

ORANGE COUNTY BUSINESS JOURNAL

CALLAHAN & BLAINE

California's Premier Litigation FirmSM

Insurance Law: A Specialty for all Seasons

by Edward Susolik, Partner in Charge of the Insurance Department, Callahan & Blaine

Insurance law and insurance issues impact a wide variety of legal specialties: litigation, corporate, regulatory, employment, real estate and property, just to name a few. A litigation attorney who also has knowledge and expertise in insurance law is a powerful asset for any business entity. For example, it is a huge advantage for a corporate client in litigation if counsel is able to successfully trigger liability insurance coverage for the lawsuit.

In this article, I will summarize some of the general insurance principles that arise in a wide variety of commercial litigation contexts. Properly applied, these principles can bring a company millions of dollars in insurance benefits.

1. Fundamental Insurance Principles

There are two fundamental principles 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 lawyers, many of whom view insurance policies in a very literal and one-dimensional manner.

The reality is that through coverages such as advertising injury and personal injury, general liability policies can potentially provide coverage for a wide variety of commercial litigation lawsuits, including 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.

The second fundamental principle of insurance coverage for business litigation is that corporations must aggressively pursue insurance benefits. Insurance companies 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 any business entity.

If a corporation does not aggressively pursue its insurance benefits, such benefits will likely ultimately be denied or minimized.

2. 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.

The failure to tender, or a delayed tender, may have significant negative consequences. As a threshold matter, the insured 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. Finally, 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.

3. Duty to Defend

The duty to defend is the most important concept in insurance. 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.

4. The Insurance Magic of the Cross-Complaint

Many defendants in business litigation cases file cross-complaints against the plaintiff. 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.

5. 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.

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

6. Corporate Plaintiff Strategies and Insurance

A company that is a plaintiff in commercial litigation must consciously manage the litigation such that the defendant's insurance coverage is maximized. 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.

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.

Conclusion

Expertise in insurance law is an extremely powerful weapon for lawyers representing business clients. An attorney handling litigation for corporate clients who is an also an expert in insurance law can bring millions of dollars of insurance benefits to such companies.

Edward Susolik

Edward Susolik is the partner in charge of the Insurance Department at Callahan & Blaine, an Orange County boutique litigation firm with 30 attorneys. Mr. Susolik has handled over 1000 insurance law disputes in his 26 years of practice, and has recovered over \$1.0 Billion in insurance benefits on behalf of his policyholder clients. He has been an adjunct professor at USC Law School, where he has teaches Insurance Law, and is an editor of the Rutter Guide on Insurance Litigation. Mr. Susolik has been named one of the “Top 100 Attorneys in Southern California” by Super Lawyers every year from 2010 to 2016. He can be reached at 714.241.4444. Callahan & Blaine's website is found at www.callahan-law.com, and its insurance website is at www.insurance-litigation.com.

