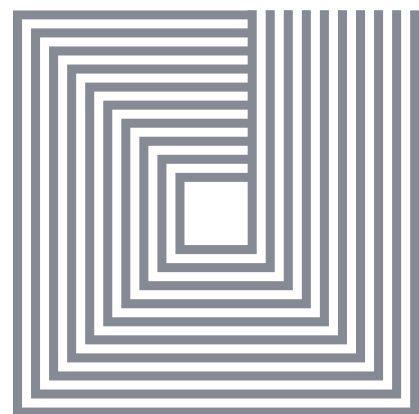


WHEN INSURANCE DECIDES THE CASE

TOOLS FOR ATTORNEYS AND MEDIATORS



PRESENTED BY

HON. EVELIO GRILLO (RET.) – ADR SERVICES, INC.

HON. PAUL HERBERT (RET.) – ADR SERVICES, INC.

JOAN COCHRAN, ESQ. – COCHRAN, DAVIS & ASSOCIATES PC

TANYA GOMERMAN, ESQ. – GOMERMAN | BOURN & ASSOCIATES

MIKE LAURENSEN, ESQ. – GORDON REES SCULLY MANSUKHANI, LLP

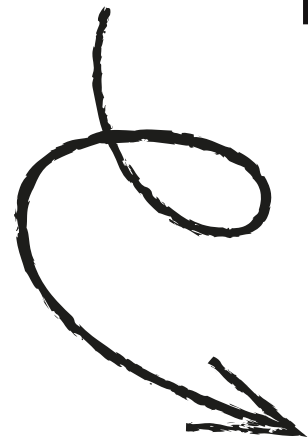
OUTLINE

- Insurance Fundamentals ○
- Insurance in Settlement ○
- Policies Frequently Seen in Litigation ○
- Key Coverage Concepts ○
- Carrier Considerations in Settlement ○
- Policy-Limit & Time-Limited Demands (§999) ○
- Applied Hypotheticals ○

INSURANCE BASICS: AN OVERVIEW

INSURANCE IS A KEY RESOURCE FOR ALL SIDES:

- **Plaintiffs:** Most direct path to compensation
- **Defendants:** Defense + indemnity against catastrophic loss
- **Lienholders:** Opportunity for partial reimbursement



Today's Focus:

Third-Party Insurance Coverage: Protects the policyholder when sued for alleged liability

WHY ATTORNEYS MUST UNDERSTAND INSURANCE



1. Insurance nuances impact **litigation strategy** and **case outcomes**
2. Policies contain **limitations, exclusions, defined terms, and burdens of proof**
3. Understanding coverage strengthens negotiation leverage

COVERAGE PROMISES & THRESHOLD QUESTIONS

Key Questions

- Do the allegations fall within the policy's **Insuring Clause**?
- Was the event **sudden and accidental**?
- Was there an "**occurrence**" during the policy period?

Typical Insuring Clause

Insurer "will pay those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' ... caused by an 'occurrence' ... during the policy period."

READING THE POLICY CAREFULLY

- Review the **Definitions** Section (glossary)
- Copy/paste all **defined terms** as written
- Confirm the **burden of proof**
 - **Insured** → prove coverage applies
 - **Insurer** → prove exclusions apply
- Identify **Exclusions**:
 - Punitive damages
 - Mold
 - Other policy-specific carve-outs

COVERAGE GAPS BY INSURANCE TYPE

Bodily Injury / Property Damage

- Policy limits
- Intentional acts not covered

Owners / Landlords / Tenants

- Return of rent
- Attorney fee awards
- Mold & toxic substances

Employment (EPLI)

- Large SIRs
- Wasting limits
- Plaintiff's attorney fee awards
- Consent clauses

Professional Liability

- Consent provisions complicate settlements

Construction Defect (CGL)

- Contractor's work is NOT an "occurrence"
- Only resulting property damage may be covered
- No coverage for breach of contract
- Mold frequently excluded

PRACTICAL COVERAGE CONSIDERATIONS

ATTORNEYS SHOULD EVALUATE:

- Have all claims and cross-claims been pled?
- Have you triggered the duty to defend?
 - Creates insurer incentive to settle
 - Without it: plaintiffs pursue only the insured's assets
- Have all funding sources been identified?
 - Primary + excess coverage
 - All significant assets

ADDITIONAL PRACTICAL QUESTIONS



- Are there **Reservation of Rights** letters?
- Is there a **Self-Insured Retention (SIR)**?
 - What is its size?
- Are any **pooling agencies** involved?

INSURANCE IN SETTLEMENT NEGOTIATIONS

- Understand the interests of:
 - The **insured**
 - The **insurance company**
- Does the insured have (or need) **coverage counsel?**
- Identify opportunities for **synergy** to protect both parties
- Insurance realities directly influence settlement posture and ranges

PUTTING IT INTO PRACTICE



In Settlement:

- Know coverage limits
- Know exclusions
- Know SIR obligations
- Understand insurer motivations
- Use coverage facts to inform your strategy and negotiation angles

Rutter Group: California Practice Guide — Insurance Litigation

- Excellent starting point for researching:
 - Specific types of insurance
 - Leading appellate decisions
 - Definitions, clauses, exclusions, and coverage interpretation

**RECOMMENDED
RESOURCE**

WHAT CAN AN INSURER CONSIDER WHEN EVALUATING A SETTLEMENT OFFER IN A PERSONAL INJURY LAWSUIT?

1. Whether or not the claim is covered under the Policy.
2. The Policy Limits.
3. A desire to reduce the amount of future settlements.
4. Whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.



- A 1. and 2.
- B 3 Only
- C 4 Only.
- D All of the Above

JOHANSEN

Johansen v. California State Auto. Assn. Inter-Ins. Bureau,
15 Cal.3d 9

Johansen involved an insured that was sued as a result of an automobile accident. In *Johansen* the court found that the insurer refused to settle in bad faith when, faced with a substantial likelihood of an excess judgment, the insurer refused to settle within policy limits.

The insurer did not settle because it believed that the automobile accident was not covered by the terms of the policy. Although the insurer had a good faith basis to believe that coverage was not afforded under the policy, the outcome of a declaratory relief action determined that the insured's policy did, in fact, cover the accident. The court found that liability will attach even where the denial of coverage was made in good faith. *Id.* at 13.

SUCH FACTORS AS:

[1] the limits imposed by the policy,
[2] a desire to reduce the amount of future settlements, or
[3] a belief that the policy does not provide coverage, should not affect a decision as to whether the settlement offer in question is a reasonable one.” (*Id.*, at p. 16, italics added.)

- The court did, however, expressly reserve in a footnote the question of the extent that a coverage dispute might be taken into account by an insurer in a case where there were *multiple claims* asserted by the insured, some of which were indisputably *not covered*.

Johansen also expressly described the standard that is to be applied to determine if a settlement offer is “reasonable”:

“[T]he *only permissible* consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.”

JOHANSEN

The *Johansen* court found that an insurer must weigh the interests of the insured with equal weight as its own when evaluating a reasonable settle demand. To that end, the court said,

“ California authorities establish that an insurer who fails to accept a reasonable settlement offer within policy limits because it believes the policy does not provide coverage assumes the risk that it will be held liable for all damages resulting from such refusal, including damages in excess of applicable policy limits.” *Id.* at 13.

**CAN REFUSAL TO SETTLE BE
IN BAD FAITH IF NO
EXPOSURE TO AN EXCESS
JUDGMENT?**

A

Yes

B

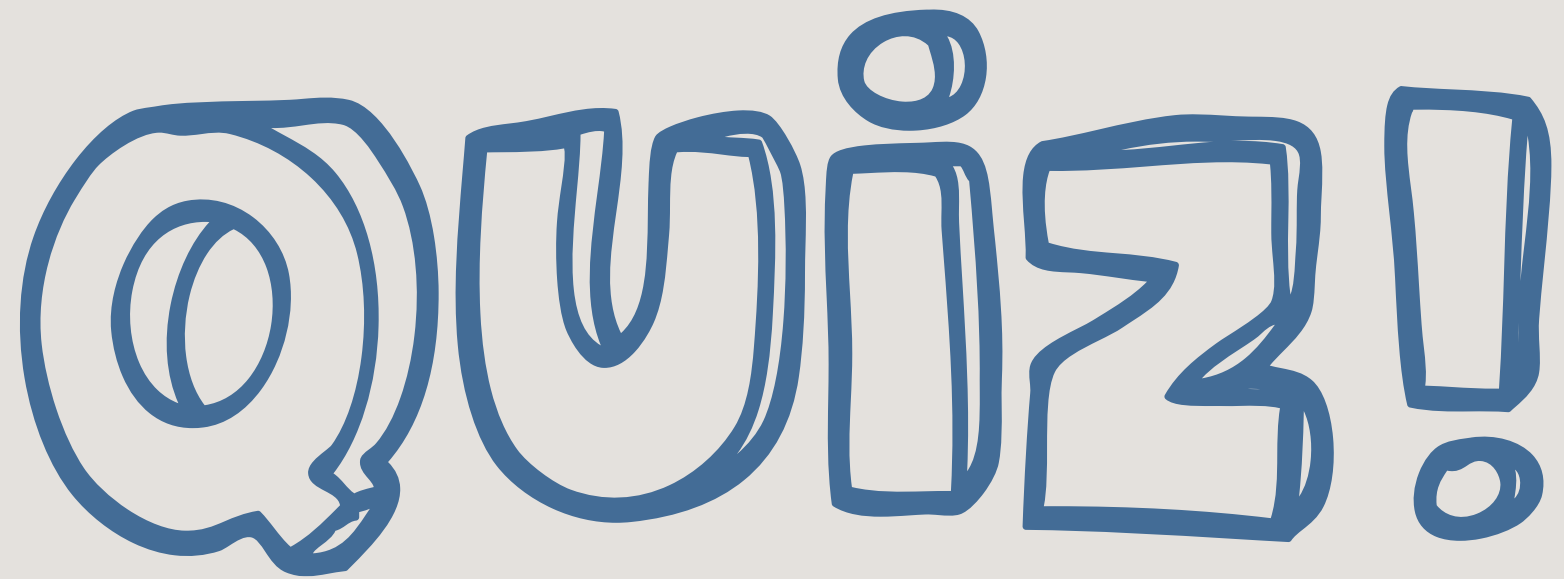
No

Quiz!

YES!

- In *Bodenhamer v. Superior Court*, 192 Cal.App.3d 1472 (1987), the court found that an insurer may be sued for bad faith where there was no exposure to an excess judgment. In that case, the insured, a jewelry store was robbed. As a result of the robbery, the insured submitted a claim for third party actions against it and also a claim for the stolen jewelry.
- The insured alleged that the insurer knew that the claims were valid, but still deliberately delayed payment to the insured. The insurer argued that liability could only be found where there was an unreasonable refusal to settle *and* an excess judgment. However, the court refused this position. The court permitted the insured to bring a bad faith action for refusal to settle even without an excess judgment.

CAN INSURER CONSIDER COVERAGE WHEN EVALUATING SETTLEMENT IN MIXED ACTION?



A

Yes

B

No

In *Camelot By The Bay Condominium Owners' Association, Inc. v. Scottsdale Insurance Company*, 27 Cal.App.4th 33 (1994), the insured tendered its defense to Scottsdale who agreed to defend Breihan under a reservation of rights. Scottsdale believed that certain construction defects alleged by Camelot were not covered under the policy. However, Scottsdale did not bring a declaratory relief action against Breihan on these coverage issues. Camelot initially demanded \$300,000 to settle the underlying dispute. The defense attorney for Breihan, hired by Scottsdale, informed Scottsdale that in her opinion any judgment against Breihan would likely exceed \$300,000. Thus, defense counsel requested \$300,000 in settlement authority. Scottsdale refused to settle.

YES!

- **It appears that the court found there was no bad faith in Camelot By The Bay because the court recognized that some of the claims actually were not covered.** Thus, the court distinguished that factual scenario from *Johansen* and *Communale* because in those cases it was determined that coverage actually did exist under the policy. Thus, *Camelot By The Bay* can still be read in harmony with prior case law which found that an insurer denies coverage at its own risk. The court said,
- “In *Comunale*, *Johansen*, and *Samson*, the basic coverage dispute was whether the particular vehicle involved in the accident was covered at all by the policy; that is a very similar basic coverage problem to that involved here, whether particular property damage fell at all within the scope of the policy provisions. However, in those cases, coverage was found; **in this case, only partial coverage existed**” *Camelot By The Bay*, at 34 footnote 821

DID THE INSURER ACT IN BAD FAITH BY FAILING TO EFFECTUATE SETTLEMENT IN ABSENCE OF A SETTLEMENT DEMAND WHEN LIABILITY IS CLEAR?

A

Yes

B

No

QUIZ!

DOES THE INSURER HAVE THE DUTY TO EFFECTUATE SETTLEMENT?

- ***Du v. Allstate Insurance Company, No. 10-56422 (9th Cir. June 11, 2012).***
- 9th Circuit: Good Faith and Fair Dealing Requires Insurer to Settle When Liability Is Clear
- The Ninth Circuit held that even in the absence of a settlement demand an insurer has a duty to effectuate settlement in instances where liability is reasonably clear under the implied covenant of good faith and fair dealing of California law. The lower court had ruled that a jury instruction stating this principle of California Law was incorrect and should not be used in the circumstance presented. The Ninth Circuit reversed the ruling that the statement of the law was incorrect, but determined that the lower court had not abused its discretion in disallowing the jury instruction based on the facts in question.

IN OCTOBER, 2012, DU CASE AMENDED, SO IS THERE A DUTY OF THE INSURER TO INITIATE SETTLEMENT TALKS?

- On October 5, 2012, the Ninth Circuit issued a further amended opinion expressly refusing for now to determine whether breach of the covenant of good faith duty to settle has occurred without there first being a settlement demand within limits. As a result, *Du* may no longer be cited for this proposition that the insurer must effectuate settlement in the absence of a demand when liability is clear. There is still uncertainty which remains as to whether an insurer can be exposed to liability under California law for breach of the covenant of good faith and fair dealing if it fails to settle in the absence of a within limits settlement demand.
- Insurers should take a Proactive Approach when liability is clear.

California Fair Claims Practices CERTIFICATION

STANDARDS FOR PROMPT, FAIR AND EQUITABLE SETTLEMENTS

7 FACTORS TO SHOW IF SETTLEMENT IS LOW

(SECTION 2695.7(G))

- The extent to which the insurer considered evidence submitted by the claimant to support the value of a claim
- The extent to which the insurer considered legal authority or evidence made known
- The extent to which the insurer considered advice of its claims adjuster as to the amount of damages
- Any other credible evidence
- The extent to which the insurer considered the advice of its counsel that there was a substantial likelihood of recovery in excess of policy limits
- The procedures used by the insurer in determining the dollar amount
- Extent to which the insurer considered the probable liability of the insured and the likely jury verdict

TIME-LIMITED DEMANDS (CCP §999)

A “Time-Limited Demand” is an offer to settle any cause of action prior to the filing of a complaint or demand for arbitration made by the claimant to a tortfeasor with a liability insurance policy to settle the claim within the insurers limits of liability. Formerly referred to as a “Policy Limits Demand,” by statute a Time-Limited Demand is (1) required to be in writing, specify a time period of not less than 30 days (33 if by mail) for acceptance and contain other information specified by CCP section 999.1(a)-(g) including a description of, and reasonable proof of, the injury (CCP section 999.1), and (2) is required to be delivered by email or physical address designated by the insurer for receipt of Time-Limited Demands, or to the insurance representative assigned to handle the claim, if any (CCP section 991.2). Time-Limited Demands that do not substantially comply with CCP section 999.1 and 999.2 shall not be considered to be a reasonable offer to settle within the policy limits for the purpose of any lawsuit alleging extracontractual (i.e., tort) damages against the insurer.

Hypotheticals

EXCESS CARRIER

Tortious Transportation, a trucking company is insured by P Insurance Co. under a non-wasting policy with a \$1,000,000 bodily injury limit. E Insurance Co. underwrites the excess coverage in the amount of \$4,000,000. Being thinly capitalized, these insurance policies are the only assets from which a judgment can be paid. One bright sunny afternoon, the driver of a Tortious semi-truck ran over a pedestrian, Widow McGillicuddy, who was crossing the street in a well-marked cross-walk with the light, severely injuring her. Widow McGillicuddy's injuries include a severe traumatic brain injury. As a result of the accident, Widow McGillicuddy can no longer work and cannot support herself. Plaintiff's counsel contends McGillicuddy will require support and life care in the amount of \$5,000,000. The defense physician who conducted the IME concurs on the necessity for some type of life care plan, but disagrees with the amount.

Plaintiff's counsel, based on "overall insurance coverage" of \$5,000,000 makes a "policy limit" demand of \$5,000,000 in advance of the mediation, with the expectation that the excess carrier will contribute to the settlement during the mediation. The excess carrier attends the mediation but refuses to contribute to the settlement. The plaintiff's counsel declares that the plaintiff will sue to excess carrier for bad faith.

HOW MUCH INSURANCE IS AVAILABLE TO SATISFY MCGILLICUDDY'S CLAIM?

A

\$1,000,000

B

\$5,000,000

Quiz!

\$1,000,000

Under California law , the primary insurance coverage must be exhausted before the excess insurer's obligations are triggered. Here, going into the mediation, the primary policy was neither exhausted nor offered to the plaintiff. The excess has no obligation to contribute to the settlement.

PART 2

Same facts as above, except the primary insurance carrier interpleads the face amount of the primary policy in order to avoid multiple liability for claims filed by McGillicuddy's daughter and granddaughter, who were in the crosswalk and were also hit by the Tortious truck.

**HAS THE EXCESS BEEN
TRIGGERED?**

A

Yes

B

No

GENERALLY, NO.

As a general rule there is no “constructive exhaustion” exception to the requirement that all primary insurance must be exhausted before excess insurance is triggered. California case authority is consistent that "actual payment of no less than the [primary] limit" is required to trigger the excess. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*, 161 Cal.App.4th 184 (2008); *Truck Ins. Exchange v. Kaiser Cement & Gypsum Corp.*, 16 Cal.5th 67 (2024) (Though acknowledging that actual policy language controls, affirmed the principle that exhaustion of primary insurance is required to trigger the excess policy).

PART 3

Same facts as # 1, above, but the primary carrier has paid out the full amount of the policy and there are no other primary policies that may provide coverage.

DID THE FILING OF AN INTERPLEADER AND DEPOSITING THE INTERPLEADED FUNDS WITH THE COURT TRIGGER THE EXCESS CARRIER'S OBLIGATIONS?

A

Yes

B

No

YES.

Payment of the full amount of primary coverage triggers the excess for covered claims. Although excess carriers have no duty to contribute to settlements or participate in defense until primary policy limits are exhausted. As the California Court of Appeal explained in *Continental Casualty Co. v. Royal Insurance Co.*, "The excess carrier has no duty or right to participate in the defense, absent contract language to the contrary, until the primary policy limits are exhausted" *Continental Casualty Co. v. Royal Ins. Co.*, 219 Cal.App.3d 111 (1990). However, once the excess is triggered, the excess carrier has a duty to "effect reasonable settlement within its own policy limits." *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group*, 76 Cal.App.3d 1031 (1978).

PERSONAL INJURY: FACT PATTERN

Little Johnny (age 10) is hit by a car while riding his bike. Medical damages = **\$1,000,000.**

He lives with **Mom and Dad**, and **Grandpa** lives in the home unless otherwise stated.

PERSONAL INJURY: GOVERNING RULES

1. UIM Cap Rule (Ins. Code §11580.2(p))

When more than one UM/UIM policy applies, the injured insured's damages are **deemed not to exceed the highest UM/UIM limit** available.

2. Offset Rule

The amount payable under UIM is:

Highest UIM Limit – Liability Recovery = UIM Available

3. Pro-Rata Allocation Between Carriers (§11580.2(d))

If multiple UM/UIM policies apply, insurers **share the UIM amount pro-rata** based on their limits (unless a statutory exclusion knocks one out).

4. No Stacking of Limits

You cannot add multiple UM/UIM limits together.

5. Household Members Are Insureds

A child living with parents/grandparents is insured under all household UM/UIM policies.

6. Intentional Acts & Intrafamily Claims

- Liability will NOT cover intentional acts.
- UM/UIM does NOT apply to intentional collisions.
- Intrafamily liability limitations depend on residency.

PERSONAL INJURY: SCENARIO 1

The driver has 25K/50K insurance.

Mom and Dad have 250/500K in UIM.

Grandpa has 100/300 in UIM.

What is the maximum that little Johnny can recover?

- A 25K
- B 350K
- C 250K
- D 500K

TOTAL RECOVERY - \$250K

Step 1 — Cap

Highest UIM = **250K**

Step 2 — Offset

250K – 25K = **225K UIM total**

Step 3 — Pro-Rata Allocation

Total UIM = 225K

Policies: 250K (Mom/Dad) and 100K (Grandpa)

- Mom/Dad share = $250 / (250 + 100) = 71.4\% \rightarrow$ **\$160,714**
- Grandpa share = $100 / (250 + 100) = 28.6\% \rightarrow$ **\$64,286**

Total Recovery = \$250,000

(\$25,000 liability + 225,000 UIM)

PERSONAL INJURY: SCENARIO 2

The driver has 25K/50K insurance.

Mom and Dad have 100/300K in UIM.

Grandpa has 250/500 in UIM.

What is the maximum that little Johnny can recover?

TOTAL RECOVERY - \$250K

Step 1 — Cap

Highest UIM = **250K**

Step 2 — Offset

250K - 25K = **225K UIM total**

Step 3 — Pro-Rata Between 100K & 250K

- Grandpa (250K): $250/500 = 71.4\% \rightarrow$ **\$160,714**
- Mom/Dad (100K): $100/300 = 28.6\% \rightarrow$ **\$64,286**

Total Recovery = \$250,000

PERSONAL INJURY: SCENARIO 3

The driver has \$1 million liability.

Mom and Dad have 100/300K in UIM.

Grandpa has 250/500 in UIM.

What is the maximum that little Johnny can recover?

TOTAL RECOVERY

Liability is greater than all UIM limits → **No UIM triggers.**

Recovery = Up to \$1,000,000 from driver's liability.

PERSONAL INJURY: SCENARIO 4

The driver is Uninsured

Owner liability is 15/30

Mom and Dad have 100/300K in UIM.

Grandpa has 250/500 in UIM.

What is the maximum that little Johnny can recover?

TOTAL RECOVERY - \$250K

Step 1 — Cap

Highest UIM = **250K**

Step 2 — Offset

250K - 15K = **235UIM total**

Step 3 — Pro-Rata Between 100K & 250K

- Grandpa $250/350 = 71.4\% \rightarrow \$167,857$
- Mom/Dad $100/350 = 28.6\% \rightarrow \$67,143$

Total Recovery = \$250,000

PLOT TWIST!

Dad was the driver that accidentally hit
Little Johnny.

PERSONAL INJURY: SCENARIO 5

Dad accidentally hits Johnny.

Dad is the named insured on the liability policy.

**JOHNNY CAN RECOVER FROM DAD'S
INSURANCE UP TO THE POLICY LIMIT.**

A

True

B

False

FALSE

Key points

- Many CA liability policies exclude **household family members**.
- UIM does **not** apply because the “underinsured motor vehicle” definition excludes the insured’s own vehicle.

Result:

Johnny cannot recover under Dad’s policy or Dad’s UIM.

He may still recover under **other household UIM policies**, subject to exclusions.

(This scenario becomes policy-language specific.)

PERSONAL INJURY: SCENARIO 6

Parents divorced.

Johnny lives **only with Mom.**

Dad hits Johnny.

Dad liability = 100/300

Mom UIM = 250/500

RESIDENCY RULE

Johnny is **not** a resident relative in Dad's household → Dad's liability covers him normally.

Step 1 — Dad liability = \$100K

Step 2 — Mom UIM Cap = 250K

Step 3 — Offset: 250K – 100K = 150K UIM

Total Recovery = \$250,000

All from Dad + Mom.

PERSONAL INJURY: SCENARIO 7

Johnny lives **50/50** with both parents.

Dad liability = 100/300

Mom UIM = 250/500

RESIDENCY RULE

A child with 50/50 custody is considered a resident of **both households** for UM/UIM.

When he is a resident of both households he recovers **zero**.

PERSONAL INJURY: SCENARIO 8

Dad hits **Johnny and Mom** while crossing the street.

Dad's liability = **\$1,000,000**

Who Can Recover?

WHO CAN RECOVER?

Both are **third-party claimants** under Dad's liability.

Per-Person vs. Per-Accident

If Dad's policy is:

- **\$1M per person / \$1M per accident** → They must share the **\$1M total**.

PERSONAL INJURY: ETHICAL ISSUE

**THERE IS A CONFLICT OF INTEREST
BETWEEN MOM AND JOHNNY.**

A

True

B

False

TRUE

Representing both mom and Johnny simultaneously creates a **direct conflict** because they compete for the same limited pool of insurance funds.

PERSONAL INJURY: SCENARIO 9

Dad was driving his **work truck** during Scenario 8.

Work truck has a **\$5M policy**.

Available Coverage

- 1. Dad's liability policy (1M)** – usually primary or co-primary
- 2. Employer's policy (5M)** – usually **primary** for negligent acts in course & scope, or **excess** depending on wording.

POTENTIAL RECOVERY = UP TO \$6M COMBINED

Subject to:

- Per-person caps
- Per-accident caps
- Allocation between Mom and Johnny based on damages

PERSONAL INJURY: SCENARIO 10

Dad **intentionally** runs over Johnny and Mom because of jealousy.

- Dad is driving his employer's car.
- Dad liability = 1M
- Employer liability = 5M

HOW MUCH CAN JOHNNY RECOVER?

- A 1 Million Dollars from Dad's Insurance
- B 5 million
- C All of the above
- D None of the above

CAN ONLY SUE DAD PERSONALLY

Intentional Acts Excluded

- Dad's auto liability policy → denies coverage.
- Employer NOT vicariously liable for purely personal intentional torts.
- UM/UIM → does NOT cover intentional collisions.

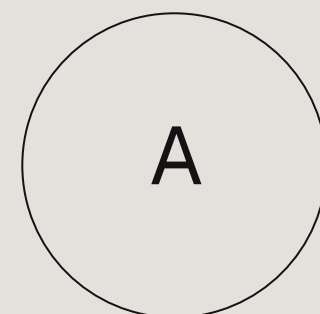
Result

No auto policy applies.

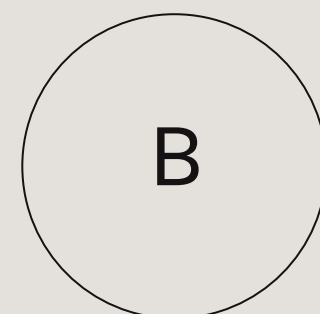
Mom and Johnny can **only sue Dad personally.**

EMPLOYMENT

Have you practiced Employment Law, or had experience with EPLI (Employment Practices Liability Insurance?)



Yes



No

EMPLOYMENT: FACT PATTERN

Jane Smith is a former employee of Silicon Valley tech “unicorn” IsntAlGreat (“company”). She was employed as the Executive Assistant (“EA”) to the company’s current CEO Jack Ryan. She has filed suit against IsntAlGreat and Ryan in state court alleging that she was sexually harassed by Ryan during her employment. Ryan had a similar claim made against him by his prior EA but it was settled out of court. IsntAlGreat has EPL insurance with ABC Insurance. The policy is a wasting policy and has a \$250,000 deductible/self-insured retention and a \$1 million limit.

EMPLOYMENT: SCENARIO 1

ABC would like to settle the case due to the potential exposure posed by the serious allegations and believes the case is worth \$500,000, but IsntAlGreat is standing behind its current CEO and “doesn’t want to pay her a dime.”

EMPLOYMENT: SCENARIO 2

Smith has made a \$750,000 demand and IsntAlGreat has demanded that ABC pay it due to the potential damage the claim could do to the company as it approaches its next funding round and is willing to contribute its deductible toward the settlement, but ABC doesn't believe the case is worth that much.

EMPLOYMENT: SCENARIO 3

Same as Scenario #2, but now the demand is for “policy limits.”

EMPLOYMENT: SCENARIO 4

Smith has made a demand of \$5 million due to the potential for punitive damages based on the fact that the board of IsntAlGreat was aware of the prior claim but did nothing about Ryan's behavior.

EMPLOYMENT: SCENARIO 5

The case has been heavily litigated for two years and there's only \$250,000 left on the policy. Discovery has not gone well for IsntAlGreat and Smith's demand is now \$1 million. There is no excess insurance.

EMPLOYMENT: SCENARIO 6

Same as Scenario #5, but IsntAlGreat has discovered it has an excess insurance policy that no one was previously aware of.

CONSTRUCTION

Have you been involved in cases where Construction Law coverage issues have arisen?

A

Yes

B

No

CONSTRUCTION

The “Nice” family want to remodel their San Francisco home of 1370 square feet to add a second floor and modernize the interior spaces throughout. They hire General Contractor (General) to perform the remodel in two phases, each memorialized by a separate contract. Contract No. 1 has a scope of work to gut and remodel the kitchen. Contract No. 2 covers the much larger remodeling project.

General successfully obtains permits from the Planning Department for the kitchen remodel while the much larger project remains under permit review. General hires a subcontractor (Sub) to demolish the existing kitchen only. Unfortunately, Sub speaks a different dialect of the native language he shares with General. Sub misunderstands the scope of his assignment and demolishes the entire structure except the portion facing the street.

Planning Department “red tags” the entire project and imposes the City’s standard 5-year moratorium on any further permit reviews for the project. The Nice Family is forced first to rent, and later to buy another house to live in for several years, while still making their mortgage payments on their first home. The Nice family retains counsel, who sues General and Sub. General purchased a standard CGL policy through Nationwide that has a \$2 million liability limit.

CONSTRUCTION: SCENARIO 1

General's construction company, ("Superior") is an S-Corp that holds limited assets of its own. General's personal assets consist of a home (incumbered by its own mortgage) and other funds worth no more than \$200,000.00. General is 43 years old and wants to remain working as a general contractor for 20 more years. He feels terrible about what happened but believes his CGL policy will protect him because, after all, the house demolition resulted from an honest misunderstanding, so the Intentional Acts exclusion in the CGL policy should not apply, right??? Nationwide accepts tender of the defense, but under a very long reservation of rights letter. At mediation, General and Sub threaten to declare bankruptcy and Nationwide asserts its many defenses to indemnifying the losses. **What issues and interests come into play to reach a global settlement?**

CONSTRUCTION: SCENARIO 2

Same as Scenario #1, except that the home had a permitted rental unit in the basement that received water damage that occurred after the demolition was finished, when the rainy season started. Water damaged drywall in the unit and caused the caused its hardwood floor to warp. The leaks were patched up, but leftover moisture led to mold growth in the unit.

Tenant was forced to move out and sues Nice Family for relocation expenses, rent differential, emotional distress, and exposure to mold spores. Fortunately, Nice Family had purchased an Owners, Landlord & Tenant policy through State Farm. State Farm defends Nice Family under its own reservation of rights letter. State Farm files a cross-complaint against General and Sub since they caused the entire cascade of problems, and places everyone on notice of its lien to recover all State Farm has already paid to relocate the tenant. **What new issues come into play?**

CONSTRUCTION: SCENARIO 3

Same as Scenario #1, except that it was General's own workers that misunderstood the boss' instructions and over-demolished the home.

THANK YOU

Joan Cochran

Cochran, Davis & Associates PC
joan@cochranlaw1.com



Hon. Evelio Grillo (Ret.)

ADR Services, Inc.
judgegrillo@adrservices.com



Tanya Gomerman

Gomerman | Bourn & Associates
tanya@gobolaw.com



Hon. Paul Herbert (Ret.)

ADR Services, Inc.
judgeherbert@adrservices.com



Mike Laurenson

Gordon Rees Scully Mansukhani, LLP
mlaurenson@grsm.com



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- *Bodenhamer v. Superior Court*, 192 Cal.App.3d 1472 (1987)
- *Camelot By The Bay Condominium Owners' Association, Inc. v. Scottsdale Insurance Company*, 27 Cal.App.4th 33 (1994)
- *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal. 2d 654
- *Samson v. Transamerica Ins. Co.*, supra, 30 Cal.3d
- *Du v. Allstate Insurance Company*, No. 10-56422 (9th Cir. June 11, 2012).