

# GETTING THE MOST OUT OF YOUR LIABILITY INSURANCE POLICIES AND INDEMNITY AGREEMENTS

AUGUST 2, 2023

SHAUN CROSNER

MICHAEL GEHRT

MIKAELA WHITMAN



PASICH<sub>LLP</sub>

# SOURCES OF COVERAGE

- Consider all potentially applicable policies
  - Primary and excess/umbrella
  - Different lines of insurance
  - Historical policies
  - Named insured, additional insured, and successor rights
- Consider all contracts and indemnity agreements

# STRATEGIC CONSIDERATIONS RE INDEMNITY AGREEMENTS

- Must be drafted carefully and revisited periodically as appropriate
- Obligations may be unilateral or mutual
- The role of indemnity agreements in the defense of claims
- Distinction between indemnity obligations and Additional Insured coverage
- Disputes between insurers and indemnitors
- Triggers of indemnity vs. triggers of insurance coverage
- Questions concerning prioritization

# PROVIDING NOTICE

- When notice is required
- Notice to indemnitors vs. notice to insurers
- How to give notice to insurers
  - Follow the policy provisions exactly, but substantial compliance may suffice
- Which insurers must receive notice
  - All potential sources of coverage – check indemnity agreements
  - Primary and excess/umbrella insurers
- What happens if there is not “timely” notice to insurers?
  - Notice-prejudice rule and other excuses for delayed notice
  - Costs incurred before notice may be treated as voluntary payments

# POTENTIAL INSURER RESPONSES

- 1) Accepting coverage unequivocally
- 2) Accepting coverage under a reservation of rights
- 3) Denial of coverage

## RESPONDING TO A DENIAL

- Timing considerations
  - Respond now or later?
  - Deferred response generally does not waive rights
- Must be mindful of statute of limitations and any contractual limitations periods

# UNDERSTANDING THE RESERVATION OF RIGHTS

- Significance of reservation of rights
- Reservations may trigger right to independent defense counsel
  - Test varies by jurisdiction
  - California: reservation of rights coupled with control of issue affecting coverage dispute

# UNDERSTANDING THE RESERVATION OF RIGHTS

- The insured's role in the appointment of independent defense counsel
- Disputes regarding independent counsel's hourly rates
  - Factors differ from state to state
  - Cal Civil Code § 2860: Insurer must pay rates which it actually pays in the defense of "similar" actions in the "community" where action is pending or claim arose



# THE INSURER'S DEFENSE DUTY

- Duty to Defend
  - Insurer typically retains defense counsel, although insured may have input
  - Triggered by mere *potential* for coverage
    - ❖ Even if claims are predominantly uncovered
  - Not limited to the “four corners” in most jurisdictions
  - Duty to defend is typically both immediate and complete

# THE INSURER'S DEFENSE DUTY

- Duty to Advance or Reimburse Defense Costs
  - Insured generally selects counsel and defends itself
  - Insurer generally bound to pay full rates, subject to reasonableness of fees
    - ❖ Modern trend: hourly rate caps in policies
  - Duty to advance/reimburse generally is contemporaneous – i.e., must advance or pay as fees and expenses are incurred

# THE INSURER'S DEFENSE DUTY

- Absent provision to the contrary, generally no right to allocate defense costs
- Some liability policies purport to give insurer right to allocate between covered and uncovered defense costs
  - May result in insured bearing some percentage of defense-related expenses
- “Best Efforts” allocation provisions
  - Obligate insurer and insured to attempt in good faith to agree on fair and proper allocation
  - Does not obligate insured to accept insurer’s proposed allocation

# COVERAGE FOR SETTLEMENTS

- Duty to settle flows from an insurer's duty of good faith and fair dealing
- Voluntary payments clause – insured may not make a payment or assume any obligation without the insurer's consent, which cannot be unreasonably withheld
  - Insurer likely does not need to show prejudice, but this rule varies by jurisdiction
- Navigating disputes over the decision to settle
- Questions concerning the reasonableness of a settlement

# COVERAGE FOR SETTLEMENTS

- A few thoughts on mediation:
  - Choose a mediator who can deal with insurance as well as substantive issues.
  - Importance of coverage counsel as well as underlying defense counsel at any mediation.
  - Involvement of insurers in mediation.
  - Issues posed by mediation confidentiality.

# COVERAGE FOR SETTLEMENTS

- Allocation of Settlement Amounts
  - When settlement involved both covered and uncovered claims or covered and uncovered parties, many courts use the “larger settlement rule,” under which allocation is appropriate only if the uninsured claims cause a settlement to be higher than it otherwise would have been.

**TIP: Consider potential allocation issues when drafting settlement agreements.**

# COVERAGE FOR JUDGMENTS

- Insurer's coverage obligations typically depend on amounts actually awarded on various claims.
- Coverage for each element of relief must be analyzed separately

# COVERAGE FOR JUDGMENTS

- Awards of attorneys' fees and costs
  - Some policies expressly cover, but some purport to exclude coverage
  - Even if attorneys' fees and costs are excluded, fee award may be covered as element of compensatory damages
- Awards of Punitive Damages
  - Coverage may be available for corporate insureds in a variety of circumstances
  - Insurability depends on context and applicable law





# QUESTIONS?



**Shaun Crosner**  
**SCrosner@PasichLLP.com**  
**(424) 313-7844**



**Michael Gehrt**  
**MGehrt@PasichLLP.com**  
**(424) 313-7855**



**Mikaela Whitman**  
**MWhitman@PasichLLP.com**  
**(424) 313-7890**

