

McGuireWoods

Unlocking Hidden Value in Your Company's Insurance Policies: Ten Tips for California Insureds

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About the McGuireWoods Insurance Recovery Group

- Recognized by Chambers, Legal500, and Law360 as one of the country's top Insurance Recovery Groups
- 40+ insurance recovery attorneys positioned throughout the United States (San Francisco, Los Angeles, Pittsburgh, Houston, New York, Richmond, Charlotte, and Atlanta) and London
- More than \$15 billion recovered for corporate policyholders
- Insurance coverage litigation throughout the country
- Extensive experience arbitrating insurance coverage disputes both domestically and internationally

Tip No. 1: Consider All Sources of Coverage and Indemnity

- Consider all potentially applicable policies
 - Primary and excess/umbrella policies
 - Different lines of insurance
 - Historical policies
 - Named insured, additional insured, and successor rights
- Consider all contracts and indemnity agreements
 - Role of indemnity agreements in the defense of claims
 - Distinction between indemnity obligations and Additional Insured coverage
 - Disputes between insurers and indemnitors
 - Triggers of contractual indemnity vs. triggers of insurance coverage
 - Questions concerning prioritization

Tip No. 2: Avoid Preconceived Notions of What Is and Is Not Covered

- Words matter – and assumptions can be dangerous
- Contrary to what insureds may be told, coverage potentially available for:
 - A wide range of claims (fraud, misrepresentation, wage and hour, breach of contract, etc.)
 - A wide range of relief (attorneys fees, fines, tax liabilities, punitive damages)
- Because exclusions and limitations are construed narrowly, do not assume they will bar coverage
- Notice-related considerations

Tip No. 3: Do Not Underestimate the Breadth of Coverage Grants and Extensions

- Consider all sources of coverage within the policy
 - There may be coverage under more than one coverage grant and/or extension
- Read full policy and actively look for coverage
 - i.e. insuring agreements, endorsements, extensions, amendments, declarations
- Do not overlook carve backs or exceptions
- Do not assume only one type of policy responds to one type of claim
 - Your insurance program is not always a perfect jigsaw puzzle
 - Errors and Omissions policy vs. Directors and Officers policy (professional services exclusion)
 - Employment Practices Liability policy vs. Directors and Officers policy (employment claims exclusion)

Tip No. 4: When Navigating First-Party Losses, Involve Consultants as Needed

- Consultants can effectively assist with preparation and submission of a claim and claim preparation costs are typically covered
- Forensic accountants
 - Reviews accounting records and presents business interruption claims in a digestible format for the insurer
 - Pushes back against unreasonable limitations or assumptions (e.g., seasonal variances, unique business opportunities, etc.)
 - Counters insurer-retained accountants
- Insurance Brokers
 - Can be a helpful advocate, particularly if the broker has deep ties and a strong business relationship with the adverse insurer
 - May have visibility into insurer's handling of similar claims

Tip No. 5: When Seeking a Defense, Scour Third-Party Claims for Covered and Potentially Covered Allegations

- Duty to defend triggered by the mere ***potential*** for coverage
 - This is true even if the claims are predominantly uncovered
 - Not limited to the “four corners” in most jurisdictions
 - In California, insurers have a duty to investigate extrinsic facts
 - Duty to defend extends beyond policy period
- In a “mixed” action, in which some claims are potentially covered, and others are not, the insurer must provide and fund a defense of the *entire* action
- It is enough that a single claim is potentially covered by the policy.
 - Example: *Buss v. Superior Court*, 16 Cal. 4th 35, 49 (1997) (complaint alleged 27 claims against insured, of which only one (defamation) was potentially covered)

Tip No. 5: When Seeking a Defense, Scour Third-Party Claims for Covered and Potentially Covered Allegations (Continued)

- Two words “buried” in a complaint can trigger coverage
 - Rationale: The “plasticity of modern pleading” allows the transformation of claims that are at least potentially covered into claims that are not, and vice versa.

- Defense duty not limited to third-party complaints
 - Defendants may cross-complain on any matter, whether related to matters alleged in the complaint or not. If the claims joined are potentially covered, the insurer owes a duty to defend the cross-complaint.
 - An answer may allege an offset that reduces the monetary value of plaintiff’s claim. In such cases, a liability insurer may owe a duty to defend plaintiff against the offset claim.
 - “Claim” may include pre-litigation demand letters, government investigations, etc.

Tip No. 6: When Facing Third-Party Claims, Consider Demanding Independent (or “Cumis”) Defense Counsel.

- Defense duty is breached when an insurer furnishes defense counsel with a disqualifying conflict of interest.
- In that case, the insured is usually permitted to hire independent counsel at the insurer’s expense. *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal. App. 3d 358, 364 (1984).
 - Insured’s right to select, insurer’s obligation to pay
- What conflicts require independent counsel?
 - Reservation of rights, without more, is not enough.
 - Must have a reservation of rights coupled with control of issue affecting coverage dispute
 - The insurer must provide independent counsel for the insured when resolution of some issue in the lawsuit **will bear directly on the outcome** of the coverage dispute.
 - In that case, the “insurer may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely on the insured.” *Cumis*, 162 Cal. App. 3d at 364.
 - Can an insurer withdraw the triggering coverage defenses?
- Benefits of independent defense counsel
 - Control of defense and settlement strategy; undivided loyalty

Tip No. 7: Do Not Assume That Policy Sublimits Cap Your Recovery.

- The function of sublimits
- Carefully review language of the sublimit
 - As a limitation on coverage, must be interpreted narrowly and in insured's favor
- A sublimit may only apply to certain damages or loss
 - Sublimits should only apply to sums that fall within their plain terms
- Absent enforceable limitations, insured may be able to stack multiple sublimits
 - Consider anti-stacking language
- Additional coverage may be available beyond sublimits
- Where sublimits conflict, the larger limit may apply

Tip No. 8: Use California's Policy Interpretation Rules to Your Benefit.

- If policy language is ambiguous (i.e., susceptible of more than one reasonable interpretation), the court will interpret the provision in accordance with insured's objectively reasonable expectations.
 - Not a question of which interpretation is “most reasonable”
 - Insured's reasonable expectations control *even if the parties had no actual mutual understanding* regarding the disputed policy provision. (Often, the insured has not even considered the issue that has arisen.)
 - When insurance policy terms are *ambiguous*, extrinsic evidence is generally admissible to establish the parties' intent.
 - Matters considered: premiums paid, availability of other insurance, advertising, party communications, ISO drafting history, positions taken in other litigation, course of performance
- Insuring clause interpreted broadly
 - Exceptions to exclusions interpreted broadly as well
- Exclusions and limitations are “strictly construed against the insurer and liberally interpreted in favor of the insured”
- Key to coverage: advancing a reasonable, pro-coverage position on disputed policy language

Tip No. 9: Challenge Denials of Coverage When Appropriate.

■ Potential Insurer Responses

- Accepting coverage unequivocally
- Accepting coverage under a reservation of rights
- Denial of coverage

■ Timing considerations

- Respond now or later?
- Deferred response generally does not waive rights
- Consider jurisdictional issues
- Response may build record for future coverage litigation.

■ Negotiations and mediations as option

Tip No. 10: Take the Necessary Steps to Preserve and Enforce Your Rights

- When should coverage counsel should be hired
- “Reserving Rights” in correspondence with insurer
- Deadlines to file suit or initiate arbitration proceedings
 - Contractual limitations provisions
 - Statutes of limitation
 - Equitable tolling, waiver, and estoppel
 - Tolling agreements
- Considerations for commencing a coverage action

Questions or Comments?



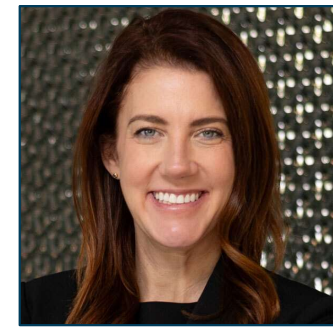
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