

TOM HOMANN LAW ASSOCIATION NEWSLETTER

San Diego's Gay, Lesbian, Bisexual & Transgender Bar
 "Championing equal rights through education, advocacy and fellowship"

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Co-President's Column



INSPIRED

By Andrea Kimball

It never fails. Somehow, after each THLA Annual Dinner I always walk away inspired. This year was no different. For those of you who attended the Ninth Annual Dinner held at the Wyndham on May 2, 2002, you know what I am talking about. This year's keynote speaker, Jim Hammer, shared his experience prosecuting Marjorie Knoeller and Robert Noel for the death of Dianne Whipple. Jim spoke about what he learned from litigating the infamous case and being the first California prosecutor to obtain a murder conviction for a dog mauling. Jim also discussed his personal experience of coming out seven years ago and then being re-outed on the Today Show.

For me, the most memorable excerpt from Hammer's remarks were as he detailed his discussions with the jury foreman after the trial. After sitting through weeks of theatrics by the defense which included Attorney Ruiz accusing Hammer of "pandering to the gay community" and implying that because Whipple was a lesbian, her death was somehow less tragic, the jury foreman commented about these tactics by

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Truth is, fifteen years ago the defense's tactic of turning the jury against Whipple, a lesbian, might have worked. It worked for Dan White twenty years ago as he was paroled after serving only five years for the cold-blooded murder of Harvey Milk. The words of the jury foreman tell me that our work and the work of THLA is forcing a change in people's attitudes. Sure, it's still not a perfect world, there are homophobes, racists and bigots around every corner. But the foreman's incredulous statement of "who do you think we are" tells me that at least those twelve people were offended at the notion that Whipple deserved less justice based on her sexual orientation.



2002 ANNUAL DINNER

CO-PRESIDENT AWARDS

Charlie Bird, Luce Forward,
 Hamilton & Scripps
 The Honorable Carole Migden,
 CA Assemblywoman

FRIEND OF THE COMMUNITY AWARD

San Diego Volunteer Lawyers
 Program

OUTSTANDING SERVICE AWARD

Gays & Lesbians for
 Programming Excellence
 KPBS Television

This work of advocacy, education and working to change attitudes about the GLBT community is THLA's mission. It is the Jim Hammer's of the world and others who are brave enough to say "I am gay, so what" that truly forces people to evaluate their own prejudices and stereotypes. It will be a long struggle to change the years of discriminatory thinking against gays and lesbians, but it is a battle we can win. Thankfully, on that fateful day in Los Angeles, one jury of twelve acknowledged the progress we have made.

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"The Five Gold Mines of Finding Insurance Coverage for Your Clients"

By Roger D. Brown, Osborne & Nesbitt, LLP

GOLD MINE #1 UNEARTHING COVERED CLAIMS

1. **Rule of Thumb: Always Assume There May Be Coverage**

An insurance policy is a "labyrinth of verbiage, within which lurks whatever contract was made."¹ Often-times, surprising finds of coverage can be made in policies. Whenever a client is sued, therefore, the rule of thumb should be to assume coverage, identify all policies, and tender immediately.

2. **Coverage For Business Torts**

There is a good chance that a complaint filed in a business litigation dispute will allege, or at least potentially allege, at least one claim covered by insurance. This may be all that is needed to have the entire cost of defense paid for by insurance (see, Gold Mine #2).

The following is a non-inclusive list of claims which are frequently alleged in business litigation disputes and which may be covered by a standard commercial general liability policy:

Abuse of Process, Libel, Bodily Injury, Loss of Use of Property, Breach of Contract, Malicious Prosecution, Disparagement of Another's Good, Products or Services, Misappropriation Another's Advertising Ideas or Style of Doing Business, False Arrest, False Detention, Products Liability, False Imprisonment, Property Damage, Infringement of Copyright, Title or Slogan, Slander, Trespass, Invasion of Privacy, Wrongful Eviction.

The range of covered claims broadens dramatically if the defendant has any type of specialty policy, such as Umbrella Excess, Directors & Officers, Professional Liability, and/or Employment Practices Liability.

3. **Coverage For Fraud And Breach Of Contract?**

No insurance policy can expressly cover fraud claims.² However, many policies (such as Directors & Officers and Professional Liability policies) do provide coverage for breach of "duty," a broad term which arguably encompasses negligent misrepresentation claims. Fraud claims should be tendered under such policies on the basis that a potential exists that a jury could disbelieve the plaintiff's allegations of fraud yet still find the defendant liable, on the same facts, under a theory of negligent misrepresentation. This "lesser-included offense" argument is often successful in persuading insurers to defend fraud claims.

Breach of contract claims may be covered by both commercial general liability insurance policies³ and specialty policies.⁴ Even policies which purport to exclude contract claims often only exclude claims alleging breach of an "express" contract. This leaves the door open for coverage of implied contract and *quantum meruit* claims.

1. *Calmar S.S. Corp. v. Scott* (2nd Cir. 1952) 197 F.2d 795.

2. *California Insurance Code* ? 533 prohibits coverage for loss "caused by the willful act of the insured."

3. *Vandenberg v. Superior Ct. (Centennial Ins. Co.)* (1999) 21 Cal.4th 815, 839.

4. For example, Directors & Officers insurance policies usually cover claims arising out of "breach of duty" without expressly limiting the coverage to tort rather than contractual duty.

GOLD MINE #2 TRIGGERING A DEFENSE

1. **Duty to Defend Standard**

a. **"Potential" For Coverage**

An insurer's duty to defend is triggered whenever a third party asserts a claim against an insured which is

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Insurance Goldmines continued from page 2...

“potentially” covered by the policy. Or, stated another way, an insurer has to defend if there is “any possibility” of coverage.¹

b. “Facts,” Not “Labels,” Trigger Coverage

Whether a complaint alleges a potentially covered claim is determined not by the formal causes of action pled, but rather by the facts alleged.² For example, if the complaint alleges facts which could support a cause of action for defamation, this will trigger coverage even though the complaint does not include a cause of action, or even seek damages, for defamation.

c. Extrinsic Evidence Must Be Considered

An insurer may have a duty to defend even if a complaint does not allege facts or causes of action evidencing a potentially covered claim. The duty to defend is determined based on “the facts of the complaint *and extrinsic facts*.”³ So, for example, if in the course of being deposed the plaintiff testifies that the insured damaged his property, this will trigger a duty to defend even though the complaint contains no mention of a property damage claim. Based on the facts ascertained through discovery (i.e., the plaintiff’s deposition), a “potential” exists that a property damage claim could be pled.

2. Duty To Defend Entire Action

An insurer has a duty to defend the entire action if *any* claim is potentially covered.⁴ In other words, identify a single potentially covered claim, and the entire costs of defense will be paid for by insurance. Although the insurer has a right to later seek reimbursement of any defense costs it paid to defend claims which were not potentially covered by its policy, this is a right it will rarely exercise given the difficulty it will face in meeting its burden of proof.⁵

1. Illustration of how this standard applies can be found in the seminal duty-to-defend case of *Gray v. Zurich* in which the California Supreme Court held that an insurer had to defend its insured against a charge of intentional assault. Despite the plaintiff’s pleading of intentional conduct, the Court found a “potential” that the jury could find that the insured acted only negligently. *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275. See also, *Montrose Chem. Corp. v. Superior Ct. (Canadian Universal Ins. Co., Inc.)* (1993) 6 Cal.4th 287, 295.
2. *Vandenberg v. Superior Ct. (Centennial Ins. Co.)* (1999) 21 Cal.4th 815,839; *CNA Cas. of Calif. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 607-608.
3. *Foster-Gardner, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (1998) 18 Cal.4th 857, 880.
4. *Buss v. Superior Ct. (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35, 48.
5. The California Supreme Court in *Buss*, supra, noted that it may be “extremely difficult” for an insurer to carry its burden of proving an allocation of the costs of defending claims not even potentially covered by its policy. *Buss*, supra, 16 Cal.4th 35, fn.21.

GOLD MINE #3

MINING FOR EXCESS GOLD

1. Types of Excess Coverage

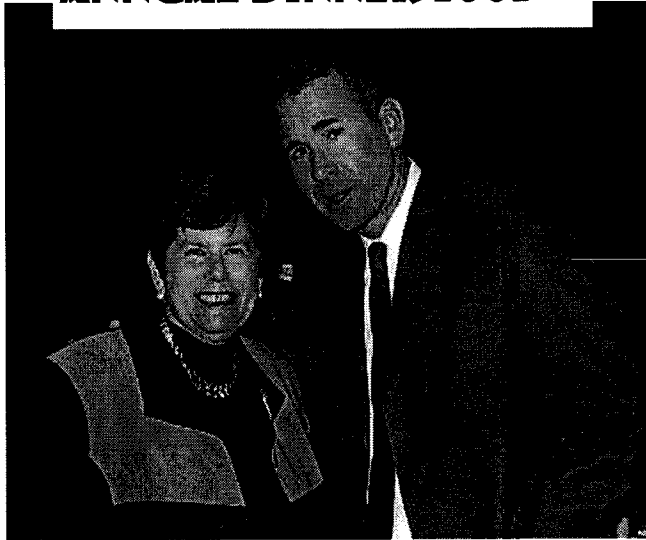
There are two types of excess policies: “following form” and “umbrella.”

A “following form” excess policy simply adds an excess layer of identical coverage above the underlying primary policy. As its name implies, a “following form” excess policy insures against exactly the same risks as the underlying primary policy.¹

An “umbrella” excess policy also adds an excess layer of identical coverage above the primary policy. In addition, however, an “umbrella” excess policy also insures certain additional risks not covered by the pri-

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ANNUAL DINNER 2002



Pictured: Hon. Bonnie Dumanis & our speaker Jim Hammer

Schedule of Events

Wednesday, June 12, 2002:
CAL WESTERN Law School
Board Meeting, 6 p.m.

Wednesday, July 10, 2002:
CAL WESTERN Law School
Board Meeting, 6 p.m.

July 26-28, 2002: PRIDE WEEKEND

Save the Date: Aug. 10, 2002*

A joint event for THLA and LHR (Lawyers for Human Rights from Los Angeles) will do a day at the Del Mar Races. Please try to attend to meet LHR members.

*Note that this is a change of date from our last announcement.

September 2002:
Law Student Reception
Time/Place T.B.A.

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mary.² For example, an “umbrella” excess policy may cover emotional distress, discrimination and humiliation claims; it may have a more inclusive list of additional insureds; it may cover damage to property in the insured’s care, custody or control; it may have less stringent cancellation provisions; and it may provide broader territorial coverage.³

It is with respect to this broader “umbrella” coverage that “drop down” may apply which can be a gold mine in business litigation.

2. “Drop Down”

“Drop down” refers to a situation where a claim is not covered by the primary policy, but is covered by the broader coverage of the “umbrella” policy. For example, an insured sued for discrimination may have no coverage under its primary policy, but the claim may be covered by its “umbrella” excess policy.

In this situation, the umbrella excess policy “drops down” and functions in all respects as a primary policy with duties to both defend and indemnify the insured.⁴

1. *Coca-Cola Bottling Co. v. Columbia Cas. Ins. Co.* (1992) 11 Cal.App. 4th 1176, 1182-1183.
2. *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 812.
3. Since excess insurance policies are generally not standardized there can be significant differences between umbrella excess forms.
4. Usually subject to a self-insured retention.

GOLD MINE #4

WOULD YOU LIKE CUMIS WITH THAT?

Cumis counsel means two things to insurers, neither good: they lose control of the defense, and the cost of the defense just went up. Since insurers almost universally “overlook” an insured’s right to *Cumis* counsel (despite having a statutory duty to notify an insured of this right), it is always important to carefully analyze an insurer’s reservation of rights to see if a *Cumis* right is triggered. Very often it is.

Unlike insurer-appointed defense counsel - who represents both the insured and the insurer - *Cumis* counsel represents *only* the insured. The *only* duties *Cumis* counsel owes to the insurer are those circumscribed by section 2860(d) of the California Civil Code, i.e., duties to inform and consult with the insurer on matters relating to the action.

Relieved of any fiduciary duties owing to the insurer, *Cumis* counsel should conduct the defense with a view to not only winning the case, but also ensuring that if the case is lost, or it settles, the client’s liability will be covered by insurance. From discovery, motion practice, structuring settlements, and selecting verdict forms, *Cumis* counsel must have a thorough understanding as to how all aspects of the defense may impact, and could enhance, coverage.¹

1. Because the insurer is defending, albeit subject to a reservation of rights, the insured is still bound to comply with the policy conditions, the most important of which forbids the insured settling the case without the insurer’s consent. (See, Land Mine #5.)

GOLD MINE #5

UNCORKING POLICY LIMITS

1. *Within-Limits Settlement Demand*

California, rightly, imposes very severe penalties on insurers which unreasonably reject opportunities to settle third-party claims against their insureds.

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The rule is as follows: an insurance company has a duty to accept a third-party claimant's settlement demand provided the demand is reasonable and within the limits of the policy. If the insurer rejects the demand then it will be liable for the full amount of any resulting judgment against the insured, even if the judgment exceeds the policy's limits.¹

Provided the third-party claimant is willing to make a reasonable within-limits demand this can have the effect of entirely insulating the insured from liability. Either the insurer will accept the demand and the case will settle, or the insurer will reject the demand thus opening up its limits in the event of an excess judgment at trial.

2. *Settling After An Insurer Denies Coverage*

All bets are off when an insurance company wrongfully refuses to defend its insured against a third-party claim. California law permits an insured, placed in this predicament, to enter into a reasonable settlement with the plaintiff and then sue the insurer to recover the settlement payment.

Two important rules apply here. First, both the defense costs and the settlement will be presumed to be reasonable and the burden will be on the insurer to rebut this presumption.² Second, if the third-party claim alleged both covered and noncovered claims, the insurer will have the burden of proving how much of the settlement was paid to settle the noncovered claims. If the insurer cannot carry this burden it will be liable for the entire settlement.³

California law also permits an insured, wrongfully denied a defense, to assign all insurance rights (except punitive damage and emotional distress claims) to the plaintiff in exchange for a covenant not to execute on a stipulated judgment. This is a difficult, and dangerous, area of the law, however, and certain legal steps must be taken in order to make the stipulated judgment binding on the insurer.⁴