 (2001).
4. For an excellent guide of how to successfully recover UM/UIM coverage, *see* Gerald A. Schwartz, "Maximizing your client's recovery with underinsured motorist coverage," *The Journal of the Virginia Trial Lawyers Association*, Volume 21 Number 1 (2009).
5. *See Goodville Mut. Casualty Co. v. Borror*, 221 Va. 967, 970 (1981) (affirming the principle, similar to the contractual canon of construction *contra proferentem*, that any ambiguity contained within an insurance policy will be construed against the insurer).
6. *See, e.g., Christy v. Mercury Casuality Co.*, 283 Va. 542 (2012) (looking to the "clear and unambiguous language" of an automobile liability policy, and holding that the policy's exclusion of med pay coverage "to the extent that benefits therefor[] are in whole or in part payable" by workers' compensation, excluded coverage of all medical expenses, even where only a portion of the medical expenses were payable by workers' compensation).
7. *See Salzman v. Kanchev*, 80 Va. Cir. 139 (Va. Cir. Ct. 2010) (finding one sentence on a declarations page operated to exclude any intra-policy stacking of uninsured / underinsured motorist coverage).
8. 283 Va. 609, 620 (2012).
9. *Id*. at 621.
10. This language is taken directly from an umbrella policy issued by State Farm.

11. *See Crowell v. Duncan*, 145 Va. 489 (1926). But be warned, negligent entrustment is a difficult claim to recover under in the Commonwealth. *See, e.g., Turner v. Lotts*, 244 Va. 554 (1992).
12. *See Johnson v. Windsor Ins. Co.*, 268 Va. 196 (2004).
13. *See* Rule of Professional Conduct 1.8(f).
14. *See State Farm Mut. Auto. Ins. Co. v. Floyd*, 235 Va. 136, 142 (1988) ("[T]he insurer has control of the defense, ordinarily including the right to negotiate settlement at its discretion....").
15. *Id.*, ("[A]n insured, in order to recover for an excess judgment on the ground that the insurer failed to take advantage of an opportunity to settle within the policy limits, is required to show that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.")
16. *Id.*; *see also Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 76 (2000).
17. Smarter people than this author can explain this in more detail. *See, e.g.*, Wehe, Jeffrey C., "Take the initiative with injury claim reserves," *Trial Magazine* (July 1, 2006).

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