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How to Drive Down Your Legal Costs Through Strategic Use of Liability Insurance

I have seen it many times with my clients in Orange County. Your company is sued and you are caught completely off guard by the lawsuit and have to scramble to respond within the various statutory deadlines.

Frequently, you view it as a "shakedown" lawsuit. The reality is that defending against even a baseless claim can result in significant legal costs. That means less money for R&D, marketing, employee-retention, and other things which your funds were intended to be spent.

Lawyers are not always known for thinking of creative ways to save their clients' money. The truth is that many companies throughout Orange County have insurance policies that could cover their legal costs in the event of a lawsuit; it's just that many companies are not actually aware of the scope and applicability of those policies.

By Drew A. Harbur

A good starting point is being "an insured," which under California law is granted vast protections.

Every insurance contract contains an implied covenant of good faith and fair dealing that "neither party will do anything which injures the right of the other to receive the benefits of the agreement."

If a carrier unreasonably denies your claim, they can be liable for tort damages. Juries have slapped carriers with massive bad faith verdicts over the years, sometimes well in excess of $10 million to $20 million.

Attorneys from **Callahan & Blaine** won an original verdict from **Farmers Group Inc.** for over $57 million for wrongfully denying a defense to a local business client.

Immediate Duty to Defend

Once a claim is submitted to the insurance carrier, it has a duty to immediately extend a defense where the lawsuit seeks damages that would be covered on any theory or cause of action.

A carrier's duty to defend is quite broad, arising when the facts alleged in the underlying complaint give rise to even a potentially covered cause of action.

Additionally, every insurer has the unequivocal duty to fully and thoroughly investigate all claims submitted to it. This duty equally extends to the obligation to affirmatively seek out any facts which could potentially trigger coverage. Finally, "[a]ny doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor."

The protections provided by California law can often play out in practice to a company's advantage. For example, many people think of commercial general liability coverage as "slip and fall" insurance.

In reality, a general liability policy can be used to cover a much wider array of claims and lawsuits.

In a recent case, a business client of mine based in Orange County was sued under multiple theories of liability, including defamation, unfair competition, and false advertising. As a result of provisions in my client's standard commercial general liability policy, we were able to secure insurance coverage for the defense.

Critically, because the defense for all causes of action—even potentially uncovered ones—were inextricably linked with the covered claims, we secured coverage for all of the client's legal fees. This provided our client with significant leverage in the litigation and ultimately led to a favorable settlement for our client and the carrier. Those fees, which were significant since the case was on the road to trial, would have otherwise been paid out of the client's general account.

In another case, my client was sued following a data hacking incident, something which, unfortunately, is increasingly common for Orange County businesses.

One of the first set of documents we asked for was our client's professional liability and general liability insurance policies. We secured coverage under both policies, which included coverage for legal fees and the costs associated with notifying consumers of the breach.

Why Not Use Insurance?

Some companies do not involve insurance at the outset of litigation because they simply do not know what type of protection could be available under their current policies. This is understandable.

As anyone who has been sued knows, things move fast at the outset of litigation and a review of byzantine insurance policies is not everyone's first thought.

This can be remedied by involving relevant personnel—including your broker—any time you have a claim or the threat of a claim and telling your lawyer you need them to review the potential for insurance coverage, even if they do not bring it up.

It is important to move quickly because most insurance policies have very specific timing and notification requirements. Indeed, failure to tender in a timely fashion can result in a waiver of your rights under an otherwise applicable policy.

Put simply, you cannot wait to see the result of lawsuit and then decide to involve insurance.

Other businesses may hesitate to involve insurance because they worry about a spike in future premiums. This concern is valid and should be considered. Insurers do assess "claims history" when a business applies for, or renews, any kind of insurance, in the same way your personal auto insurer would. Accordingly, any decision regarding insurance must include a cost-benefit analysis.

You should always make sure to discuss the potential "costs" of tendering a claim with your attorney before tendering. Historically, the impact on premiums under a general liability policy are not as significant as under other forms of insurance, such as Errors & Omissions ("E&O") or Directors & Officers ("D&O") policies.

The Bottom Line

It is good business and legal strategy to analyze the insurance aspects of any lawsuit at the outset and make an informed decision to submit or not submit a claim after weighing all the pros and cons. This should include an analysis of the applicable law, as well as the financial impact of seeking coverage.

Drew A. Harbur is a senior trial attorney with Callahan & Blaine of Santa Ana. Harbur began his career in Orange County as a business litigator with Gibson, Dunn & Crutcher. He then served as a deputy district attorney, prosecuting various types of crimes, including business fraud, gang violence, and murder. For the Business Journal's annual list of Insurance Brokers, see our Special Report starting on page 19.

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