

# Buchalter

## How Insurance Can Assist Your Clients & Your Practice

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# Introduction

- Forms of Insurance Coverage:
  - Commercial General Liability (“CGL”)
  - Employment Practices Liability Insurance (“EPLI”)
  - Directors & Officers (“D&O”)
  - Pollution Legal Liability (“PLL”)
  - Title Insurance
  - Representation & Warranty Coverage (“R&W”)
  - Property Insurance (Homeowner, Business Interruption)
  - Long Term Disability
  - Cyber Insurance



# There's Value in a Hybrid!

- First Party vs. Third Party:
  - First Party: The policyholder suffers a direct loss of some property, and looks to the policy/carrier to be made whole
  - Third Party: The policyholder is accused by a third party of some form of liability, and looks to the policy/carrier to be made whole.
- Hybrid Policies
  - Provide both First Party and Third Party coverages
  - Cyber, Representation & Warranty, Homeowner's



# Occurrence vs. Claims-Made Policies

- Both types are liability policies protecting insureds against third-party claims.
- Key Differences:
  - Types of “claims” that trigger coverage
  - Policies/policy periods that are triggered by a claim
  - Applicable notice requirements: substantive, not merely clerical/procedural
- Failure to identify correct policies and policy periods and satisfy applicable notice requirements can result in loss of coverage.

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

- Occurrence policies (general liability, auto liability, umbrella)
  - Cover claims for injury or damage occurring during policy period.
    - Coverage triggered by filing of a “suit” against the insured.
    - Timing of suit is essentially irrelevant to coverage.
    - Continuing injury or damage can trigger coverage under multiple policies.
    - Notice requirements not particularly strict. Key is not to prejudice defense.
- Claims-made policies (D&O, E&O, EPL)
  - Cover claims made against the insured during the policy period.
    - Coverage triggered by wide array of defined “claims” against insured.
    - Timing of claim central to coverage, as it determines which single policy applies.
    - Notice requirements are strict, and non-compliance can destroy coverage.
      - Timing of notice, form of notice, recipient of notice, method of delivery, etc.
- The same suit can implicate coverage under both policy types.

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

- Practice Pointers:
  - Make sure client knows what policies it holds and has copies.
  - Make sure client knows what constitutes a “claim” under claims-made policies.
    - When in doubt, consider Notice of Circumstances
  - First question: When does current policy period expire?
  - Don’t get tunnel vision re: applicable policies or policy periods.
  - Prioritize claims-made notice.
  - Follow the notice rules.
  - Beware of the 12:01am expiration rule.
- Once claims properly tendered under all potentially applicable policies, substantive coverage issues can be addressed.

# Duty to Defend

- The duty to defend is broad and can include:
  - Groundless claims;
  - False claims;
  - Fraudulent claims;
  - Allegations of intentional torts;
  - Allegations of willful acts; or
  - Allegations of criminal conduct
  - Triggering duty: Insurer must defend a suit which potentially seeks damages within the coverage of the policy. *Gray v. Zurich*, 65 Cal. 2d 263 (1966).
  - The defense is excused only where “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.”  
*Montrose I*, 6 Cal. 4th 287 (1993)

# Duty to Defend

- Determination – Insurer may have a duty to defend based on either:
  - The allegations in the third-party complaint
  - Any facts known to the insurer from any source
  - No potential for coverage exists for speculative pleadings

## When Duty Begins and Ends

The duty to defend arises when the insured tenders the defense of a “suit”

The duty to defend does not end until:

- The underlying lawsuit is concluded
- The facts show that there is “no potential for coverage”
- The policy limits are exhausted



# Duty to Defend

- When is Insured Entitled to Select its Own Counsel
- The insured is entitled to independent counsel (or *Cumis* counsel) of its choosing at the insurer's expense if a conflict of interest exists

# Duty to Indemnify

- Duty to indemnify requires the insurer to pay the cost of damages or settlements resulting from a claim against the insured
- Duty to indemnify:
  - is triggered when liability is established
  - runs to claims actually covered

## Do not Settle without Insurer's Consent

- Insurers are not obligated to accept every settlement offer
- While insurers may indemnify insureds for settling a claim, it will only do so if the insurer consented to the settlement beforehand

# Operation of CGL Policies

- CGL policies cover third-party claims for defined:
  - Property damage (PD)
    - Physical injury to tangible property and loss of use of uninjured tangible property
  - Bodily injury (BI)
  - Personal and advertising injury (PAI)
    - Specified offenses against a person or business
- CGL policies are occurrence policies covering:
  - PD and BI occurring during policy period (possibly multiple periods)
  - PAI caused by specified “offense” committed during policy period (multiple periods unlikely)
- Funds defense against suit in addition to policy limits
- Deductible vs. SIR affects initial defense/settlement responsibility

# Pursuit of CGL Coverage

- Insured bears burden of proving trigger of coverage (PD, BI, and/or PAI alleged).
- Insurer bears burden of proving exclusion or other limitation applies to bar or limit coverage.
- Most coverage disputes center on PD and PAI coverages.
  - Common PD issues (Example: *Sampson v. Premier*):
    - Defective work vs. resulting damage
    - Which claimed or awarded damages are “because of” triggering PD or PAI?
  - Common PAI issues (Example: *Mauthe v. Versa Cardio*):
    - Does alleged misconduct constitute specified PAI “offense”?
      - Commercial disparagement
      - Wrongful eviction
      - Invasion of privacy

# Additional Insured Coverage Under CGL Policies

- Client entitled to coverage under CGL policy held by a third-party who provided goods to or performed services for client.
- Excellent contractual risk transfer device:
  - AI right created by contract between client and third-party.
  - Actual protection comes from third-party's CGL insurer.
  - Different from contractual indemnification right that tend to appear in contracts requiring AI status; both protections should be pursued separately.
- AI status should be considered when determining CGL policy tenders.
- Contractual right to AI status is not itself coverage; additional insured endorsement (AIE) and general policy provisions affect coverage.
  - Some causal connection between third-party work/product and injury required.
  - Third-party breach of AI requirements makes third-party the "insurer." (Client beware!)

# *Employment Practices Liability Insurance (EPLI)*

## Coverage for Employment Related Claims

*If your client is an employer, this coverage is a necessity*



# Employment Practices Liability Insurance (cont.)

## Types of Claims Covered

- *Wrongful termination (actual or constructive)*
- *Wrongful demotion; failure to promote;*
- *Wrongful refusal to employ*
- *Negligent hiring or supervision*
- *Discrimination*
- *Harassment*
- *Coercion*
- *Retaliation*
- *Specific tortious conduct (e.g., libel, slander, invasion of privacy, humiliation, abuse, etc.)*

## Types of Claims Not Covered

- *Wage & Hour (though some carriers offer additional limited coverage by endorsement)*
- *Criminal, fraudulent, or malicious acts*
- *Willful or intentionally harmful acts*
- *Assumed liability*
- *Workers compensation, disability benefits*
- *Violations of statutory laws, other than those specified*
- *Contract claims (some covered, some not)*
- *Specific tortious conduct (sometimes excluded)*

## Key Aspects

- Nearly always written on a “**claims-made**” basis, and often on a “**claims made and reported**” basis.
  - Often a “retroactive date” as well.
- Encompasses defense and indemnity.
- Covered “Loss” can include defense costs, making it a “burning limits” policy.
- Deductibles/Self-Insured Retentions – responsibility of employer.
- Can possibly have multiple sources (joint employer).



## Best Practices

- Be vigilant on when a claim may arise, and give notice
- Be mindful of policy continuity
- Areas of Negotiation
  - Selection of defense counsel (Buchalter!)
  - Retentions
  - Sublimits
  - Arbitration
  - Choice of Law



# Directors & Officers Liability Coverage

## Nature of D&O Liability Coverage

- Provides primarily three types of coverage:
- Directors & Officers Liability (Coverage A)
- Company Reimbursement (Coverage B); and
- Entity Coverage (Coverage C)
- Entity Coverage May be limited to Securities Claims



# D&O Coverage – Common risks

- Directors and officers are sued for a variety of reasons related to their company roles, including:
  - Breach of fiduciary duty resulting in financial losses or bankruptcy
  - Misrepresentation of company assets
  - Misuse of company funds
  - Fraud
  - Failure to comply with workplace laws
  - Theft of intellectual property and poaching of competitor's customers
  - Lack of corporate governance

# D&O Coverage – Coverage Traps

- Many of the very wrongful acts that trigger the policy may also trigger application of an exclusion
- Intersection of broad definition of “Claim” and strict notice requirements often leads to coverage disputes
- Some companies combine D&O with EPLI insurance

# D&O Coverage – Relevant Terms

- DEFINITIONS
- Wrongful Act
- Loss
- Claim
- Notice of Circumstances

# D&O Coverage – Exclusions

- EXCLUSIONS

- Insured v. Insured

- carvebacks

- Prior Acts

- Conduct Exclusions

- Dishonest acts/fraud
- Personal profit or advantage

- Professional Liability Exclusion.

- Bodily Injury and Property Damage.

- Pollution.

- Same or related Wrongful Acts for which notice has been given under another policy.

# D&O Coverage – Other Key Issues

- Claims Made vs. Claims Made and Reported
- Allocation Provisions
  - Best efforts
  - Alternative Dispute Resolution
  - Predetermined Allocation
- Priority of Payments

# D&O Liability – Basic Contract Construction

- Typically Duty to Reimburse Defense Costs – Not Duty to Defend.
- Self-depleting policies – defense costs erode limits.
- Right to select counsel.
- Panel counsel issues
- Insurer must consent
- Payment on an “as-incurred” basis
- Advancement of defense costs with potential right of reimbursement
- Consent to settlement



# Risk Transfers: How Private Equity Can Help Your Clients

- “Traditional” Contractual Indemnification
- Compare: the new role of private equity in:
  - Aggregation and purchase of large-dollar or tranching claims
  - Partnerships in litigation between private equity and claimholders
  - Coordination between PE investors, law firms and thought leader experts
  - Private equity hybrids as insurers / reinsurers
    - Example: manuscript policies and unique risks
  - “Negative dollar” purchases of past, unliquidated losses
    - Example: underinsured, or uninsured, losses – class actions, legal malpractice



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