



A Liability Insurance Primer for In-House Counsel

Summary of Topics

- Anatomy of a Liability Policy
- The Application Process
- The Claims Handling Process
- Handling Denials





Anatomy of a Liability Policy

Liability v. First-Party

First-Party Policies

- Cover Losses Directly Incurred by the Insured

Liability Policies (aka “Third Party” Policies)

- Cover Third-Party Losses for Which the Insured is Liable

Duty to Defend v. Reimbursement

Duty to Defend Policies

- Insurer Chooses Counsel (absent right to independent counsel)
- Tripartite Relationship (except independent counsel)
- Covers 100% of Defense Costs
 - Subject to ROR
 - Independent Counsel Rate Limit

Duty to Defend v. Reimbursement (cont'd)

Reimbursement Policies

- Insured Chooses Counsel (subject to consent)
- Insured May Have to Pay Counsel and Obtain Reimbursement from Insurer
- May Not Cover 100% of Defense Costs
- Satisfaction of Retention Is Condition to Coverage

Claims-Made vs. Occurrence Policies

Occurrence Policies

- Coverage Triggered by Date of Damage or Injury
- Generally, Must Tender as Soon as Practicable
- Pre-tender Defense Costs Not Recoverable
- Typically, Defense is Outside of Limits

Claims-Made vs. Occurrence Policies (cont'd)

Claims-Made Policies

- Coverage Hinges on Timing of “Claim”
- Timely Reporting is also Typically a Coverage Condition
- Pre-tender Defense Costs Not Recoverable
- Typically, “Burning Limits”

Deductibles versus Retention

Deductibles

- Typically Small in Amount
- Collected from Insured
- Immediate Duty to Defend

Retention

- Typically Larger Than a Deductible
- Typically Must be Satisfied Before Coverage is Triggered

The Application Process

Communicate with Your Broker

- Make Sure Your Broker Understands Your Business and Its Exposures
- Communicate Changes in Your Business
- Don't Overlook Boilerplate or Pre-Filled Information

Representations

The Application is critical!

- It is an exam on which you must score 100%
- An insurer can rescind or deny coverage based on misstatement or omission of material facts, even if innocent mistake

Warranties

Beware of Warranties!

- Mentioned in the Application
- If Clearly Stated, Compliance May Be a Condition to Coverage

Items to Negotiate

- Arbitration Provisions
- Choice of Counsel Provisions
- Sub-Limits
- Exclusions

Retroactive Date

- Past Conduct Covered Only If It Occurred After the Retroactive Date
- Different from Date of Claim
- Be Careful When Switching Insurers
- Potential for Partial Coverage if Distinct Covered Acts are Committed After the Retroactive Date



The Claims Handling Process

Tendering

- Tender Immediately
- Tender Under the Correct Policy Year
- Don't Overlook Excess/Umbrella Coverage

Consent

No Voluntary Payments Provision

- Pre-tender Fees and Costs Not Covered
- Post-tender Fees and Costs
 - Counsel Needs Consent for Big Ticket Items (Mediation, e-Discovery)
- Don't Make or Accept an Offer Without Consent!

The Duty to Defend

- Immediate Duty
- Potential for Coverage Standard
- Coverage Triggered by Facts Alleged, Not Causes of Action Pled
- Extrinsic Evidence May Be Helpful in Establishing Coverage

The Duty to Defend (cont'd)

- Typically Extends to Entire Lawsuit, With Potential Right of Reimbursement
- May Extend to Prosecution of a Counterclaim
- Terminates When Limits Exhaust or No Potential for Coverage

Exclusions

- Conduct Exclusions (reservation may trigger right to independent counsel under duty to defend policy)
- Conduct or Knowledge of One Insured Should Not Be Imputed to Innocent Insureds
- Knowledge of CEO is Typically Imputed to Corporation

Settlement

Duty to Settle

- Unreasonable Refusal to Settle within Limits May Result in Insurer's Liability for Excess Judgment
- Pre-litigation Demands are Subject to C.C.P. § 999

Settlement (cont'd)

Hammer Clauses

- Certain Policies Allow the Insured to Veto a Settlement (E&O)
- Hammer Clauses Limit Insurer's Liability if Settlement Recommendation is Rejected

A Denial Can Be a Valuable Asset

Recoverable damages include:

- Defense Fees and Costs
- Amounts Paid in Settlement or to Satisfy a Judgment
- Value of Non-Monetary Consideration Paid
- Prejudgment Interest at 10%
- Brandt Fees
- Punitive Damages

A Denial Can Be a Valuable Asset

California Statutory Limitations

- Tolled During Certain Periods
- Four Years for Breach of Insurance Contract
- Two Years for Bad Faith
- Be Aware of Potential Contractual Limitations Period

Thank you!

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