

Managing Your Relationship With Your Defense Counsel And Your Insurer In Litigation

Presentation to Association of Corporate Counsel – America

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When Should You Notify Your Carrier?

- Answer: As Soon As Possible
- General Liability Policies
 - Notice/prejudice rule
 - But pre-tender fees are generally NOT recoverable
- Directors & Officers/Errors & Omissions Policies
 - Claims made/Claims made and reported
 - Deadlines generally are enforceable even without prejudice
 - Do pre-tender fees count against the deductible?

How Should You Notify Your Carrier?

- Broker
- Defense counsel
- Coverage counsel
- “Long-form” v. “short form” tender
- Facts outside the complaint

Who Gets To Choose Defense Counsel?

- Duty to defend and no reservation of rights
- Reservations of rights and conflicts of interest
 - Civil Code section 2860
 - Ethical principles – the *Cumis* decision
 - Outcome within the control of defense counsel
- Directors & Officers policies – approved list
- Multiple insureds and separate counsel

What Rates Must The Carrier Pay?

- Civil Code section 2860:
 - If duty to defend, then:
 - “rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended”
 - If carrier breaches duty to defend, no 2860 rates
- D&O: No duty to defend – reasonable rates

Can The Carrier Allocate Defense Costs?

- General liability policies – No
 - *Buss v. Superior Court*
 - Potential right to reimbursement
 - “solely” for noncovered claims
 - Insured’s cross-claims
- Directors & Officers policies – Maybe
 - Policy provisions
 - “reasonable relation” test (*Safeway; Raychem*)
 - contemporaneous (*Gon; Okada*)

Can The Carrier Insist On “Litigation Guidelines”?

- Guideline examples
 - Prior Approval and Consultation
 - Legal Research, Bates Stamping, Travel
 - Number of Attorneys (meetings, depositions)
 - Expert Retention, Motion Practice
 - Reimbursement Rates
- Ethical interference with exercise of professional judgment
 - *Dynamic Concepts v. Truck*
 - *In the Matter of the Rules of Professional Conduct* (Montana)
- Civil Code Section 2860 Standard

How Do You Keep The Carrier Informed?

- Duty to cooperate
- Role of defense counsel and coverage counsel
- Section 2860 obligation
- Privilege issues
 - acceptance of defense
 - litigation strategy, status reports, damages review
 - coverage disputes, coverage litigation

Are Insurer-Insured Communications Privileged *As to Others*?

- Plaintiffs, Third Parties, Other Carriers
- Answer may differ based on:
 - forum (state or federal)
 - denial of coverage, reservation of rights
(*Letrolarm, First Pacific Networks*)
 - underlying claim based on federal/state law

What Can I Tell My Insurance Broker?

- Broker as coverage ally
 - Prodding carrier to accept defense
 - Preparing litigation against carrier
- *Atmel v. St. Paul*
 - May maintain attorney-client privilege under some circumstances
 - Denied motion to compel broker to produce certain documents
- Ensure broker understands role, privilege & limits

How Do You Get The Carrier To Settle The Case?

- Satisfy the carrier's need for information
- Address coverage disputes
- “Voluntary payments” and “no-action” clauses
- Carrier contribution with reservations – *Johansen*
- Refuse to settle without carrier money?