FINDING AVAILABLE AVENUES

OF COVERAGE & COLLECTIBILITY

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A major component of achieving justice for your clients is to find the avenue of collectibility that will indemnify for the loss. Oftentimes attorneys are confronted with collectibility obstacles such as a lack of insurance for various reasons, small policy limits, or polices that ostensibly don't provide coverage, or provide only limited coverage. Discussed in this article are some creative ideas to help you navigate the avenue of collectibility.

GET THE INSURANCE POLICY AND INSURANCE AGENT'S FILES

When the issue of what is or is not covered under a policy of insurance surfaces, you must get the actual policy. Many times an insurance company will conclude that the policy expired prior to the accident or that there is a particular exclusion of coverage. In those events get the policy and review it yourself because insurance companies are often wrong about these matters. Insurance policies are discoverable. *CCP 2017(b)* provides, "a party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgement that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment". Insurance policies are subject to discovery *(Irvington-Moore, Inc. v Sup.Ct. 14 Cal.App.4th 733, 18 Cal.Rptr 2d 49)*.

Where an insurance company asserts that a policy lapsed, or was cancelled, or non renewed, it should not end your inquiry. Theses are typical examples of obstacles to collectibility that may or may not be true. You must look at all of the relevant documents to get at the truth. Start by identifying the name of all of the insurance agents that the defendant used prior to the accident and then subpena each and every file. You may be surprised to learn that the alleged lapsed or cancelled policy is still in effect contrary to what the insurance company is telling you. For example, suppose an insurance company failed to give an appropriate notice of cancellation or non renewal or failed to send it to the named insured and other required persons pursuant to the Insurance Code or could not prove that the notice of cancellation or non renewal was sent. Some examples:

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In <u>*State Farm Mutual Automobile Insurance Company v Brown*</u> *(1974) 40 Cal.App.3d 385, 115 Cal.Rptr 213,* the insured received a semi annual premium notice followed by a notice of lapse and did not pay the renewal premium. Nonetheless the policy was held to automatically renew because State Farm failed to send out a notice of intention to cancel for non payment. *Insurance Code § 663* requires that no insurer shall fail to renew a policy in the absence of giving its insured a 20 day notice of its intention not to renew. The failure to give such notice creates an automatic renewal of the policy beyond its expiration date.

<u>*National Automobile & Casualty Insurance Company v California Casualty Insurance Company*</u> *(1983) 139 Cal.App.3d 336, 188 Cal.Rptr 670,* likewise, held that the insurers failure to give 20 days advance notice of non renewal results in an automatic renewal of the policy. *Insurance Code § 663* now requires 30 days advance notice of non renewal and a statement of reasons pursuant to *Insurance Code § 666.*

An insurance company's attempt to cancel a policy is ineffective unless there is at least 20 days prior notice or 10 days prior notice where the reason is non payment of premium *(Insurance Code 662).* The insurance company is required to state the reason for the cancellation and unless the reason is included in the notice of cancellation or the notice of cancellation states that upon written request by the named insured to the insurer 15 days before the date of cancellation the insurer will specify the reason for such cancellation, the policy remains in force *(Insurance Code § 662).* In <u>*Lee v Industrial Indemnity Company*</u> *(1986) 177 Cal.App.3d 921, 223 Cal. Rptr 254,* the insurance company attempted to send a notice of cancellation to the insured but the notice failed to contain a statement required by Insurance Code § 677, that the insured upon written request could obtain a statement of facts upon which the cancellation was based. The statute specifically provides that the cancellation notice "shall state" that the insured may request the underlying facts. The use of the term "shall" connotes a mandatory obligation, *(Insurance Code § 16).*

In <u>*Firemans Fund Insurance Company v Allstate Insurance Company*</u> *(1991) 234 Cal.App.3d 1154, 286 Cal.Rptr 146,* the insurance company urged that it had cancelled the policy of a highway carrier prior to the accident. The evidence showed that the insurance company failed to give notice to the Public Utilities Commission as is required under <u>*Public Utilities Code § 3634.*</u> The court held that in the absence of notice to the PUC the policy remained in force for the full policy limit not withstanding the fact that the highway carrier had obtained replacement insurance and that the PUC had received written notice of such new insurance. The insurance carrier failed to comply with its mandatory duty in sending notice to the PUC.

Also see, *Transamerica Insurance Company v Tab Transportation, Inc.* (1995) *12 Cal.4th 389, 48 Cal.Rptr 2d 159,* which also held that a highway carriers insurance policy remain in effect until cancelled by 30 days written notice to the PUC.

Insurance Code § 663 requires a 20 written notice prior to renewal of a policy and 30 day written notice prior to non renewal of a policy. In the event the insurance company fails to give the named insured notice within these time limits the policy remains in effect for 30 days from the date the written notices are finally sent out.

Where an insurance policy is cancelled other than for non payment of premium the insurance company is required to notify the insured of the possible eligibility for automobile insurance through the assigned risk plan. Arguably, the failure to include such a notice would keep the policy in force, *(Insurance Code § 665).*

How does an insurance company prove that it gave the appropriate notice to its insured? Merely showing that an envelope was mailed to its insured is not enough. In *Pries v American Indemnity Company* *(1990) 220 Cal.App.3d 752, 269 Cal.Rptr 617,* the insured claimed that it did not receive a notice of cancellation yet the insurance company was able to come up with a postal receipt showing that a notice was mailed to the insured. The court held that this was not sufficient because the envelope could have been empty. The court also rejected a declaration of the insurance company's habit and custom in mailing cancellation notices to prove that a notice cancelling this particular policy was mailed to the insured. The court set forth the kind of evidence of proof of mailing that an insurance company needs in order to prove that it complied with the Insurance Code in giving notice of cancellation. This includes a declaration of a competent witness who (1) placed the notice of cancellation in an envelope, (2) can state the envelope was address to the insured, (3) that the envelope had proper postage, (4) that it was placed in the U.S. Mail in a certain location.

Escobedo v Snider *(1996) W171209 (Cal.App.2d)* involved an airplane crash where the insurance company for the airplane took the position that there was no coverage for non payment of premium and that the policy had lapsed prior to the date of accident. The insurance company had sent several notices indicating that the policy had lapsed and was cancelled prior to the accident. The insurance company failed to send a notice 30 days in advance of cancellation to the Department of Aeronautics pursuant to *Public Utilities Code § 24361* which requires a non-commercial aircraft policy to remained in force and effect until the insurer mails such a notice of cancellation. This recent case demonstrates clearly that lack of compliance with a

statutory mandate requiring transmittal of cancellation notices is still an effective tool in establishing insurance coverage.

In cases where the defendant's insurance carrier has become insolvent and there is no claim to assert with the California Insurance Guaranty Association (CIGA), an attorney should look into the potential liability of the insurance broker. In *Nowlon v Koram Insurance Center, Inc.* *(1991) 1 Cal.App.4th 1437, 2 Cal.Rptr 2d 683*, an insurance broker placed liability coverage for a maintenance company with an out of state insurer not authorized to do business in California. The insurer became insolvent. Plaintiff was unable to assert a claim with CIGA so he filed a lawsuit against the insurance broker for the defendant claiming the broker was negligent, per se, for violating a *Insurance Code § 703* by selling insurance from an out of state carrier while not being a surplus line broker. The court held that the statute was intended to safeguard the rights of third parties who may be injured by acts or omissions of insureds.

INDEPENDENT LIABILITIES AS PROVIDING ADDITIONAL AVENUES OF COLLECTIBILITY

Where the automobile policy limits are limited one must give consideration to other independent liabilities that might exist. For example; negligent entrustment applies to one who entrusts a motor vehicle to a person known to be incompetent or unfit to drive. *Syah v Johnson* *(1966) 247 CA.2d 534, 55 Cal.Rptr 741;* *Allen v Toledo* *(1980) 109 CA.3d 415, 167 Cal.Rptr 270.* Negligent entrustment liability is independent and therefore would trigger insurance limits that are in excess of the vicarious liability of an owner of a vehicle pursuant to Vehicle Code § 17150.

a.) FIRST PARTY BAD-FAITH

Post *Moradi-Sahalal v Firemans Fund* *(1988) 46 Cal.3d 487*, bad faith cases in the automotive arena are brought on a first party basis, usually UM or UIM cases. Insurance companies have a duty under common law of good faith and fair dealing. Where an insurance company unreasonably refuses UM or UIM benefits a bad faith case should be considered. Under no circumstances will the UM policy limits be opened or increased, *Neal v Farmers Insurance Exchange* *(1978) 21 Cal.3d 910*. The insured or anyone qualified as an insured can recover actual damages for the loss of use of settlement funds due to the delay, emotional distress, litigation expenses, and punitive damages where malice is established pursuant to *CCP § 3294*.

b.) THIRD PARTY BAD-FAITH

In third party cases, there is no direct bad faith case against the defendant's insurance carrier. However, following a verdict, in excess of the policy limits, the insured would have a right to proceed against their carrier for bad faith. The plaintiff can obtain an assignment of the insureds bad faith

claim and any contract claim in exchange for covenant not to enforce any judgment. The plaintiff third party would then be in a position to sue the insurance company for the full amount the judgment although in excess of the policy limits. There is a split of authority as to whether or not a bad faith action lies against an insurer before an excess judgment has been rendered and whether a prejudgment assignment is effective. *Critz v Farmers Insurance Group (1965) 230 Cal.App.2d 788, 41 Cal.Rptr 401* which validates; *Smith v State Farm Mutual Auto Insurance Company (1992) 5 Cal.App.4th 1104, 7 Cal.Rptr.2d 131*, for contrary view. A stipulated judgment will not support an assignment of a bad faith cause of action against an insurer (*Smith v State Farm Mutual Auto Insurance Company*, supra. An assignment of an insurers bad faith claim may be made involuntarily by operation of law such as when an insured files bankruptcy and it is then made by the bankruptcy trustee. *Purdy v Pacific Auto Insurance Company (1984) 157 Cal.App.3d 59, 203 Cal.Rptr 524*, Emotional distress and punitive damages claims are non assignable as they are considered personal tort claims, *Murphy v Allstate Insurance Company (1976) 17 Cal.3d 937, 132 Cal.Rptr 424*.

Since there is no splitting of a bad faith cause of action, a judgment obtained by the assignee merges the other causes of action for the personal torts. An assignment of the entire claim waives the purely personal damages. There are several alternatives to the splitting problem. One is for the insured to sue in his name for all damages and simply agree to pay all or any part of the recovery to a third party assignee, *Murphy v Allstate*, supra. Usually, although the suit is in the insureds name, the third party assignee assumes control of the litigation and pays all costs. The insured and third party assignee can join in the action against the insurer together and so doing it permits recovery on both the assigned claims and the personal tort claims including that of punitive damages, see *Cain v State Farm Mutual Auto Insurance (1975) 47 Cal.App.2d 783, 121 Cal.Rptr 200*. An excellent letter of "assignment of action for covenant not to execute" can be found in Rutter Group, California Practice Guide, Insurance Litigation, Chapter 12B, pg 123.

c.) SPOLIATION OF EVIDENCE

In the case where there is negligent or intention destruction of evidence or failure to preserve evidence, a cause of action may lie for spoliation of evidence. An agreement to preserve the physical evidence is an essential element of the tort of intentional spoliation. *Smith v Sup.Ct (1984) 151 Cal.App.3d 491, 198 Cal.Rptr 829*, *Reid v State Farm Mutual Auto Insurance Company (1985) 173 Cal.App.3d 557, 218 Cal.Rptr 913*. The courts have also recognized a cause of action for negligent destruction of evidence where there has been a special relationship between the parties, see *DeVera v Long Beach Public*

Transit Company (1986) 180 Cal.App.3d 782, 225 Cal.Rptr 789.

d.) PIERCING THE CORPORATE VEIL

A situation may develop where a corporation or an individual may in fact be the "alter ego" of the other and piercing the corporate veil maybe the only way to obtain full compensation. In *Automotriz v Resnick* 47 Cal.2d 792, 306 P.2d 1, the supreme court held that if a corporation is dominated or controlled by one or more individuals and the failure to disregard the corporate entity would sanction a fraud or promote injustice, the corporate veil would be pierced. In that event a court would disregard the corporate entity and assess the tort against the individuals themselves. An important factor is whether the corporation was undercapitalized for its intended business purpose. Other factors include; co-mingling of funds or assets, failure to segregate funds of separate entities, diversion of corporate funds and assets, treatment by an individual of the corporate assets as his own, failure to maintain adequate corporate records, etc.., see *Associated Venders, Inc. v Oakland Meat Company* 210 Cal.App.2 825, 26 Cal.Rptr 806 for discussion of various factors. The "alter ego" doctrine applies in holding a corporation or an individual as the "alter ego" of the other. The basic requirement is that there be such a unity of interest in ownership that the separate personalities of the corporation and that the individual no longer exist and that if the acts are treated of those of the corporation alone, an inequitable result will follow, *Automotriz v Resnick*, supra.