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Insurance Law: A Primer for In-House Counsel

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In-house counsel must have significant knowledge in a wide variety of legal specialties: litigation, corporate, regulatory, employment, real estate and property, just to name a few. Critically, one of the key areas where in-house counsel must acquire legal understanding is insurance law, especially if they handle any litigation.

Insurance law is the ultimate inter-disciplinary specialty. Insurance concepts and principles cut across virtually every field of litigation — business litigation, intellectual property, employment law, products liability, real estate, corporate disputes and a broad spectrum of other contexts.

An in-house counsel who has insurance expertise is a powerful asset for his corporate employer. For example, if in-house counsel is able to successfully trigger liability insurance coverage for a complex litigation lawsuit, it is like finding gold in the backyard.

In this article, I will summarize some of the insurance principles that arise in a wide variety of commercial litigation contexts. Properly applied by in-house counsel, these principles can bring his or her company millions of dollars in insurance benefits.

Fundamental Insurance Principles

There are numerous fundamentals of insurance law for commercial litigation.

First, through a variety of insurance rules and principles, general liability insurance policies provide coverage for an incredibly broad variety of business lawsuits. The full spectrum of commercial litigation that is potentially covered by insurance is frequently misunderstood by many in-house counsel and their corporate officers, many of whom view insurance policies in a very literal and one-dimensional manner.

The reality is that general liability policies can potentially provide coverage for virtually every type of commercial litigation lawsuit, through coverages such as advertising injury and personal injury. These include business litigation lawsuits such as copyright and trademark infringement,

misappropriation of trade secrets, unfair competition and many others.

Even business lawsuits that center on allegations typically not covered by general liability policies — such as breach of contract, fraud, shareholder or partnership disputes and wrongful termination — nevertheless frequently involve secondary allegations of defamation, disparagement, invasion of privacy or related torts which do implicate insurance coverage. See *Buss v. Transamerica* (1997) 16 Cal.4th 35.

In addition, there is a wide plethora of specialized insurance policies that cover commercial litigation scenarios. These include Director & Officer, Error and Omission, Intellectual Property, Employment Practices Liability and numerous other types of policies.

The second fundamental principle of insurance coverage for business litigation is that corporations must aggressively

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pursue insurance benefits. Insurance companies are not Santa Claus. These are not the “good hands people” of marketing lore. These are multi-billion dollar, international corporations whose fundamental objective is to maximize profits for owners/shareholders – just like your company.

Thus, in-house counsel must be clear in understanding that a significant majority of insurance claims will be contested by their insurance carriers. While certain claims are either clearly covered or obviously not covered, the large majority of claims fall within the grey area. In that instance, insurance companies either typically deny such claims, or handle them pursuant to a comprehensive reservation of rights.

In order to obtain full coverage for these claims and maximize insurance benefits, a company must aggressively pursue such benefits with a highly experienced defense counsel who has significant expertise and experience for in maximizing insurance coverage. If a corporation does not aggressively pursue its insurance benefits, they will likely ultimately be denied or minimized.

Tender Early/Tender Often

It is black-letter law that an insurance company’s duties to provide coverage for third party liability claims are not triggered until the policyholder tenders the claim to the insurer. Thus, it is absolutely critical that in-house tender all lawsuits, arbitration demands, regulatory complaints and other legal proceedings to all insurance companies. Even threats to sue or other contentious communications need to be reported to the insurance company as potential claims.

Ultimately, there are many negative things that occur because of a failure to tender, or a delayed tender.

First, the company will likely not be able to recover any defense fees incurred pre-tender.

Second, the policy may have “claims made and reported” deadlines which require notice within the policy periods or shortly thereafter.

Third, even if the policy does not have such reporting deadlines, a carrier may argue that it has been substantially prejudiced by late notice, and deny the claim.

Duty to Defend

The duty to defend is the most important concept in insurance. If there is one fundamental principle that corporate clients and their defense counsel must understand and appreciate, it is the duty to defend.

Black letter California law requires an insurer to immediately defend their insureds if the allegations in the complaint fall within, or may potentially fall within, the scope of coverage

provided by the terms and definitions of the policy. *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263.

Triggering the duty to defend can result in a significant shift of power in litigation. It can provide a defendant significant leverage against a plaintiff, as suddenly a company’s defense fees are being paid by an insurer. For complex cases, such a benefit can be worth millions of dollars.

In light of the critical importance of the duty to defend, this issue frequently becomes the first battlefield between insurer and insured. Insurers file declaratory relief actions seeking judicial resolution of difficult coverage issues, to try to terminate the duty to defend. Policyholders initiate bad faith complaints arising from the insurer’s wrongful refusal to defend.

The Insurance Magic of the Cross-Complaint

Many defendants in business litigation cases file cross-complaints against the plaintiff, often in a knee-jerk or mirror-image fashion. Corporations and their counsel must understand the profound impact such a cross-complaint will have on the litigation. When a cross-complaint is filed by a defendant, the plaintiff must immediately tender the cross-complaint to its insurance company for coverage. An insurance company has duty to defend a cross-complaint if the allegations are potentially covered.

By obtaining insurance coverage for a cross-complaint filed against it, a plaintiff can pay for and subsidize much of the attorney’s fees and costs it incurs for prosecuting its plaintiff’s case, as such fees and costs are inextricably intertwined with purely defense related fees. Moreover, all of the defense fees for the cross-complaint are also paid for.

In fact, in many cases, a cross-complaint may not even be necessary to trigger the duty to defend of the plaintiff’s insurance carrier. A critical but rarely appreciated California Supreme Court opinion entitled *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 C.4th 189, 126 Cal. Rptr. 2d 908, stands for the proposition that certain affirmative defenses whereby a defendant seeks an offset against the plaintiff’s damages may constitute a claim under the plaintiff’s insurance policies, thereby triggering the duty to defend even when no cross-complaint is filed.

Independent Counsel

One of the most important principles in California insurance law is the right to independent counsel. A corollary of the duty to defend, California Civil Code section 2860 imposes a mandatory duty upon insurers to provide independent counsel when the resolution of a third party claim bears directly on the outcome of the coverage dispute between the insurer and its insured. *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364.

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Corporate counsel must recognize the situations under which the right to independent counsel is triggered, as well as the practices and procedures which are required to demand and obtain Cumis counsel.

Further, after a company has successfully obtained the right to Cumis counsel, the real work begins. Outside counsel must act as both defense counsel and coverage counsel for the lawsuit. Having defense counsel with insurance law expertise is the very essence of the Cumis doctrine. Cumis counsel must provide an aggressive and comprehensive defense of the third party claims while at the same time maximizing the insurance benefits available to the client.

Corporate Plaintiff Strategies and Insurance

A company that is a plaintiff in commercial litigation must consciously manage the plaintiff's litigation such that the defendant's insurance coverage is maximized. This requires that the company's counsel have expertise in insurance law. By carefully focusing the plaintiff's cases toward covered claims, the plaintiff ensures that judgments are collectable against the insurance company and that carriers are forced to respond in settlement and mediation. It is also a truism that it is much easier to settle cases when insurance companies are involved in the settlement negotiations than when private companies are forced to dig into their own pockets.

In the alternative, in some cases the plaintiff does not wish to trigger insurance coverage so that the defendant must bear the cost of defense by itself. In that case, the claims must be carefully drafted by corporate litigation counsel to avoid triggering the duty to defend. Again, it is critical for counsel to have insurance expertise.

Mediation and Settlement

Many settlements involve insurance and insurance issues. In fact, the majority of settlements are paid by insurance money. Further, insurance coverage, bad faith, duty to defend and insurance defense issues are frequently the catalysts for settlement. The bottom line is that insurance controls the settlement dynamic and decisions regarding the timing and amount of settlements made by insurance companies.

A corollary to this fundamental axiom of insurance law is that lawyers with insurance law expertise will have a significant advantage over an adversary in settlement discussions. This expertise can take many forms. For example, an attorney could be a plaintiff's counsel seeking to maximize the amount of settlement to be paid by the defendant's insurance company. Conversely, an attorney can be defense counsel seeking to either settle a case using insurance company money or force the plaintiff to lower their demands or even drop the case completely because they have leveraged the duty to defend against the plaintiff.

Conclusion

As demonstrated above, expertise in insurance law is an extremely powerful weapon for in-house counsel and his or her outside counsel.

Insurance issues and principles arise in virtually every field of commercial litigation. An in-house counsel handling litigation matters for a corporate client who is also an expert in insurance law can bring millions of dollars of insurance benefits to their company.

For more information on this subject, please call Ed Susolik directly at 714.241.4444.