

Top 10 Things Litigators Should Know About Insurance

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Most non-insurance litigators run for the hills when the topic of “insurance coverage” arises. Others profess to know enough about insurance coverage just to make themselves dangerous. Considering the rising costs of defending and settling lawsuits, it is important that all litigators — both in-house and outside counsel — know some basic information about insurance in order to preserve potential insurance benefits available to their clients.

Not only is such information potentially beneficial for the client as there may be insurance to cover the costs of litigation, but for outside counsel, basic insurance knowledge is critical to minimize risks such as potential malpractice exposure.

This article is designed to remind litigators about insurance concepts that they should know immediately. Some of the concepts are basic, such as giving notice, but others are more nuanced. The goal here is to identify the various insurance issues for litigators so they help to preserve their clients’ valuable insurance coverage.

1. What Constitutes an “Occurrence” or “Claim” that Triggers Coverage?

A threshold issue to consider is what types of losses and events qualify as a “claim,” and thus trigger coverage under an insurance policy. As noted below, it is extremely important to provide timely notice of a covered loss or claim under all applicable policies, which begs the question of what exactly is a claim under a liability policy. While the answer depends on the particular policy language at issue, there are a few general rules of thumb.

Under an occurrence-based policy, coverage is often triggered by injury or harm, suffered during the policy period, that was caused by an event or series of events. Other policies, however, specify that the “occurrence” itself, rather than — or in addition to — the injury or harm must take place during the policy period. Determining the relevant policy is pretty straightforward when a single act results in immediate injury. The analysis tends to be more complex when the claim arises from conduct that spanned multiple policy periods or involves progressive injury or harm. Under those circumstances, all policies in effect from the time the injury-causing conduct began through the entire time that the injury or damage continues might provide coverage.

Under a claims-made policy, coverage typically is triggered by a “claim” made against the policyholder and reported to the carrier during the policy period. Most policies broadly define “claim” to include far



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more than a lawsuit or other formal proceeding. For example, some policies' "claim" definitions also include oral or written demands for monetary or non-monetary relief and requests for a tolling agreement. Therefore, it is important to recognize that these pre-lawsuit demands could be deemed a "claim" for which the client should provide notice or risk losing insurance coverage when the later lawsuit is ultimately filed.

2. Notice, Notice, Notice ... and More Notice!

Liability insurance policies typically require the policyholder to provide notice of a covered loss or claim within a specified time period. The deadline for providing notice can be as early as "immediately," and as vague as "as soon as practicable," the interpretation of which often is subject to debate. Some policies provide a specific deadline for providing notice, such as during, or within 60 days after, the policy period.

While the construction of notice provisions often is subject to debate, it is best to provide notice — in writing and in a manner that provides proof of delivery — as soon as possible. In some jurisdictions, late notice can be a complete bar to coverage. In other jurisdictions, untimely notice is not a bar to coverage unless the carrier can prove actual and material prejudice as a result; however, litigating these issues tends to be fact-intensive, time-consuming and expensive.

Additionally, even if notice is not deemed untimely or prejudicial, carriers often contend that they are not responsible for pre-tender costs, i.e., any fees or costs incurred prior to the date on which they received notice. While there may be arguments as to why these costs nevertheless should be covered, it is better to avoid these disputes altogether, and to give notice "early and often" under all potentially applicable insurance policies.

3. Identify (and Provide Notice Under) all Relevant Policies.

It is not uncommon for a given loss to be covered under more than one insurance policy, and it is important to make sure timely notice is provided under all potentially applicable policies.

For example, liability arising from progressive losses, such as construction defects or environmental damage, may be covered under multiple policies spanning the time period during which such progressive harm took place, particularly when the policies are occurrence-based policies. Also, it is important to remember to provide notice under all excess policies covering the relevant time periods, even if, at the outset, it does not appear that the excess layer will be implicated. Additionally, in the context of progressive property damage, your client not only might face potential liability to third parties, but also might sustain first-party property damage losses and related business interruption and extra expense losses. Under these circumstances, notice should be given to the client's first-party insurance carriers and to its liability carriers.

Other circumstances in which more than one type of insurance policy might cover the loss include a lawsuit alleging both employment claims and also management level wrongful acts. These lawsuits could trigger both employment practices liability and directors and officers liability policies.

4. Be Mindful of, and Comply with, all Other Policy Deadlines.

In addition to notice requirements, insurance policies often include other deadlines, which sometimes are buried in fine print. For example, some policies have contractual limitations periods, which can be as

short as one year. Additionally, property insurance policies typically include a deadline for submitting a sworn proof of loss, which can be as short as 60 days post-loss. In order to preserve your client's rights and to avoid or minimize the likelihood of disputes regarding compliance, it is a good practice at the outset to identify and calendar — and, of course, ultimately to comply with — all policy deadlines.

5. Consider Other Parties' Policies Where Client may be an "Additional Insured."

When identifying all potentially applicable policies, it is important to focus not only on your client's own insurance policies but also to consider whether your client is covered as an "additional insured" under other businesses' insurance policies. If so, it is important to get copies of those policies and to make sure notice is provided under them as well.

6. Do not Ignore the Duty to Cooperate.

A policy's cooperation clause requires the policyholder to provide information to the carrier, and to assist the carrier in the defense and settlement of the underlying lawsuit. While the specific policy language will dictate the scope of the duty to cooperate, in general, a policyholder should provide documents and information about the underlying lawsuit, attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses required to adequately defend the lawsuit. As discussed below, in some circumstances, the client's obligation to share information with the carrier might be limited based on privilege grounds.

The duty to cooperate also restricts the policyholder from entering into voluntary settlements or making payments without first advising, and obtaining consent from, the carrier. In most jurisdictions, the carrier must show prejudice from the policyholder's failure to cooperate to avoid paying policy benefits, which is a heavy burden for the carrier to satisfy. But as a practical matter, if you need the carrier to fund the settlement, it makes sense to keep the carrier apprised of the underlying lawsuit and developments, including all settlement opportunities. In return, the carrier is required to provide a prompt and good faith response, or risk potential bad faith liability.

7. Protecting Privilege — the Carrier's Coverage Position and Requests for Information.

The carrier's response to a claim tender, and applicable state law, will determine the existence and scope of any common interest between its client and the carrier and the risk of privilege waiver and other risks associated with providing the carrier with otherwise-privileged information regarding the underlying action. When a carrier defends pursuant to a reservation of rights, it typically requests information about the underlying lawsuit, including privileged information. Defense counsel therefore must assess: (1) actual or potential conflicts of interest created by the reservation of rights; (2) the existence and scope of any common interest between the client and its carrier notwithstanding the reservation of rights; and (3) what information to share and how to share it in a manner that best protects against waiver of the privilege and otherwise protect the client's interests vis-à-vis its coverage claim.

For example, in California, Civil Code section 2860(d) states that, "[w]hen independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, ... Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party." Other states have employed different approaches. Thus, it is important to understand the general scope of the coverage issues raised by the carrier, as well as state law governing the common

interest doctrine, in order to avoid waiving privilege or exposing your client to other risks when sharing information with the carrier.

8. Be Wary of Taking Unnecessary Positions in the Underlying Lawsuit that Could Impact the Availability of Coverage.

Defense counsel should be aware of major “hot button” coverage issues to avoid losing coverage unwittingly. To be clear, we are not suggesting that defense counsel take positions simply to preserve insurance — defense counsel’s main objective should always be to try to eliminate or minimize the client’s liability.

However, we have seen many instances where defense counsel have taken positions that do not materially impact the client’s exposure that have compromised or eliminated the client’s insurance coverage. Here’s one example: The client is a defendant in a toxic tort action where hundreds of plaintiffs allege bodily injury spanning from 1968 through the present. The allegations trigger two policies covering the years 1968 and 1969, and there are no other available policies. The two policies provide a full defense because the carrier has a duty to defend the entire claim. Defense counsel unwittingly takes unnecessary positions, speculating that the client’s alleged conduct giving rise to the plaintiffs’ claims may have commenced in the early 1970s. In this example, with hundreds of plaintiffs, whether the liability began in 1968 versus the early 1970s would not have a material impact on the client’s overall liability; the main defense is lack of causation. Nonetheless, based on this position, the carrier now might claim that the 1968 and 1969 insurance policies are not triggered and the client may lose insurance coverage to pay for its defense without any meaningful reduction in potential liability.

This is an extreme example — but we have seen many situations where a better understanding of the big picture coverage issues could have prevented the loss of insurance coverage for the client.

9. Never Take the Carrier’s Initial Denial or Limitation as Absolute: Always Push Back.

After providing notice of a claim, the carrier has three options: (1) accept the tender without reservation, (2) accept the claim pursuant to a reservation of rights or (3) deny the claim. When a client receives a denial or reservation of rights letter from the carrier, the policyholder should evaluate the denial or coverage limitation thoroughly and evaluate the basis for it, and, in almost every instance, the policyholder should push back. It doesn’t always happen but a letter contesting the carrier’s denial can result in a carrier changing course and agreeing to provide a complete, or at least partial, defense. The simple reason is that carriers sometimes make mistakes; they cite the wrong policy language, fail to consider an endorsement that eliminated the exclusion referenced in a coverage denial or fail to fully understand the true nature and scope of the underlying complaint to recognize the potential for a duty to defend. Pointing out these errors or inadequacies and just documenting a challenge to the carrier’s denial, in writing, is important to preserve the client’s rights. The potential return on investment by writing a simple letter pushing back against the carrier’s original claim denial could be huge.

Carriers also often agree to provide a defense but reserve certain rights. One common reservation that we have seen recently is a reservation of the right to limit the hourly rates that they will pay independent defense counsel, sometimes as low as a one-third or one-half the actual hourly rates incurred to retain defense counsel. This “low ball” rate limitation typically is the carrier’s opening bid and when a policyholder pushes back, most policyholders are able to secure a higher hourly rate and the ability to open up a better dialogue with the carrier to ensure the timely payment of defense fees going forward.

10. Failure to Inquire About, and to Preserve Rights Under, Your Clients' Insurance Coverage Might be Grounds for a Malpractice Claim.

For many litigators, the thought of insurance causes their eyes to glaze over. But some courts have found that, under certain circumstances, defense attorneys might have a duty to investigate, to advise their clients regarding and to take steps to preserve their clients' rights under potentially applicable insurance policies, and that the failure to do so could constitute malpractice.

For example, in declining to dismiss a client's malpractice claim against its law firm, the court in *Shaya B. Pacific LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*[1] found that, depending on the scope of the agreed representation and the surrounding facts and circumstances, an attorney could be found negligent for its "failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim." Likewise, in *Tush v. Pharr*[2], the Alaska Supreme Court reversed the lower court's grant of summary judgment in favor of the law firm, finding that there were questions of fact about whether the defense attorneys had (and breached) a duty to further investigate whether liability insurance was available to their clients. See also *Jordache Enterprises Inc. et al. v. Brobeck Phleger & Harrison*[3], and *Atlas Iron and Metal Co. v. Ashy*.[4]

While no lawyer likes reading — or even writing — about the "M" word, it is important to be aware that these cases exist, and to understand the importance of at least asking questions about, and making sure your clients receive timely advice regarding, insurance.

Some people are motivated by carrots. Others are motivated by sticks. Regardless of which category you are in, if your client has received a demand or has been sued, it is a good idea to ask questions about your client's insurance policies (as well as your client's rights under the policies of others), and to work with your client to ensure that steps are taken to preserve its rights under those policies. By doing so, you are providing a valuable and necessary service to your client while also minimizing your exposure to subsequent malpractice claims.

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[1] 827 N.Y.S.2d 231, 236 (N.Y. Sup. App. Div. 2006).

[2] 68 P.3d 1239, 1244-47 (Alaska 2003).

[3] 958 P.2d 1062 (Cal. 1998).

[4] 918 So.2d 1205, 1208 (La. Ct. App. 2006), cert. denied, 927 So.2d 276 (La. 2006).