

# INSURANCE COVERAGE FOR CLASS ACTION LITIGATION

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## SOURCES OF COVERAGE FOR CLASS ACTIONS

- Consider all potentially applicable policies
  - Primary and excess/umbrella
  - Different lines of insurance
  - Historical policies
  - Named insured, additional insured, and successor rights
- Consider all contracts and indemnity agreements

# THE INSURER'S DEFENSE DUTY

- Duty to Defend
  - Insurer typically retains defense counsel, although insured may have input
  - Triggered by mere *potential* for coverage
    - ❖ Even if claims are predominantly uncovered
  - Not limited to the “four corners” in most jurisdictions
  - Duty to defend is typically both immediate and complete

# THE INSURER'S DEFENSE DUTY

- Duty to Advance or Reimburse Defense Costs
  - Insured generally selects counsel and defends itself
  - Insurer generally bound to pay full rates, subject to reasonableness of fees
    - ❖ Modern trend: hourly rate caps in policies
  - Duty to advance/reimburse generally is contemporaneous – i.e., must advance or pay as fees and expenses are incurred

# THE INSURER'S DEFENSE DUTY

- Absent provision to the contrary, generally no right to allocate defense costs
- Some liability policies purport to give insurer right to allocate between covered and uncovered defense costs
  - May result in insured bearing some percentage of defense-related expenses
- “Best Efforts” allocation provisions
  - Obligate insurer and insured to attempt in good faith to agree on fair and proper allocation
  - Does not obligate insured to accept insurer’s proposed allocation

# PROVIDING NOTICE

- When notice is required
- Notice to indemnitors vs. notice to insurers
- How to give notice to insurers
  - Follow the policy provisions exactly, but substantial compliance may suffice
- Which insurers must receive notice
  - All potential sources of coverage – check indemnity agreements
  - Primary and excess/umbrella insurers
- What happens if there is not “timely” notice to insurers?
  - Notice-prejudice rule and other excuses for delayed notice
  - Costs incurred before notice may be treated as voluntary payments

## SATISFACTION OF DEDUCTIBLES AND RETENTIONS

- Deductibles and retentions may need to be satisfied before insurer's defense obligation commences
  - Depends on nature of coverage and policy provisions
  - Importance of negotiations surrounding selection of defense counsel
- Increasingly common to see higher "class action" deductibles, particularly in California
  - Potential focus of negotiation during policy renewal discussions
  - Need for careful review of wording

# COVERAGE FOR “WAGE AND HOUR” CLASS ACTIONS

- Broad coverage grants in EPL insurance policies
  - “Misrepresentation”
  - “Breach of Contract”
  - “Failure to implement or enforce appropriate policies and procedures
- Exclusions often not as broad as insurers contend
  - FLSA and “similar” provisions of state law
  - “Wage and hour law” exclusions
  - “Public policy” misnomers
- Possibility of other coverages being implicated



# COVERAGE FOR BIPA CLASS ACTIONS

- CGL coverage for “personal and advertising injury”
  - Standard definition includes “oral or written publication of material that violates a person’s right of privacy”
- Commonly-invoked exclusions
  - “Employment-related practices” exclusions
  - “Recording/Distribution in Violation of Statutes” exclusions
  - Ambiguity in exclusions re access/disclosure of “confidential or personal information”
- Other policies potentially implicated

# COVERAGE FOR CCPA AND CIPA CLASS ACTIONS

- Could implicate CGL coverage for “publication of material that violates a person’s right of privacy,” depending on specific allegations
  - But, cyber risks can be excluded
- Non-standard liability coverages potentially applicable (D&O, E&O), depending on breadth of coverage and scope of exclusions
- Cyber insurance policies potential source of recovery
  - “Wiretapping” exclusions may not apply
  - Exclusions for gathering/collection of data not necessarily applicable either

# COVERAGE FOR UCL CLASS ACTIONS

- Typically there is no coverage under standard CGL policies because “damages” are not available under the statute—only restitution and injunctive relief
- However, some courts have found coverage under E&O or D&O policies, at least for the defense
- Common exclusions include “unfair competition” or “unfair trade practices” exclusions, but if it is not defined, some courts have found ambiguity.
  - After all, consumer protection claims are not the same as anti-competitive claims
  - Interpreting such exclusions broadly would vitiate the broad coverage provided by these types of policies

# STRATEGIC CONSIDERATIONS RE INDEMNITY AGREEMENTS

- Must be drafted carefully and revisited periodically as appropriate
- Obligations may be unilateral or mutual
- The role of indemnity agreements in the defense of claims
- Distinction between indemnity obligations and Additional Insured coverage
- Disputes between insurers and indemnitors
- Triggers of indemnity vs. triggers of insurance coverage
- Questions concerning prioritization

# COVERAGE FOR CLASS ACTION SETTLEMENTS

- Duty to settle flows from an insurer's duty of good faith and fair dealing
- Voluntary payments clause – insured may not make a payment or assume any obligation without the insurer's consent, which cannot be unreasonably withheld
  - Insurer likely does not need to show prejudice, but this rule varies by jurisdiction
- Navigating disputes over the decision to settle
- Questions concerning the reasonableness of a settlement

# COVERAGE FOR CLASS ACTION SETTLEMENTS

- A few thoughts on mediation:
  - Choose a mediator who can deal with insurance as well as substantive issues.
  - Importance of coverage counsel as well as underlying defense counsel at any mediation.
  - Involvement of insurers in mediation.
  - Issues posed by mediation confidentiality.

# COVERAGE FOR CLASS ACTION SETTLEMENTS

- Allocation of Settlement Amounts
  - When settlement involved both covered and uncovered claims or covered and uncovered parties, many courts use the “larger settlement rule,” under which allocation is appropriate only if the uninsured claims cause a settlement to be higher than it otherwise would have been.

**TIP: Consider potential allocation issues when drafting settlement agreements.**



# QUESTIONS?



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