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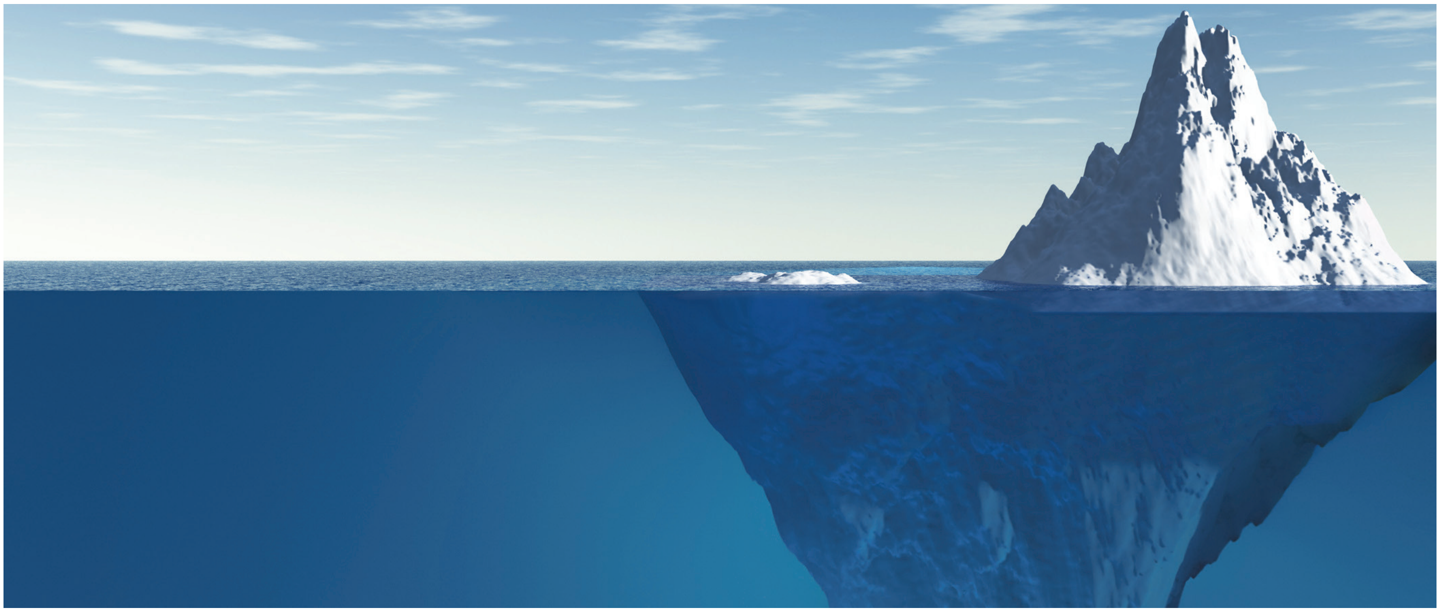

Ensuring you get all the insurance information

ALTHOUGH DISCOVERY RULES OBLIGATE DEFENDANTS TO PRODUCE ALL INSURANCE POLICIES, MANY FAIL TO COMPLY WITH THIS RULE

Imagine a case arising from a crash involving a commercial vehicle. The defendant discloses a $1 million commercial policy, either in response to a discovery request or because of an initial disclosure obligation (depending on the jurisdiction). Is that all the insurance there is?

Maybe. Maybe not. Although discovery rules obligate defendants to produce all insurance policies, many fail to comply with this rule. Some "decide" the disclosed insurance is "sufficient" to cover the plaintiff's damages and thus withhold the rest. Others simply ignore their obligation to look. And still others may deliberately conceal the full coverage, hoping to affect both litigation strategy and settlement negotiations by such omission.

No matter the motivation, failing to disclose the full insurance coverage harms plaintiffs and violates discovery rules. In this article, we will discuss the steps plaintiffs' counsel should take to ensure all insurance has been disclosed, and, if it has not been, the remedies to seek. That includes case-terminating sanctions – something we recently achieved in January 2025.

Why does the insurance matter?

Although typically inadmissible at trial, insurance-coverage information is a core part of discovery. California courts have long recognized a plaintiff's "discoverable interest" in a defendant's applicable insurance coverage. (See, e.g., *Laddon v. Superior Court* (1959) 167 Cal.App.3d 391, 396.) As one California court noted, it is California's "established public policy" that "the provisions of a liability insurance policy are not a matter for the sole knowledge" of the defendant "to the exclusion of the injured person." (*Doak v. Superior Court* (1968) 257 Cal.App.2d 825, 830.) That includes the policies themselves, which, as one court explained, are discoverable "to avoid a situation where any party argues language in the policy precludes coverage in the matter." (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 598.)

Courts have repeatedly recognized that the disclosure of complete insurance information "will tend to promote the efficacious disposition of negligence litigation by settlement or by trial." (*Doak*, *supra*, 257 Cal.App.2d at 830.) These disclosures allow "counsel for all parties to make a realistic evaluation of the case, so that settlement and litigation strategy are based on knowledge of the size of the fund that is available for the satisfaction of any judgment obtained, rather than speculation." (*Sakakibara v. Spectrum Gaming Group, LLC* (D. Nev. 2010) 2010 WL 2947381, at *2.)

Emphasizing that point: Although insurance information is undoubtedly important to settlement, it is also important to "litigation strategy" as well. For instance, an attorney handling a case involving limited insurance may conclude that hiring certain experts or taking certain depositions would generate costs that would unnecessarily reduce the limited source of recovery available to the plaintiff. Or, a plaintiff may conclude that limited insurance counsels against proceeding with a costly surgery, even though it has been recommended by her doctor. (As discussed below, that last example was from a case we handled that resulted in striking the defendant's answer.) Suffice to say: Full disclosure of the insurance limits has far-reaching consequences, which is why the law permits it.

What laws permit discovery of insurance?

California's form interrogatories permit parties to ask an opponent for insurance information by interrogatory. (See California Form Interrogatory 4.1.) Parties may request insurance information by other discovery, including requests for production and person-most-knowledgeable depositions. (See Code Civ. Proc., § 2025.230.)

Other jurisdictions have self-executing obligations for insurance to be disclosed. Rule 26(a) of the Federal Rules of Civil Procedure, for instance, requires a defendant to disclose "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." (Fed. Rules Civ. Proc., rule 26(a)(1)(A)(iv).) Many state jurisdictions, which have rules derived from the Federal Rules of Civil Procedure, contain identical or substantially similar language.

California's recently enacted "initial disclosure" provision is a hybrid of those two approaches. (See Code Civ. Proc., § 2016.090.)

The self-executing obligation notwithstanding, these jurisdictions also permit discovery of insurance information through other mechanisms. That includes interrogatories, document requests, and PMK depositions. (PMK depositions are frequently referred to as "30(b)(6)" depositions after the rule that permits them.)

Be wary of noticing a 30(b)(6) on insurance only. Since many jurisdictions permit only one "PMK" deposition per company, noticing a limited 30(b)(6) may affect your ability to later obtain binding deposition testimony from the company on other topics. One tactic is to use Rule 30(b)(1) of the Federal Rules of Civil Procedure, or its state analogue, which allows notice of a deposition to an unknown person with "a general description sufficient to identify the person or the particular class or group to which the person belongs." (Fed. Rules Civ. Proc., 30(b)(1).) A deposition notice to "the custodian of your insurance policies," for instance, allows for the deposition of someone with knowledge without burning the 30(b)(6). But, because it is not a 30(b)(6), it will not create testimony that is binding on the company.

Whether through a 30(b)(6) or PMK deposition, obtaining testimony from a binding company witness on insurance coverage should always be a part of your evidentiary work-up. In cases where the defendant has complied with its obligation and produced all policies, then this questioning is unlikely to play any further role in the case. But in cases where the defendant has failed to produce all insurance policies, the questioning may reveal additional policies or demonstrate the defendant's direct involvement in the incomplete disclosure. As discussed in further detail below, establishing the defendant's involvement in the non-disclosure – rather than simply the actions of defendant's counsel – can be an important piece of evidence if the case proceeds to sanctions.

How much insurance must a company disclose?

Under California law, defendants must disclose any and all insurance that may be liable to satisfy a judgment. This includes not only primary coverage, but also excess and umbrella policies, even if the defendant believes the claim is worth less than their limits. The obligation is clear: Form Interrogatory 4.1 requires disclosure of "any insurance agreement under which any person carrying on an insurance business may be liable to satisfy in whole or in part a judgment."

In *Doak,* which noted that liability insurance is discoverable because plaintiffs have a contractual interest under Insurance Code section 11580, the court emphasized that the pendency of litigation gives the injured party a discoverable interest in applicable insurance. (257 Cal.App.2d at 829.) Similarly, in *Hecht*, the court ordered production of liability insurance policies to determine collectability in a legal-malpractice case. (137 Cal.App.4th at 579.) The court confirmed that even a non-party's liability insurance can be discoverable when relevant to damages and coverage issues.

In short, defendants may not unilaterally decide how much insurance information to disclose. If a policy may be implicated – even indirectly – it must be produced. Strategic withholding or partial disclosure frustrates the very purpose of California's discovery laws, which exist to promote full transparency and fairness in litigation.

Other jurisdictions also prohibit defendants from unilaterally limiting the amount of insurance provided. For instance, in Nevada, which follows the federal rules, a party must disclose any insurance policy that could apply to the claims made in an action. (*Vanguard Piping v. Eighth Jud. Dist. Ct.* (2013) 129 Nev. 602, 607-08, 309 P.3d 1017, 1020.) "Any" means what it says: whether the defendant says that the plaintiff's injuries are minimal or concedes they are severe,

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all of the insurance must be disclosed. *Vanguard* highlights the principle at play: It is not up to the defendant to unilaterally determine the appropriate amount of insurance to disclose. That is why the rule is all or nothing.

What if the insurance is not provided?

In discovery responses, when a defendant discloses only part of the applicable insurance coverage, say, a $1 million policy, while not disclosing additional excess or umbrella coverage, the issue is not a routine discovery dispute; it's about a failure to fully and accurately disclose the truth about applicable coverage.

If a defendant provides discovery responses that appear complete – with no objections – and it later turns out that additional coverage exists, the problem is not one of scope or ambiguity. It's a misrepresentation. The defendant has made an affirmative disclosure that is false or misleading, violating both the discovery rules and the duty of candor owed in litigation.

In such cases, a motion to compel may be unnecessary or even unavailable – because there was no objection to compel a response beyond. Instead, the appropriate remedy may be sanctions, including case-terminating sanctions where prejudice and willfulness can be shown. California courts recognize that evasive or incomplete responses, even without outright concealment, can constitute sanctionable conduct. In *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1103, the court upheld terminating sanctions where the defendant's discovery responses "submitted no meaningful information," were "evasive," and failed to comply with discovery obligations, even after multiple opportunities. While *Liberty Mutual* did not involve insurance disclosures specifically, it reinforces a critical point: A party cannot comply with discovery by simply appearing cooperative while failing to disclose material information.

By contrast, where a defendant does assert objections – such as claiming the request is overbroad or irrelevant – California law requires the plaintiff to follow the meet-and-confer process (see Code Civ. Proc., § 2016.040) and, if necessary, file a motion to compel. But when no objection is made, and disclosure is simply false or incomplete, the plaintiff has no obligation to guess that more might exist. The failure lies with the defendant – not with the plaintiff's diligence.

What sanctions can be imposed?

Failure to properly disclose insurance can lead to several different kinds of sanctions. A court may impose monetary sanctions. Sometimes those sanctions can be limited to the time opposing counsel took to uncover the non-disclosed policy and file the appropriate motion. Sometimes a court may fix an amount per non-disclosed policy; for instance, a judge in Las Vegas imposed a sanction of $10,000 per undisclosed policy (resulting in a $210,000 sanction award).

Monetary sanctions are not the only relief. Under appropriate circumstances, an appropriate remedy could be "case-terminating" sanctions – in other words, to strike the defendant's answer and place the case in a default procedure. That would mean the damages portion of the case would proceed as though the defendant had defaulted. The court would award damages based on only a prima facie showing.

Practically speaking, achieving defensible case-terminating sanctions requires creating an extensive factual record – typically including an evidentiary hearing – and tailoring the arguments to pertinent case law. (See e.g., *Liberty Mutual*, 163 Cal.App.4th at 1106; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 280, 26.) This may be a difficult burden.

Two examples of case-terminating sanctions

But difficult is not impossible. In the last five years, we have achieved case-terminating sanctions in two Nevada cases arising from the non-disclosure of complete insurance information. The facts and circumstances of these cases illustrate how policing the disclosure requirement through sanctions can be done.

In the first example, *Elizondo v. Califano*, the defendant caused a rear-end car crash on the freeway. Both in pre-litigation and litigation, the defendant disclosed only one insurance policy: a $250,000 automotive policy. The plaintiff's medical bills were nearly more than the policy even before she was recommended to undergo a fusion surgery. Following through on that recommendation would have pushed her medical expenses above the available insurance. Consequently, she decided to forgo the surgery and live with the pain the surgery could have relieved.

After discovery closed – and after significant settlement discussions where the $250,000 policy was represented as the only available insurance – the defendant disclosed a $1 million umbrella policy. Defense counsel framed this disclosure as good news for the plaintiff: there was more insurance to cover the claim. But by that time, discovery was closed; experts had been disclosed; trial was imminent; and, perhaps most importantly, the incomplete disclosure had artificially created a "treatment gap" defense counsel would no doubt exploit at trial: if the plaintiff were in such pain, why did she not get the surgery?

We filed a motion for case-terminating sanctions. The court ordered an evidentiary hearing and took evidence on both the defendant's willfulness and our client's prejudice. That included testimony from the defense attorney, our co-counsel (who had represented the client during pre-litigation and through the close of discovery, and testified under a limited waiver of privilege), and adjusters from within the insurance company. Based on that record, the court found the non-disclosure was willful; that the plaintiff reasonably relied on the disclosure to make decisions for surgery; and that her decision to forgo surgery based on the non-disclosure was prejudicial. Consequently, the court struck the defendant's answer.

A misinterpretation of *Elizondo* would be that case-terminating sanctions are possible only where highly specific prejudice to the plaintiff is established – in that case, the decision to forgo surgery. While that is persuasive evidence, it is not the only way to show that case-terminating sanctions are appropriate. Prejudice does not necessarily require that level of precision.

Miller v. Garda CL West, the second example, illustrates that point. That case was also a rear-end collision caused by an employee of the defendant company. During discovery, the defendant disclosed one $5 million insurance policy. Our co-counsel wrote defense counsel to confirm that the $5 million policy was the only insurance available; defense counsel confirmed it was. The plaintiff served requests for production seeking all policies; the defendant responded and identified the previously disclosed $5 million policy. Discovery closed without any further insurance disclosed, and the parties unsuccessfully mediated the case. With trial approaching, our co-counsel associated our firm into the case.

Shortly after we appeared, we wrote defense to ask the same question that had been asked over a year before: Was the $5 million policy the only policy? Defense counsel eventually disclosed that more insurance existed, eventually producing an additional $3 million excess policy without any additional insurance. The title of the electronic file containing that $3 million excess policy was "1st XS," prompting us to ask whether there was "second," "third," or even more excess policies. Defense counsel then revealed that there were, but that, given the client's request for confidentiality, they would not be disclosed until we agreed to a protective order. We filed a sanctions motion instead.

In our sanctions motion, we asked for three forms of relief: the imposition of monetary sanctions; the immediate disclosure of all insurance; and an evidentiary hearing concerning the defendant's available insurance and the disclosures it had made in the case. As we explained to the court during the hearing, the need for the evidentiary hearing was to establish a clear record that all policies had been disclosed. In court, under oath testimony from a company representative was the most definitive way to achieve that. Or, as we put it, "going to the principal's office."

The court agreed with us and set the evidentiary hearing for about a month later – and just two weeks before the trial was set to begin. The court also ordered the defendant to disclose all policies by the end of the day. Defendant thereafter sent us a list disclosing three additional insurance policies totaling $17 million in coverage. That was $20 million more in insurance than the $5 million that was initially disclosed.

But what was sent was only a list. Before the evidentiary hearing, we followed up with defense counsel to demand production of the policies. In response, and just days before the evidentiary hearing, defense counsel disclosed an additional $47 million in coverage provided over five separate policies. That meant that, just days before trial was set to begin, the defendant disclosed $67 million more insurance than it had disclosed over the years the case had been pending.

Then came the evidentiary hearing. The defendant presented its general counsel to testify. At that hearing, she confirmed that the $67 million in additional, undisclosed coverage could apply to the claims made by our client. She further testified that she did not know anything about the circumstances of the insurance disclosure since she had only become involved with the case just a few days prior to the hearing. At the conclusion of her testimony, we requested case-terminating sanctions. After taking the matter under submission, the court ordered a further evidentiary hearing to evaluate prejudice to our client and the willfulness of the defendant's conduct.

That hearing went forward about a week before trial. Defendants called the same witness. During this testimony, she revealed that she learned it was "the common practice" to disclose only the "primary policy" (i.e., the $5 million policy) and withhold the "excess policies" (i.e., the undisclosed $67 million). When asked whether defendant considered excess insurance relevant, she testified that it would not be "if it is not considered a case that … would have an exposure in damages beyond the primary amount," and that, depending on the "common practice," it may not need to be disclosed. When her testimony concluded, we did not call any witnesses.

We instead argued that the prejudice was the effects the non-disclosure of insurance had on trial and settlement strategy. Evidence like that from *Elizondo* – highly specific prejudice – was not presented. Instead, the prejudice was that courts recognize as a matter of law: it prevented plaintiff from "mak[ing] a realistic evaluation of the case, so that settlement and litigation strategy are based on knowledge of the size of the fund that is available for the satisfaction of any judgment obtained, rather than speculation." (*Sakakibara*, 2010 WL 2947381, at *2.) Said differently – by concealing the insurance, the defendant denied plaintiff the opportunity to make informed decisions about trial strategy, including experts to hire, costs to incur, and the like, since the "size of the fund that is available for the satisfaction of any judgment" was artificially depressed. Forcing the plaintiff to prove specific prejudice under those circumstances would perversely reward the defendant's action; because plaintiff did not know about the additional insurance, she would not be able to say how things would have changed.

The other major issue was whether defendant was responsible, even in part, for the nondisclosure, or whether it was only defense counsel. If the latter, then courts are more reluctant to impose case-terminating sanctions, since that could punish a party for the acts of its attorneys. Defense counsel, leaning into this doctrine, emphasized that, if anyone was to blame, it was them and them alone. We pointed out two salient facts: first, that the defendant's witness endorsed the "only produce the primary policy" practice; and second, that it was the defendant itself, and not merely defense counsel, who insisted on confidentiality before some of the policy information was disclosed.

The court took the matter under submission. The night before the trial was set to begin, the court issued a detailed order striking the defendant's answer and setting the case for a default prove-up. The matter settled three days later.

When you suspect that less than all insurance information has been disclosed

Elizondo and *Miller* carry helpful lessons if you suspect anything less than all policies have been disclosed.

First, pay attention to the insurance disclosures. Ask whether you have received all policies. Follow up promptly on objections. Do not allow defendants to leave you at an informational deficit about the available insurance.

Second, communicate about insurance matters in writing. In *Miller*, defense counsel frequently asked to disclose insurance information over the phone. We refused, asking that any information about insurance come in writing only. That creates a written record for later motions.

Third, do not rely on self-executing discovery mechanisms alone. Request insurance through other mechanisms, like requests for production or depositions. Get the company on the record about the disclosures and show its involvement in the process. And confirm any representations that all insurance has been disclosed in writing.

Finally, stay persistent. Defendants may throw up all manner of roadblocks to full disclosure. They may ask for protective orders. They may claim the case is "not worth" any more than what insurance has been disclosed. These excuses do not change the law.

Knowing the full insurance is important to achieve full and complete recovery for your clients. For that reason, defendants may resist full disclosure, and some may even see it as an advantage they will gain over your clients. With the right approach, you can ensure full disclosure or, if defendants break the rules, hold them accountable.

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