
Liability Insurance Issues for Litigators

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Overview



- **Building Blocks of a Commercial Liability Insurance Program**

- Commercial General Liability (CGL)
- Directors & Officers Liability (D&O)
- Errors & Omissions (E&O)

- **Considerations for Defense Counsel**

- Collecting Policies from Your Client
- Time to Report/Tender
- In Depth Claims-Made: What Is a Claim?

- **Considerations for Plaintiff's Counsel**

- Pleading into Coverage
- Discovery
- Settlement Negotiations

Building Blocks: CGL



- Duty to Defend + Duty to Pay
- Insures “**Bodily Injury**” and “**Property Damage**”
- Includes “**Personal Injury**” and “**Advertising Injury**” Coverages
- Triggered by an “**Occurrence**” during the policy period (includes continuous exposure)
- Does Not Insure:
 - Contractual Liability/Your Work
 - Expected or Known Loss
 - Pollution (after 1986)

Oft-Litigated Issues: CGL



■ What Is Property Damage?

- Failure to apply fertilizer led to soil that lacked nutrients and weed prevention → YES.
W. Heritage Ins. Co. v. Green, 137 Idaho 832 (2002).
- Failure to achieve expected crop yield after bad fertilizer → NO.
Farm Bureau Mut. Ins. Co. v. Earthsoils, Inc., 812 N.W.2d 873 (Minn. Ct. App. 2012).

■ Number of Occurrences

- ***Results/Effects vs. Causation vs. Functional Event/Continuous Process*** Approaches
Unigard Ins. Co. v. U.S. Fidelity & Guar. Co., 111 Idaho 891 (1986) (98 storage doors damaged by snow removal → single “Occurrence”).

Building Blocks: D&O



- Duty to *Reimburse* + Duty to Pay
- Insures “**Wrongful Acts**”
- Sides A, B, C
- Triggered by a “**Claim**” during the policy period
- Does Not Insure:
 - Bodily Injury or Property Damage
 - Professional Services
 - Breach of Contract
 - Illegal Profit (finally adjudicated)
- Allocation between Covered Claims/Parties and Uncovered Claims/Parties

Building Blocks: E&O



- Similar Structure/Construction to D&O
- Triggered by a “**Claim**” during the policy period
- Insures “**Professional Services**”

Oft-Litigated Issues: D&O/E&O



■ What Are “Professional Services”?

- “Arise[s] out of the insured’s performance of his specialized vocation or profession.”

Bank of Cal., N.A. v. Opie, 663 F.2d 977, 981 (9th Cir. 1981).

- Misapplication of loan funds by mortgage banker → YES. *Id.*
- Nursing home’s submission of bills to Medicaid → NO.

Horizon West, Inc. v. St. Paul Fire & Marine Ins. Co., 45 Fed. Appx. 752, 754 (9th Cir. Sept. 3, 2002).

- Ensure definitions in E&O (covered) and D&O (covered) match up.

■ Related/Interrelated Claims

- Affects timeliness of reporting
- Affects application of limits

Considerations for Defense Counsel ANDERSEN SCHWARTZMAN WOODARD BRAILSFORD

- Collecting Policies
- Time to report
- What is a claim

What is a “Claim”?

- (1) A written demand for monetary or nonmonetary relief;
- (2) A civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which is commenced by:
 - (i) service of a complaint or similar pleading; or
 - (ii) return of an indictment; or
 - (iii) receipt or filing of a notice of charges; or
- (3) An administrative, or regulatory investigation which is commenced by a filing of notice of charges, service of a complaint or similar document of which notice has been given to the Insured.

(policy-specific)

Plead with Coverage in Mind

- Intentional conduct → Excluded
- Malicious acts → Excluded
- Illegal profit → Excluded
- Fines/penalties → Excluded

Considerations for Plaintiff's Counsel



Use Your Discovery Tools

- Federal and Idaho Rules permit discovery of “insurance agreements” which “may be liable.”
- All policies dating back to first “occurrence” are relevant where claim asserts bodily injury or property damage.
- Obtain all potential coverages.
- Obtain and examine complete documents.
- Ask for ROR letters.

Consider a Limits Demand

- A demand within policy limits triggers insurer's duty to evaluate settlement opportunity giving "equal consideration" to insured's interest as its own.
- Rejection of opportunity to settle within limits puts burden of excess judgment on insurer.



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