

# CALLAHAN & BLAINE

California's Premier Litigation Firm<sup>SM</sup>

## Litigation Management for In-House Counsel: The First 60 Days

As every general counsel knows all too well, hundreds of new lawsuits are filed every day in California. The first person to review and handle a new complaint is typically in-house counsel. While in most cases outside counsel will ultimately be retained, there are many important tasks that in-house counsel can accomplish in the first 60 days that will significantly advance the interests of the company. The following is a list of such steps and responsibilities.

### 1. Obtain an Extension to Respond

The first step is to contact plaintiff's counsel and obtain an extension of time to respond to the complaint. In virtually all cases, counsel will cooperate and provide a reasonable extension. Most plaintiff's counsel do not want the first interaction with a defendant to be an unreasonable refusal to provide a routine extension, which will then set a bad precedent of non-cooperation. You should request a 30 day extension. This will provide you a 60 day window (or 51 days in federal court) to conduct your due diligence and analysis.

### 2. Tender the Claim to Insurance

It is a truism that 100% of claims that are not tendered will not be covered by insurance. Moreover, even if a claim is tendered late, the insurance carrier will argue that it has no obligation to pay pre-tender fees. *Truck Ins. Exch. v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976-977. In fact, the carrier may even take a position of denying coverage completely if it alleges prejudice by the late tender.

It is imperative that in-house counsel tender the complaint immediately to all insurance companies who issued policies to your company. Do not limit your tender to one line of insurance. Tender under all policies – CGL, D&O, EPLI, etc., both primary and excess. Because insurance policies vary in terms of the trigger of coverage – “occurrence” policies versus “claims made” policies – you need to ensure you have accounted for all policies that were issued either when the claim occurred and when the claim was made.

Even if your initial review of the complaint leads you to conclude there is no coverage, tender anyway. It is well-established California law that as long as the complaint contains allegations of liability that might be covered by the policy, or if the complaint could be amended to include such allegations, a duty to defend exists. *Montrose Chem. Corp. v Superior Court, supra*, 6 Cal.4th at 295.

Because of this broad duty to defend, our office has successfully triggered coverage for claims involving product liability, pollution, intellectual property, unfair competition and misappropriation of trade secrets under CGL policies, class action lawsuits under EPLI policies, and banking and securities fraud claims under D&O policies. Given the financial impact of litigation and the importance of an insurer-funded defense, it could be malpractice to not tender the complaint. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744-745. So, don't delay. Tender right away.

### 3. Procedural and Jurisdictional Defenses: Arbitration, Forum, Venue and Related Considerations

Significant analysis should be given to procedural and jurisdictional defenses during the first 60 days. The first consideration is the right to arbitrate. California has a “strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.” If there is a contractual arbitration clause, promptly file a petition to compel arbitration, as failure to do so may constitute waiver of the right to arbitrate.

The second step is to determine whether an action can be removed to federal court. There are two grounds for removal: federal question (such as a cause of action based on federal law) and diversity. The deadline for removal is thirty days from being served with the complaint. 28 U.S.C. § 1446(a).

The third issue is whether venue is proper – whether the suit belongs in the Superior Court of one county versus another. (In Los Angeles, filing in the proper branch is a further consideration). You can file a motion to transfer venue pursuant to Code of Civil Procedure section 396b if venue is improper. Similar concepts of motions to transfer venue exist under the federal rules, but are even more powerful, as defendants can obtain inter-district transfers and have cases transferred all over the United States. 28 U.S.C Sections 1404(a).

### 4. Provisional Remedy Issues

There is a small minority of cases (misappropriation of trade secret, interference with contract, intellectual property, etc) where plaintiff may be seeking provisional

remedies, such as a temporary restraining order, writ of attachment, temporary protective order or other similar remedies. This may be done on an ex parte, emergency basis (with or without notice) or on noticed motion basis (16 court days).

A quick way to ascertain whether provisional remedies are being sought is to check the online docket of the court website. One can also call the clerk in the department and ask if any matters have been set for hearing. A pointed phone call and e-mail to opposing counsel can also smoke out any such proceedings.

If provisional remedy issues do arise, then many litigation decisions will have to be accelerated significantly, and outside counsel will have to be chosen quickly. In such cases, it is extremely critical to retain highly experienced business trial lawyers who know their way in the courtroom.

### 5. Cross-Complaints

In-house counsel should review the complaint to determine if there are claims for affirmative relief that may be brought against the plaintiff, or a codefendant, or someone not yet a party to the action. Claims against the plaintiff can be asserted regardless of the subject matter relationship. Code Civ. Proc. § 428.10(a).

Certain cross-complaints are compulsory, and failure to plead them will bar your company from asserting them in any later lawsuit. Code Civ. Proc. § 426.30. A cross-complaint is compulsory if the cause of action “arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action ... in (the) complaint.” Code Civ. Proc. § 426.10(c).

Cross-complaints against a codefendant or third person not yet a party to the action are generally permissive. The courts look to whether the cause of action asserted “(1) arises out of the same transaction, occurrence, or series of transactions or occurrences (set forth in the complaint) ... or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause (of action) brought against him.” Code Civ. Proc. § 428.10(b).

### 6. Discovery

There is no reason to wait until you hire outside counsel to serve fundamental discovery. While there is a 10 day “hold” on discovery for plaintiffs, there is no such waiting period for defendants, and discovery can be served immediately upon service. Code Civ. Proc. §§ 2025.210(b).

There are three types of discovery that can easily be served by in-house counsel. First, you can serve contention interrogatories and document demands which are keyed to the factual allegations in the complaint. You can ask for identification of all facts, witnesses and documents which support the contentions in the complaint, and production of all such documents. Anything not produced or identified by the plaintiff will be excluded at trial. Second, you should ask for production of the fundamental documents in the case, such as any documents that relate to the facts of the complaint. Finally, you should serve additional routine discovery, such as form interrogatories.

### 7. Conclusion

As set for the above, there are many important tasks that in-house counsel can do in the first 60 days. Not only will you save the company significant money and resources by handling these initial tasks in-house, but you will personally become much more engaged in the defense of the litigation.

#### Edward Susolik

Edward Susolik is a senior partner at Callahan & Blaine, a boutique litigation firm with 28 attorneys specializing in complex business litigation. Mr. Susolik is head of Callahan & Blaine's insurance department, and has been named one of the “Top 100 Attorneys in Southern California” by Super Lawyer Magazine for every year from 2009 to 2016. Callahan & Blaine's successes include hundreds of defense adjudications, dismissals and de minimis settlements on behalf of Orange County businesses. Callahan & Blaine's successes also include a \$934 million jury verdict in a complex business litigation case, which is the largest jury verdict in Orange County history. The firm celebrated its 31<sup>st</sup> anniversary earlier this year. Mr. Susolik can be reached at ed@callahan-law.com or 714.241.4444. Callahan & Blaine's website is found at [www.callahan-law.com](http://www.callahan-law.com).

