IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

NOVEMBER 2016

CHAIR'S COLUMN

Autumnal greetings!

I hope you all enjoyed a fun and restful summer with your families. Now that fall is upon us, the Trial Techniques and Tactics Committee has another practical, informative newsletter for your reading pleasure. This edition includes an insightful article on the admissibility of evidence of insurance for purposes other than proving liability. It is authored by Brian O'Connell of Boston, Massachusetts. Brian is the new Vice Chair of Insurance Law for our committee.

Please take full advantage of all that your committee membership offers. In addition to the newsletter, there are opportunities to propose and participate in webinars and CLE programming to a global audience. IADC is an unparalleled resource to enhance your practice and promote your firm to members around the world. I hope you enjoy this edition!

Chris
Chair, Trial Techniques and Tactics Committee

Chris Kenney is the Managing Partner of Kenney & Sams, P.C. in Boston, MA, where he focuses his practice in litigation, trials and appeals before state and federal courts throughout New England. Mr. Kenney also serves as the Vice President of the Massachusetts Bar Association. He can be reached at cakenney@KandSlegal.com.

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IN THIS ARTICLE

The article is an overview of the admissibility of evidence of liability insurance under Federal Rule 411.

Other Purposes: Admissibility of Evidence of Insurance under Federal Rule of Evidence 411

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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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There are plaintiffs' firms which have recently included statements in their advertisements that "the insurance companies don't want juries to know" that defendants in civil cases have insurance. Practically, it is not just insurance companies. Rather, if the purpose of informing a jury of liability insurance is to prove that the defendant acted negligently the drafters of the Federal Rules of Evidence and judges who understand the law share that preference to keep evidence of insurance from the jury. The Federal Rules of Evidence, however, do allow evidence of insurance "for another purpose". This article will outline the applicable Federal Rules of Evidence and briefly survey case law addressing the circumstances in which courts have admitted evidence of liability insurance.

Federal Rule of Evidence Rule 411 provides:

Evidence that a person was or was not insured against liability is not admissible to prove whether a person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness' bias or prejudice or proving agency, ownership, or control.

Federal Rule of Evidence Rule 403 provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

When a party seeks to introduce evidence of liability insurance, ostensibly not for the purpose of proving negligence, the courts consider both whether there is "another purpose" for the evidence and also weigh its probative value against prejudice.

While the Rule's examples of "bias" or "agency or control" are illustrative and not exhaustive, the majority of case law deals with these other "purposes".

While we may expect that it is often the plaintiff seeking to introduce evidence of insurance, there are situations where a defendant, particularly a defendant defending a subrogation claim, may introduce evidence of insurance to illustrate bias on the part of an expert witness. For example, in *Adams v. Meyers Builders*, 671 F. Supp. 2d 262 (Dist. N.H.2009), an insurer paid a first party property damage loss and stood to recover part of any judgment, although it was not a named plaintiff. Although ultimately, the plaintiff's did not call the particular witness due to other issues in the case, the court ruled on whether the defendant, on cross of the plaintiff's expert, could bring out that the plaintiff's' expert had conducted the appraisal of the damaged property for the insurance carrier. Although it based its decision on Rule 411, the court did not address that the plaintiff's insurance was not "liability insurance", but held that the fact that the property carrier paid the loss, and stood to recover part of any recovery, was admissible to show "bias" of the plaintiff's expert.

Evidence of liability insurance can also come in to show bias if the defendant "opens the door" to such evidence. *Charter v. Chleborad*, 551 F.2d.246 (8th Cir. (1977) was a medical malpractice case. Plaintiff's medical expert testified to the standard of care and that defendant had breached the standard. As part

of its case, defendant offered a local attorney who testified that the medical expert's reputation for truth and veracity was bad. On cross, the attorney testified that he did defense work in medical malpractice cases and that in those cases he was retained by insurance companies. On cross, plaintiff attempted to elicit testimony about what insurance companies had retained the lawyer, as well as the plaintiff's expert. The evidence would have shown that the attorney testifying as to the veracity of plaintiff's expert was retained in part by the liability carrier insuring the defendant.

The trial court did not allow this line of cross examination. After a defense verdict, the Eighth Circuit held that the trial court abused its discretion in not allowing the evidence of insurance to demonstrate bias.

"Agency, ownership, or control" are other avenues for the introduction of liability insurance. In *Hunziger v. Scheidermante*, 543 F 2d.489 (3rd Cir. 1976), the Court held that the plaintiff could introduce evidence that one defendant had insured another defendant in order to prove agency. The theory is that one does not purchase insurance for another unless there is a potential for vicarious liability.

The case of *DSC Communications v. Next Level Communications*, 929 F.Supp.239 (E.D. Texas 1996) is interesting in that it deals with an indemnity agreement. The case was a suit over theft of trade secrets. Two employees of plaintiff company defected and started their own company. The defendants sold their new company. The buyer provided the defendants from all judgments and settlements paid in the case. Plaintiffs sought to introduce the indemnity agreement.

The Court first held, contrary to case law from the Eight Circuit, that the indemnity agreement was NOT liability insurance. The Court went on to explain, however, that even if the indemnity agreement was liability insurance, it would still be admissible under Rule 411. The Court held that the indemnity agreement was admissible for the purpose of showing the plaintiff's damages in this trade secret case. The indemnity agreement was admissible because they were evidence of plaintiff's damages since they were part of the consideration paid by the buyer for the defendant's company. As the court stated, "the assumption of the liability that might be imposed on a lawsuit has some value to the Defendants". The Court then engaged in a formula to further illustrate how the indemnity o assumption of Defendants' lability was relevant to the issue of Plaintiff's damages.

Also looking to 411 for guidance, even while holding that the indemnity agreement was not insurance, the court also held that the indemnity agreement was admissible as to "ownership". The court stated, "In this case, it is the alleged lack of ownership of the trade secrets that caused the Defendants to secure the indemnity agreements….the fact that (Defendants) felt it necessary to 'insure' against the contingency that they might be found to have stolen (Plaintiff's) trade secrets is evidence that they believed that they may not have owned the trade secrets."

Counsel should be on guard for the introduction of their client's liability insurance for other purposes under Rule 411. It may also

be helpful to a defense counsel, such as in the defense of a subrogation claim, so counsel should be on guard for the opportunity. Also, business litigators may be able to introduce indemnity agreements that shift liability, even for the purpose of trying to prove that liability.

TRIAL TIP:

"THE SCIENCE IS COMPLICATED, SO EXPLAIN IT TO ME LIKE I'M A FIVE YEAR OLD"

BY: MICHAEL ZULLO

Product liability cases often involve complex scientific/engineering issues with dueling experts; and trials can be won or lost based on the credibility of the experts and the ability of the experts to communicate complex concepts to juries. Be mindful of this when preparing an expert for testimony. Challenge the expert's conclusions and assumptions at their core so that a layperson can follow the reasoning to the conclusion being presented. Take nothing for granted and use plain language whenever possible.

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