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Putting the employer on the hook in an auto case

FINDING THE COMMERCIAL POLICY AND OPENING IT UP WITH VICARIOUS LIABILITY IMPUTED TO THE EMPLOYER THROUGH COURSE-AND-SCOPE ISSUES

In almost every routine auto case where the underlying policy is eventually tendered, the question of whether there is additional coverage becomes the next major issue. So many times, we get to the place where (it seems) it's time for a policy-limit demand on the insurance policy that was originally identified in the traffic collision report. You sent them your original rep letter, medical authorizations and your air-tight policy-limit demand that states: (1) the demand is conditioned upon there being no excess or umbrella coverage; (2) the tender must come with a declaration under penalty of perjury indicating same, and (3) that the insured was not operating in the course and scope of employment. The underlying carrier will often quickly provide you with a vague declaration stating that there are no other policies and that the insured was not in the course and scope of employment when the collision occurred.

And so it begins...

This is often where the problem begins: The insurance company's idea of course and scope may differ drastically from the legal definition. The insurance company's idea of course and scope is something along the lines of a traditional employee, like a Coca-Cola truck driver, wearing a Coca-Cola uniform, driving a Coca-Cola truck, hitting your client.

But what about the salesperson who mostly works from home, who is driving to an appointment in downtown L.A., but stops to run an errand over lunchtime, then hits your client while getting back on the road to go to the meeting?

I can almost guarantee you that the underlying carrier will never consider this driver in course and scope and will provide you with a declaration indicating that the driver was not working and there is no additional coverage. You get the underlying policy, dismiss the case, and you feel like you have done everything you can for your client. But have you?

Case in point

I recently had a case that involved a driver who had an underlying Mercury policy of $100,000, who pulled out of an auto-body shop directly in front of my client. My client had knee and shoulder complaints and eventually had arthroscopic surgery on both. We made a demand against Mercury, who hemmed and hawed and started peeling off the usual list of excuses: we need more time, we need a DME, injury is pre-existing, the surgery is unnecessary, you can't injure a knee in an auto case, you can't injure a shoulder in an auto case, the dog ate my homework, the dog had kittens, it's not my fault!

So, we filed and served and named the body shop for failing to have any warning signs about the precarious hairpin turn that is 75 feet before the exit off their lot. We continued to make multiple demands to Mercury, who continued to provide excuses why they could not tender. A CCP 998 Offer to Compromise expired and we felt the policy was open.

Eventually, counsel for the auto-body shop noticed the deposition of the defendant driver in preparation for their motion for summary judgment. A week or so before the deposition, Mercury sent us a letter stating that they are tendering the policy. They also provided sworn responses under penalty of perjury that their insured was not in course and scope at the time of the collision and there is no additional policy providing coverage. (Practice Pointer: We always serve additional special interrogatories addressing each of these issues in addition to the form interrogatories.)

We were not overly concerned about the defendant driver's work status at this point because we felt the underlying $100K Mercury policy was open, which, of course, they disputed. Further, we had sworn responses stating there was no additional coverage, and he was not in the course and scope of employment at the time of the crash, so end of story, right? Not so fast.

During the deposition of the defendant driver, co-defendant body shop was questioning him about what happened as he exited the body shop. He said that he had stopped in at the body shop for a minute during lunch to get a decal for his Lexus that was repaired there the week prior. It was not available yet, and he was kind of upset and he needed to get downtown to the Jonathan Club for a work meeting he had. Wait, what? Our ears perked up and we asked the following series of questions:

Wait. What? You were working that day?

Q: Did you say you were working that day?
A: Yes.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

Q So you were going back to work or to a work appointment?
A: Yes. I wouldn't set up a meeting in downtown Los Angeles if I wasn't working because I wouldn't have gone from Santa Monica and fight traffic for two hours to get to downtown. So, I know I was working and had appointments.
Q: When you say appointments, you mean you were out on the road?
A: I'm usually on the road.
Q: So, you use your car for work; is that a fair statement?
A: Yes.
Q: Does your employer reimburse you for mileage and parking, that kind of stuff?
A: I have a car allowance?
Q. What's the car allowance?
A: $500.00

Keep in mind that all of this deposition questioning was after we received responses, under oath, that he was not working at the time of the crash. Further, a signed declaration indicating there was no additional coverage, no umbrella policy and no course and scope was also provided.

It has become common practice for insurance companies and defense lawyers to provide these blanket denials with conclusory contentions. It was also beneficial that the employer and the lawyers, who are more familiar with these issues, are not even in the case at this time. The deposition is being defended by someone who probably has minimal familiarity with vicarious-liability laws in the more non-traditional circumstances that impose liability on the employer. Having knowledge of the CACI 3700 series gives you ammo to sink them. So, you just keep asking away...

Q: You feel like driving your own car for work was a benefit to your employer?
A: It wasn't a disadvantage.
Q: How many miles a month would you drive for work?
A: Devoted to work? About 2500 miles.
Q: So, do you have a territory you drive?
A: All over Southern California.
Q: So, you're required to have a car for work then?
A: Well, yeah. You have to have a car for work.

Again, these questions fall right in line with the jury instructions. It is an excellent practice to keep a copy of the applicable jury instructions in your case file to refer to in such a situation like this one. And when they are giving you the goods, keep firing away and go for the kill.

Q; Are you aware that your previous discovery responses state you were not working on the date of the crash?
A: I could be mistaken. It's been three years. If it was during the week, I was working.
Q: For the record, October 16, 2014, was a Thursday.
A: I was working.

The employer enters the case

At this point, we filed a Doe amendment naming his employer. The employer was insured by State Farm. Defense counsel was apoplectic that they had been dragged into this lawsuit. After everyone is deposed, the motions for summary judgment start raining down. The body shop claims that it had no duty, the employer claims that there was no course and scope, and the underlying Mercury policy indicated they accepted our demand and they should be dismissed. The body shop won their summary-judgment motion. All other defendants remained in the case. After losing their summary-judgment motions, both remaining defendants took the next bite of the apple by way of motions in limine for the same relief as requested in the MSJs.

Trial

Both the employer and the defendant driver filed motions in limine to claim there was no course and scope as a matter of law and that Mercury had accepted our demand for $100K, so Mercury should be dismissed from the case. The trial judge determined that both issues were triable issues of fact and denied the motions in limine. The case was bifurcated with a bench trial for phase one regarding acceptance of the demand. Phase two was jury trial covering liability and damages of the auto accident itself.

Phase one was interesting, to say the least. While trying the case, I was called to the stand as a witness regarding the various demand letters. Keep in mind, I am the lone trial lawyer, trying this case by myself. I had to cross-examine myself while sitting on the witness stand! It was pretty funny, the court reporter was saying she had no idea how this would come out on the transcript with Mr. Sullivan asking and responding to his own questions. We got through it and the judge decided that we had demanded the policy and since they tendered, Mercury was out. While we disagreed, we still won the $100K policy, got rid of a defense attorney and their witnesses and proceeded to the phase two jury trial.

The defense denied everything in this trial. Liability was denied, which was crystal clear, but 100 percent disputed. They denied any of the treatment was necessary or related and said my client only sustained a bruise to his knee, and not even the knee that had surgery after the crash. And they most vehemently disputed that their driver was in the course and scope of employment with his company. Even though he admitted he: 1) was on his way to a work meeting at the Jonathan Club; 2) used his car daily for work; 3) drove all over Southern California to entertain clients; 4) was paid a car allowance by his employer and gas mileage. He even tried to change his deposition testimony to say that he was mistaken about the fact that he was going to a meeting because he checked his Outlook Calendar later and he did not, in fact, have a work meeting at the Jonathan Club that particular day. They used the deposition errata sheet to attempt to completely change this testimony.

During the trial, when it was time to call the defendant driver, I knew I could nail him with previous sworn deposition

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2021

testimony that he was on his way to a meeting at the Jonathan Club at the time of the crash. When I attempted to use the deposition, the defense attorney objected and the judge agreed and ruled that I could not lead the witness under Evidence Code 776, because he was dismissed as a party in phase one of the trial. So, I forged ahead, attempting to conduct a direct exam of the defendant driver, who was uncooperative to say the least. And my hands were tied because I was not able to read his deposition testimony because of the judge's ruling.

The next morning, after a panicked call to many CAALA friends, Arash Homampour came to the rescue, advising that I needed to walk the judge through 776, tell the judge he made a mistake, and ask the judge to allow me to recall the witness and re-conduct my exam. Seemed crazy, but sure enough the judge admitted he made a mistake and ordered the witness back to the court immediately to be re-examined. Keep in mind, this was March 12, 2020, and the courts around the state were beginning to close, so we knew the clock was ticking.

The examination went beautifully. All of the deposition testimony was read, and the defendant was clearly seen as an evasive liar. My brother/partner John found an additional cherry on top when he noticed that in the car photos of the defendant's totaled vehicle, there was a file folder entitled Jonathan Club in the trunk! The defendant was quite perplexed when we showed him this photo and asked if it refreshed his recollection that he was in fact on his way to a work meeting at the Jonathan Club at the time of the crash.

Why are all these details so critical? CACI Jury Instruction sets forth what is needed to prove course and scope and deal with the various issues and exceptions.

CACI 3720 Scope of Employment states:

> Plaintiff must prove that [agent] was acting within the course and scope of his employment when he was harmed. Conduct is within the scope of employment if:
> (a) It is reasonably related to the kinds of tasks that the employee was employed to perform; or
> (b) It is reasonably foreseeable in light of the employer s business or the employees responsibilities.

In this case, it was easy to argue that defendant was driving for meetings with security clients, so this instruction was easy to check off the list. The defense argued that this may be true, but the Going-and-Coming Rule clears them. CACI 3725 Going-and-Coming Rule-Vehicle Use Exception states:

> In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer s business, then the drive to and from the work place is within the course and scope of employment. The employer's requirement may be express or implied:
>
> The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employees to make it available regularly. The employee's agreement may be express of implied.

The defendant already admitted all these facts before the employer was even in the case. There are additional helpful CACI Instructions in this area.

CACI 3737 Going-and-Coming Rule Compensated Travel Time Exception

If an employer has agreed to compensate an employee for the employee's commuting time, then the employee's conduct is within the scope of employment as long as the employee is going to the workplace or returning home.

So, despite the virtual blood bath to get to trial in a course-and-scope case, the CACI jury instructions in this area are quite favorable. They get tedious and complicated, but there seem to be many paths available to complete the course-and-scope nexus for vicarious liability.

In my case, despite a battle over the issue, the first question on the special verdict form was: Was Mr. J in the course and scope of his employment with Security Company at the time of the crash? We prevailed and had a low-seven-figure verdict in a heavily disputed case. We got our verdict at 10:00 a.m., and the courts closed the same day due to COVID shutdown.

My final thoughts: Be the woodpecker and keep pecking around for information. You often cannot rely on a declaration alone. Taking depositions is sometimes the better way to dig around and see if there are any course-and-scope issues to get the employer on the hook. The CACI jury instructions are in your favor and the employer almost always has robust coverage on their policies to help compensate our clients.

Gene Sullivan is a trial lawyer whose practice focuses on catastrophic injury cases and death cases. Mr. Sullivan and his brother, John Sullivan, have been practicing law in the South Bay for over 20 years. The brothers are the founding partners of Sullivan & Sullivan. *Mr. Sullivan was nominated for 2020 CAALA Trial Lawyer of The Year award.*