



2015 CLM Annual Conference

Palm Desert

**Defense Counsel's Challenges in Complying with Carrier Guidelines vs.
The Best Interest of the Insured-Client
(Within the context of a Professional Liability claim)**

Presenters: Michael DeLonay, *Swiss Re*
Jade Gummer, *Quintairos, Prieto, Wood & Boyer, P.A.*
Traci McGuire, *Century Insurance Group*
Donald Myles, *Jones, Skelton & Hochuli, P.L.C.*
Howard Panensky, *Ironshore Insurance Company*

THE CASE

Facts:

Employee Eric was terminated from Spiers, Inc. for allegedly engaging in unauthorized trading in customers' accounts. Employee Eric retained Attorney Amber, a specialist in litigation and employment related matters, to file a civil action against his former employer, Spiers, Inc. for wrongful termination. The lawsuit was acrimonious. Ultimately, at trial Spiers, Inc. received a defense verdict.

Thereafter, Spiers, Inc. filed malicious prosecution Complaints against both Employee Eric and Attorney Amber alleging, in part, that Attorney Amber acted maliciously in the wrongful termination suit as it was filed on behalf of Employee Eric without probable cause. Spiers, Inc. sought monetary damages, costs of defending the original action, reasonable attorney's fees, and injury to reputation and business.

Attorney Amber held lawyers liability professional coverage through Certainty Insurance Company ("CIC"). Attorney Amber timely reported the Complaint to CIC. The Complaint was assigned to Adjuster Andrew, a claims attorney with CIC. Adjuster Andrew reviewed coverage on his own, issued a Reservation of Rights letter to Attorney Amber, and assigned outside Counsel Kyle to defend the lawsuit.

Policy:

The Policy issued to Attorney Amber by CIC had a \$250,000 per claim limit applicable to loss and defense expenses. The policy had a \$10,000 deductible. The Policy contains a consent to settle clause.

The Policy has an exclusion for malicious prosecution claims which reads as follows: "The Policy does not apply to any "Claim" made against any "Insured" based upon or arising out of any actual or alleged dishonest, fraudulent, criminal, malicious, intentional or willful "Wrongful Act", including "Claims" of

malicious prosecution; provided, however that CIC will defend any "Claim" alleging any such conduct until there is a judgment, final adjudication or admission adverse to such "Insured" establishing such acts were committed, at which time the "Insured" shall repay the Insurer for any "Claim Expenses" paid by the Insurer."

The Reservation of Rights letter issued by Adjuster Andrew to Attorney Amber noted the applicable policy limits, that it was a wasting limits policy, and cited the malicious prosecution exclusion. Retained Defense Counsel Kyle was copied on the coverage position letter. No supplemental letters were sent by Adjuster Andrew during the pendency of the lawsuit. Counsel Kyle and Adjuster Andrew never discussed the letter.

The Malicious Prosecution Suit:

In response to the malicious prosecution suit, Employee Eric hired Litigator Lisa to defend him and file a motion to strike the malicious prosecution Complaint. The Motion to Strike was based upon state civil procedure rules designed to protect Employee Eric's free speech and right to file the original lawsuit. The Motion to Strike was denied by the Court. Litigator Lisa appealed the denial.

During the pendency of the appeal Counsel Kyle filed a similar Motion to Strike on behalf of Attorney Amber. The Court stayed Attorney Ambers suit pending resolution of Employee Eric's appeal.

Counsel Kyle billed \$30,000 in defense costs for his initial case work-up and preparation of the Motion to Strike. Per CIC guidelines, defense counsel is to discuss any motions and related costs with CIC before preparing the same. Counsel Kyle did not discuss the Motion to Strike with Adjuster Andrew prior to filing it with the Court.

The Appellate Court affirmed the trial court ruling which denied Employee Eric's Motion to Strike the Malicious Prosecution Complaint. As a result of this decision, Counsel Kyle believes that there is over a 50% chance that the Court will also deny Attorney Amber's Motion to Strike. However, wanting to fight the good fight, Counsel Kyle believes a shrewd judge will recognize the distinction between Employee Eric's Motion and Attorney Amber's Motion and determine that Spiers, Inc. cannot satisfy the malice element against Attorney Amber. Counsel Kyle expresses his opinions to Adjuster Andrew. Adjuster Andrew does not ask any questions. Neither communicates with Attorney Amber regarding this discussion.

If Attorney Amber wins on the Motion to Strike she will be awarded attorney fees incurred in defending the action. If Attorney Amber fails to prevail on the motion, there will likely be extensive discovery to resolve the fact issues in the case including whether there was malice. Counsel Kyle believes that the probable outcome at trial in such an event is that there will be an adverse finding against Attorney Amber and communicates his assessment to Adjuster Andrew. Pursuant to the malicious prosecution exclusion the verdict would not be covered. In addition, a formal finding of malice would require Attorney Amber to pay back any "Claim Expenses" paid by CIC. Attorney Amber is reluctant to settle.

Before the ruling on Attorney Amber's Motion, the parties agree to mediate. No formal negotiations took place prior to the mediation. One week before the mediation, the decision came down from the Court denying Attorney Amber's Motion to Strike. At mediation, the opening demand from Spire's Inc. was \$450,000.

Attorney Amber is now considering legal action against CIC and Counsel Kyle.

ISSUES RAISED

1. How/if/when Adjuster should inform Defense Counsel of coverage issues;
2. Addressing Defense Counsel's actions that are non-compliant with Carrier Guidelines;
3. Extent of control/influence Adjuster can/should have over litigation strategy;
4. Attorney adjusters vs. non-attorney adjusters;
5. Best interest of the insured-client vs. keeping Adjuster happy to secure future business;
6. Ethical considerations of moving a reluctant client toward settlement;
7. Balancing obligation to achieve best outcome for Client-Insured when such decisions may limit/void coverage.

QUESTIONS REGARDING CASE

1. What obligations did Counsel Kyle have to CIC?
2. What obligations did Counsel Kyle have to Attorney Amber?
3. Communication between Adjuster Andrew, Counsel Kyle and Attorney Amber.
4. Does Attorney Amber have reason to be unsatisfied with the representation provided by CIC and Counsel Kyle?
5. Did Adjuster Andrew have a responsibility to keep Attorney Amber better informed?
6. Did Adjuster Andrew have a responsibility to question defense counsel's strategy?
7. How should Adjuster Andrew address defense counsel's non-compliance with CIC's guidelines?
8. Should Counsel Kyle, when dealing with a CIC adjuster whom is also an attorney, have an expectation that the adjuster will understand the Motion to Strike and the related potential exposures to the insured?
9. What should Adjuster Andrew's settlement position be at mediation?