PROFESSIONAL LIABILITY DEFENSE
QUARTERLY
VOLUME 16 | ISSUE 3 | 2024

Inside This Issue

Artificial Intelligence – Future Impact on Law Firms

Aram V. Desteian | *Bassford Remele, P.A.*
Linda Fisher, RPLU, CPLU | *Marsh McLennan Agency LLC*

The legal profession is experiencing a significant transformation in the utilization of new technology to better serve their clients, with Artificial Intelligence (AI) at the forefront of everyone's mind. Will law firms who do not incorporate generative AI into their practice be at a serious competitive disadvantage in the future?

For the legal industry, AI brings a promising boost to efficiency by automating routine tasks, such as legal research, document drafting, contract analysis, and electronic discovery. On the other hand, there can be risk management pitfalls that law firms are susceptible to if the proper due diligence and policies are not in place.

— Continued on next page

Letter from the President

David C. Anderson, Esq. | *Collins Einhorn Farrell, PC*

As we conclude another remarkable year, I find myself reflecting on the incredible talent and dedication within our organization. This year has been one of significant growth and innovation—achievements made possible by the outstanding individuals who make the PLDF such a vibrant and influential community.

I am particularly thrilled to celebrate two members whose contributions have truly set a high bar for excellence.

First, please join me in congratulating Alice Sherren of Minnesota Lawyers Mutual Ins. Co., the recipient of the 2024 **Chris Jensen Distinguished Service Award**. This prestigious honor is awarded to a PLDF member who has provided exceptional volunteer service for the betterment of our organization.

— Continued on page 8

Current Trends – Litigation is GOOD for All

Frederick J. Fisher, J.D., CCP

Organizations, lawyers, and consumers are always looking to identify "current trends." No doubt that is equally true of Associations. In our industry, significant current trends can increase liability for insurance producers, while making it harder for defense counsel to have the weaponry to properly defend its client. As one generation retires, new generations come into the industry, yet there has been a distinct change in what traditionally has been considered true and necessary to protect.

Maxims of insurance that have existed more than 50 years are being attacked and reversed. The cause might be hedge funds and private equity companies seeking to maximize profits with their usual scorched earth process, but that does not change that at least five traditional maxims have fallen by the wayside. First and foremost is the usage of "absolute exclusions." Language such as "arising directly or indirectly from" used to exist in insuring agreements. That is no longer the case. Such language now appears to be exclusively used for exclusions given how widely the courts are interpreting them. Another factor is supply-side dominance and consolidation limiting the number of insurers available to compete.

Consider that it used to be true that insuring agreements were to be broadly interpreted and exclusions narrowly construed. With the moving of absolute language into the exclusionary area, that is no longer true. Numerous articles including my own have pointed out how broadly interpreted absolute exclusions have become with how heavily they are being used. Interestingly enough, lawyer's professional liability policies have the fewest absolute exclusions, possibly because the insurance industry doesn't want to have 450,000 law firms up in arms over it. Liability policies for insurance agents and brokers, miscellaneous professionals, and directors and officers seem to have the most absolute exclusions.

Another maxim of insurance being tossed aside is the long-held belief that insurance policies can be contracts of adhesion, where there is an unfair bargaining position. While that has always been the case, it is becoming more difficult to negotiate with an underwriter, especially because of lack of competition due to consolidation and lack of any authority to do so. Automation itself may contribute to that as it is logistically costly to modify policies automatically generated by computers.

Equally important is the demise of the concept of illusory coverage. More than one court has ruled that if only one type of claim is covered, then the policy is not illusory. Such was the language used in Ground Down Engineering v. James River Insurance Company (James River Ins. Co. v. Ground Down Eng'g, 540 F.3d 1270 (11th Cir. 2008)). In that case, an engineering firm did 100% environmental liability assessments and core sample analysis. After an errors and omissions claim was made against them, as pollution was found to exist, an absolute exclusion for pollution was enforced. The court reasoned that the policy was not illusory even though environmental work was the only thing they did, because as an engineering firm, any other engineering services they provided to clients would have been covered.

Another maxim that has fallen by the wayside is the concept of the reasonable expectation of the insured. Normally this was tied to generally accepted practices but has again been disregarded with the common theme that has permeated the above. For instance, insurance agents and brokers, especially in the commercial area of insurance, have over 30 insurance products that businesses may typically need. Yet, due to the way absolute exclusions have now been interpreted, insurance agents or brokers might be surprised to find that half of the types of policies they sell are the subject of absolute exclusions that would render an error and omission claim arising from the sale of such policies to be outside of the scope of coverage of an insurance producer.

These include the selling of fiduciary liability policies due to an absolute exclusion for ERISA, director and officer liability policies due to an SEC exclusion, any pollution and environmental liability coverages, employment practice liability insurance and more. More dangerous is that recently, while not in an insurance agent and broker policy per se, an absolute exclusion for bodily injury and property damage was enforced (See AXIS Surplus Ins. Co. v. Universal Vision Holdings Corp., No. 1:21-cv-05590 (EK)(CLP), 2024 WL 1282350 (E.D.N.Y. Mar. 26, 2024)). Almost every insurance agent and broker policy excludes coverage for that hazard. Yet almost every policy sold to customers is for that hazard that the customer faces. However, such an exclusion would not render the policy illusory, because advertising and personal injury coverage claims are not the subject of an absolute exclusions. Thus, the exclusions for bodily injury and property damage would not render the errors and omissions policy to be illusory.

What ties the above together? Simple. It is now the fanatic focus on the "sanctity of the contract" and what has been deemed to be "clear and unambiguous." If the language is clear and unambiguous, then there will be enforcement of the language. That raises the question, "clear and unambiguous as to whom?"

Lawyers might get it, but no other type of policyholder would. What insurance agent and broker would spot an absolute exclusion for up to 14 exclusions in which they appear? They routinely sell policies in which the exclusion would apply. Yet, to the court, the language is clear and ambiguous. Are we not holding consumers to a higher standard of care beyond that of being a lawyer, and equal to that of a jurist? How absurd is that?

The sanctity of the contract in being clear and unambiguous has done severe damage to traditional thinking including: insuring agreements to be broadly interpreted and exclusions narrowly construed; insurance policies or contracts of adhesion; illusory coverage; and reasonable expectations arising from usual and customary practices.

These are not the only concepts under assault. Commonly, it has been stated for decades that the duty to defend is broader than the duty to indemnify. How has that been attacked? Simple. The ability for an insurance company to determine that there may be no coverage has given rise to numerous lawsuits by insurers seeking to recover defense costs they have advanced when a perceived coverage problem exists or is substantiated, even partly.

Despite whether or not one wishes to believe this is all intentional and being driven by supply-side desires to be dominant, remember one thing, and that is that suppliers are also consumers. Ask Pharmacia Corp. who is now responsible for a $47 million portion of a $207 million settlement because an excess carrier had language in it that all underlying insurers admit liability. Even though the underlying insurers tendered their limits, such acts did not constitute a de facto admission of liability. Apparently, the courts felt it had to be stated. Who ever admits liability in a settlement? Yet the recent Pharmacia decision was upheld, and apparently a previous decision had been enforced in another case in 2012 (See J.P. Morgan Chase & Co. v Indian Habor Insurance, 98 A.D. 3d 18 (N.Y. App. Div. 2012)).

United National Insurance Company too was a victim as they wrote environmental liability insurance for their customers. They denied three claims to a policyholder and were sued for breach of contract and bad faith. They tendered those suits to their errors and omissions insurance carrier. The claim tenders were denied based on a clear and unambiguous absolute exclusion for pollution (See *United Nat'l Ins Co. v Indian Harbor Ins Co.*, 2015 WL 437630 (E. D. Pa. Feb. 2, 2015).

Whether one wants to believe that this is simply an evolution of the courts or otherwise, one must rethink that. One law firm actually wrote in their published review of the Pharmacia decision that "retaining experienced counsel to assist in reviewing policies can help an insurer craft strong coverage defenses that limit risks and save costs." This is not the only article written by a law firm that suggests all of the foregoing is intentional. In another article, a very well-known attorney wrote, "nevertheless, in today's market, perhaps putting aside the hard financial institution in financial services markets, astute brokers and policyholder counsel will resist vigorously the super absolute language. Beauty, however, is truly in the eye of the beholder and, as an insurer's coverage lawyer, I prefer super absolute beauty!"

In a guest article published by the D&O Diary, two prominent lawyers also listed out 20 ways insurers could limit their exposure to director and officer liability claims. That's right, over 20 including absolute exclusions for any number of hazards that typically would be the subject of a director and officer liability claim. What kind of policy is that if implemented?

It literally is becoming quite true that the very premise of insurance, to put the policyholder back in the position they were in before the loss, will no longer be its purpose.

Interestingly enough, all of the foregoing provides an opportunity for other lawyers. In fact, one law firm recently published an article about when an attorney should review his or her insurance policies, suggesting that it should be done before a client signs on the dotted line. As true as that might be, the realities of the renewal or acquisition process usually means that a policyholder has less than a week to review a policy. This is important because the aforementioned article listed out 18 policies that businesses generally buy as part of their portfolio of coverages, all of which would have to be reviewed for its enforceability, and "gotchas," together with a multistate review, if necessary. That process must be done in a week? Plus the cost. I doubt that even the most financially successful companies would incur the cost necessary to review all of their policies annually, as well as conducting a multistate review.

I suppose the best we can look forward to is more litigation for everyone. ■

About the **AUTHOR**

Frederick Fisher, J.D., CCP is a specialist in Professional Liability. Mr. Fisher's expertise started with a 20-year career as a Professional Lines Claims Adjuster, which included qualitative claim auditing, risk management & loss control services, and acting as a TPA. He then founded ELM Insurance Brokers and served as CEO for another 20-plus years. During his 49-year career, he has authored over 80 Trade Journal articles and 2 books. He is an A.M. Best's recommended expert and has been testifying as an Expert witness for over 30 years.

Professional Liability Defense Federation
The Standard of Care
PO Box 588 | Rochester, IL 62563-0588