DON'T IGNORE INSURANCE BROKER LIABILITY

By Mick Marderosian

When I first started my civil trial practice in 1977, I was told that a "good tort case" required the "triangle" of (1) liability; (2) damages; and (3) insurance coverage to succeed. You needed all three. Back in those days, if you had good liability and damages but no insurance coverage, many of those cases were turned away simply due to the absence of a recovery source. Since then, however, California law has developed in the arena of insurance agent/broker liability for failing to "procure" the correct type of insurance coverage for a client/insured. By taking on a number of these cases, I have learned that a denial of coverage by an insurance company does not necessarily mean the end of the road for a client regardless of whether you represent the plaintiff or defendant. If an insurance agent/broker fails to procure the coverage "requested" by the insured or fails to meet the standard of care in recommending necessary insurance coverage to an insured, California law allows the insured the ability to seek full reimbursement for any settlement or adverse judgment he or she encounters in defending himself or herself, allows for full recovery of all reasonable and necessary attorney fees and costs incurred by him or her in the underlying litigation, and allows recovery of general damages. Insurance broker liability is a very viable source of recovery to consider whenever you are confronted with a denial of insurance coverage that your client thought he or she had or should have had.

This issue of insurance broker liability typically comes up in three scenarios:

1. You represent an injured plaintiff who sues a defendant who then tenders the claim to his or her insurance carrier but is denied insurance coverage because the loss is either not covered under the terms of the insurance policy or is specifically excluded. (Example: Plaintiff is seriously injured in an auto accident and sues defendant who was operating a vehicle that was not included as one of defendant's covered vehicles under his or her policy. Plaintiff obtains a judgment against the uninsured defendant, who then assigns to the plaintiff all rights the defendant may have against agent/broker who failed to list the vehicle when procuring insurance coverage for the client. The plaintiff then sues agent/broker directly seeking satisfaction of the judgment including recovery of attorney fees); or

2. You represent a defendant who has been sued, but the insurance carrier has denied coverage because the loss is either not covered under the terms of the policy or is specifically excluded under the defendant's liability policy. (Example: a property management defendant is sued for negligent maintenance of a property by an injured plaintiff but coverage is denied because property management services were specifically excluded under the policy and the defendant is left uninsured. Defendant then hires an attorney to defend him or her in the underlying action and to initiate a lawsuit against the insurance broker who failed to procure the correct coverage for the defendant); or

3. You represent a defendant who thought coverage was placed but learned after a loss that no coverage or inadequate coverage had been procured by the insurance agent/broker. (Example: employer thought he had workers compensation coverage but learned that none had been obtained by the insurance agent/broker after an injured employee files a worker's compensation claim, thus leaving the employer exposed to civil liability, damages and penalties.)

STEP ONE : ESTABLISH THAT DENIAL OF COVERAGE BY INSURANCE CARRIER WAS PROPER

I have found it most beneficial to first explore and judicially resolve the issue of whether the subject insurance policy did or did not provide coverage for the loss at hand. This is usually handled through a declaratory relief action (C.C.P. § 1060) brought by the insured and solely against the insurance carrier and not the broker. The court decides that there either is or is not coverage. A ruling which confirms that the subject insurance policy does not provide coverage for the subject loss turns the focus completely on the insurance broker who failed to procure the right coverage for the client. Without this judicial determination, the broker will always try to defend itself by claiming that the insurance carrier is wrongfully denying policy benefits and that the damages being suffered by the insured are not due to a "failure to procure", but rather by the insurance carrier's wrongful denial of policy benefits. It should also be noted that pursuant to *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services LLC,* (2005) 127 Cal. App. 4th, 1311, attorney fees can be recovered for pursuing the declaratory relief action as discussed in greater detail below.

STEP TWO : ESTABLISH THAT THE INSURANCE AGENT/BROKER FAILED TO PROCURE COVERAGE

This is usually the heart of the litigation. Generally speaking, the insurance agent's responsibility to procure an insurance policy for a client must first be requested by the client unless the following exceptions apply:

An insurance agent or broker may be liable to a client/insured for breach of contract or negligence when an agent fails to obtain insurance for a client as promised or fails to obtain the coverage that was requested. An insurance agent or broker may also be liable if any of the following happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided; (b) there is a request or inquiry by the insured for a particular type or extent of coverage; or (c) the agent assumes an additional duty by either express agreement or by holding himself or herself out as having expertise in a given field of insurance being sought by the insured. *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.*, 177 Cal. App. 4th 624, 98 Cal. Rptr. 3d 910, 2009 Cal. App. LEXIS 1496 (Cal. App. 2d Dist. 2009); *Saunders v. Cariss*, 224 Cal. App. 3d 905, 908-909 (1990)

In procuring a policy for a customer, an insurance broker must exercise good faith and reasonable skill and diligence in selecting the insurer, obtaining the best terms possible, and ensuring that the policy covers the property in question. Bernard Witkin, Summary of California Law Insurance § 20 at 52 (10th ed. 2005); *Desai v. Farmers Insurance Exchange*, 47 Cal. App. 4th 1110, 1119-1120 (1996).

An insurance agent cannot avoid liability for foreseeable harm caused to a client by his or her silence or inaction where the broker understands the needs of the insured and the expectations with regard to the coverage sought. *Westrick v. State Farm Insurance*, 137 Cal. App. 3d 685, 691 (1982).

An insured is not required to read an insurance policy to verify that it contains the coverage the insurance agent said that he or she was going to obtain. An insured is not obligated to read the insurance policy and is entitled to rely on an insurance agent's advice. *Clement v. Smith* (1993) 16 Cal.App.4th 39, 44-45; *Williams v. Hilb, Rogal & Hobbs Ins. Servs of California, Inc.* (2009), 177 Cal. App. 4th 624, 639; *Paper Savers, Inc. v. Nacsa* (1996), 51 Cal. App. 4th 1090, 1092.

STEP THREE : ESTABLISH DAMAGES CAUSED BY THE FAILURE TO PROCURE THE CORRECT COVERAGE

Under California law, when a an insurance broker or agent's conduct requires a plaintiff to either sue a third party or defend a lawsuit, or both, attorney fees the plaintiff incurs in these other actions are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action. The "tort of another" doctrine has been applied to permit recovery of attorney fees resulting from an insurer's tortious conduct, and it should also apply to fees incurred as a result of an insurance broker's alleged negligence. *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC*, 127 Cal. App. 4th 1311, 26 Cal. Rptr. 3d 452, 2005 Cal. App. LEXIS 494, 2005 Cal. Daily Op. Service 2739, 2005 Daily Journal DAR 3686 (Cal. App. 1st Dist. 2005).

The reasonable value of a good or service is often determined by the actual payments tendered and accepted. There is therefore a presumption that the amount paid by the plaintiff for his or her attorney fees is reasonable. *Pacific Gas & E Co., v. G.W. Thomas Drayage*, 69 Cal. 2d 33, 42-43 (1967); *Kershaw v. Maryland Casualty Co.*, 172 Cal. App. 2d 248, 258 (1959).

If the evidence supports insurance broker liability, then reimbursement of attorney fees becomes a hotly contested issue and will include scrutiny over the hourly rate charged, the necessity of the services performed, and the amount of time charged for specific services. It is very important to keep good time and billing records which will have to be produced during the course of the litigation in proving recovery of reasonable and necessary attorney fees. You are also subject to having your deposition taken on this issue and there usually is a limited waiver of the attorney-client privilege as to attorney fee and billing issues. Retention of an expert witness may also be necessary on the issue of whether your requested fee is reasonable and necessary including analysis of the charged hourly rate.

It should also be remembered that you can recover general damages and emotional distress on behalf of your client, who likely suffered significant anguish over the fact that he or she was uninsured or underinsured and facing a judgment against his or her own assets.

CONCLUSION

It should be noted that the general duty of reasonable care which an insurance agent/broker owes his or her client does not include the obligation to procure a policy affording the client "complete" liability protection (*Jones v. Grewe*, (1987) 189 Cal. App. 3rd 950). However, in my experience, the problem is usually more specific than this. Usually the specific loss falls within coverage that the insured, (1) either requested and there is a dispute over whether he or she did request it, or (2) the broker should have recommended the coverage because he or she holds himself out as having an expertise in the given field of insurance, or (3) the insured was told that he or she did have the coverage when in reality he or she did not. This is why it is so important to obtain the entire file from the insurance carrier through the declaratory relief action including the carrier's underwriting file and then the entire insurance agent/broker's file in order to find out if the coverage was requested, discussed, recommended, stated (or misstated) to the insured or the insurance company, or what was simply missed by the agent/broker.

At the end of the day, if you are successful in establishing the liability of the insurance broker, you can recover for your client (1) the amount of money it took to settle the underlying case or satisfy the adverse judgment; (2) all reasonable and necessary attorney fees and costs incurred by the client in having to defend himself or herself due to a lack of insurance coverage and pursue a declaratory relief action against the insurance carrier; and (3) general damages for the emotional distress your client suffered as a result of being put in an uninsured position and faced with a large uninsured judgment. These cases are often hard fought especially over the issue of recovery of attorney fees, but well worth pursuing in correcting the problems that arise from a lack of insurance coverage.