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Hot Topics in Liability Insurance: California Coverage Law and Recent Developments in Five Easy Pieces

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Outline of Discussion Topics

- Coverage Issues Associated with Corporate Transactions
- Insurance Coverage for Cyber Liabilities
- Insurance Coverage for Food Product Recalls
- Employment Practices Liability Insurance Strategies
- Property Insurance Coverage

Coverage Issues Associated with Corporate Transactions

Coverage Issues Associated with Corporate Transactions

- Consider the intersection of liabilities, insurance and indemnities
- Insurance does not necessarily follow liabilities
 - No product line tort liability does not include right to insurance coverage for the tort.
- The law that governs the transaction does not necessarily govern the insurance policies

Coverage Issues Associated with Corporate Transactions

- Structure the transaction to implement the parties' intent regarding insurance
- Negotiate insurance transfer/assignment and indemnification of liability terms to preserve rights and access to insurance.

Coverage Issues Associated with Corporate Transactions

Central issue is enforcement of “anti-assignment” clauses:

- “Assignment of interest under this policy shall not bind [the insurance company] until its consent is endorsed hereon.”

Coverage Issues Associated with Corporate Transactions

- *Henkel Corp. v. Hartford Accident & Indem. Co.*, 29 Cal.4th 934 (Cal. 2003)
 - Insurance claims cannot be transferred until the liability is “reduced to a sum of money due,” i.e., fixed by a judgment or settlement
 - Insurer can demonstrate additional burden if “the predecessor corporation still exists or can be revived.”
- *Fluor Corp. v. Superior Ct.*, 208 Cal. App. 4th 1506 (2012)
 - Insurance Code Section 520 (1872); “Loss” cannot be defined as a “claim.” Assignment may take place without insurer consent once the loss, or harm, has occurred.

Coverage Issues Associated with Corporate Transactions

- **Insurance Due Diligence Check List**

- Collect and analyze all policies past and present
- Match available insurance against potential liabilities
- Analyze how indemnities and insurance align
- Structure the deal to reflect the parties' intent
- Review any Anti-Assignment language

Insurance Coverage for Cyber Liabilities

Insurance Coverage for Cyber Liabilities

- **Review Traditional Forms of Insurance With a Data Privacy and Information Security Lens**

- Comprehensive General Liability (CGL)
 - Exclusions for “a person’s right to privacy created by any state or federal act” may **not** exclude actions *arising under privacy rights recognized under common law* even if they were codified by the legislature (*Hartford Casualty Insurance Company v. Corcino & Associates*, CV 13-3728 GAF, C.D. Cal. (October 7, 2013)).
- Directors’ and Officers’ Liability (D&O)
- Employment Practices Liability (EPL)
- Professional Liability/Media (E&O)
- Property Damage/Business Interruption
- Fidelity/Financial Institution Bond/Crime Policy
- Fiduciary Liability



Insurance Coverage for Cyber Liabilities

Review Stand Alone Data Privacy, Security, Media and Technology-Based Coverages

- “Cyberliability” Policies
- Data Privacy and Security Coverages
 - Stand-alone policies
 - Endorsement and “package policies”
- Coverage Types Typically Available
 - Privacy Liability
 - Data Breach Expenses
 - Network Security Liability

Insurance Coverage for Cyber Liabilities

- Inaccurate applications can void coverage
 - severability will only take you so far
 - review carefully (with counsel) before submitting applications to insurers
- Trigger traps
 - retro dates
 - claims made and reported
 - interrelated wrongful acts and claims



Insurance Coverage for Cyber Liabilities

Practical Insurance Recovery Considerations

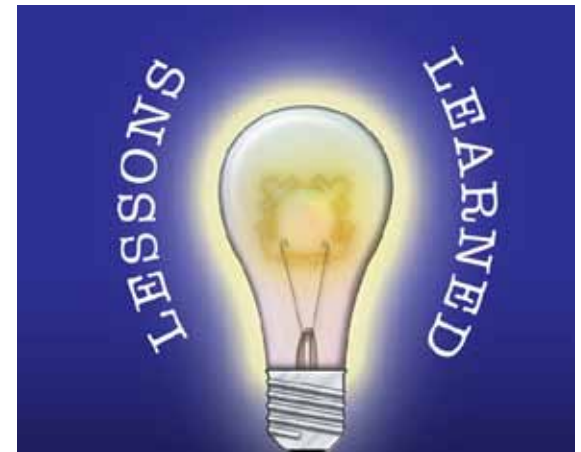
- Timely notice of claim (claims made and reported?)
 - Communications with insurers presumed not privileged
 - Law enforcement considerations – investigation secrecy
- Consent to incur prudent or necessary expenses may be required:
 - Costs of crisis stage or legal compliance such as breach notification letters, credit monitoring, call center, forensics (up to \$30 or more per customer)
 - Defense expenses (private claims; governmental/regulatory claims)



Insurance Coverage for Cyber Liabilities

Tips for Placement and Renewals

- Terms, conditions, and exclusions may be negotiable
- Insurance applications may be discoverable in litigation with third parties
- As the distance between Retroactive Date and Inception Date lengthens, policies become more valuable
- Stay up on trends and coverage options to remain at or above market standard



Insurance Coverage for Food Product Recalls

Insurance Coverage for Food Product Recalls

- **Insurance Placements and Products**
- General Liability Coverage
- First-Party Property Damage/Business Interruption Coverage
- Product Recall Coverage
 - First-party loss
 - Third-party liability

Insurance Coverage for Food Product Recalls

- General Liability Coverage Exclusions that Might Apply
 - Owned property
 - Expected/intended injury/damage
 - Withdrawal/recall exclusion – If in the policy, this is typically the killer
 - Your work/your product exclusions
 - Impaired property exclusion
 - Pollution exclusion

Insurance Coverage for Food Product Recalls

- **General Liability Coverage “Withdrawal/Recall” Exclusion**
- No coverage for: “loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
 - “Your product,”
 - “Your work,” or
 - “Impaired property,”
- if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.”
- *Does this clause work to exclude every recall from GL coverage???* No!
 - *Shade Foods v. Innovative Prods.*, 78 Cal.App.4th 847 (2000)

Insurance Coverage for Food Product Recalls

- **Product Recall Policies**

- Main Coverage Areas

1. Costs to inspect, withdraw, destroy, dispose of product (including transportation, staff overtime, additional staff)
 - Notices and communications to public
 - Replacement costs of product that cannot be reused
2. Brand Rehabilitation
 - Restoring reputation/goodwill
 - Reestablishing market share
3. Business Interruption
 - Loss of income generally for 12 months following incident
4. PR and Crisis Management
 - PR, crisis consultants, cost of handling the incident
5. Third-party liability claims

Insurance Coverage for Food Product Recalls

Lessons To Be Learned:

- Assess precisely the risks you face when considering a supplemental insurance policy like for “food product recall”, or “brand protection”
- Make sure your supplemental insurance policy covers that risk
- If loss-triggering event occurs, consider your response relative to whether your policy will cover the associated costs

Employment Practices Liability Insurance Strategies

Employment Practices Liability Insurance

- **Scope of Coverage**
- Basic insuring agreement provides:
 - Insurer shall pay on behalf of the Insured Loss for any Employment Claim first made during the Policy Period for a Wrongful Employment Practice
- Wrongful Employment Practice means actual or alleged:
 - Discrimination, retaliation, sexual harassment, wrongful termination, breach of employment agreement, violation of FMLA, employment-related misrepresentation, defamation/invasion of privacy, failure to create/enforce adequate workplace policies, etc.
- Loss includes defense expenses and money the Insured is legally obligated to pay as a result of claim, including settlements, judgments, back and front pay, compensatory damages, punitive or exemplary damages of multiple portion of any multiplied damage award if insurable under applicable law.

Employment Practices Liability Insurance

- **Definition of Loss**

- “Loss” usually includes settlements, judgments, and defense costs.
- Punitive damages or the like are covered if any state with respect to which the policyholder, the insurer, or the claim allows such damages to be covered by insurance.
- In California, insurers will argue that §533 precludes coverage.
 - Ins.C. § 533 has been held to bar indemnification for “willful acts” that may be expressly covered by an EPL policy. (Markel American Ins. Co. v. G.L. Anderson Ins. Services, Inc. (E.D. CA 2010) 715 F.Supp.2d 1068, 1077 (applying Calif. law)).
 - Ins.C. § 533 should not bar indemnification for disparate impact claims where any discrimination was unintentional or where the claims against the employer are based on wrongful conduct by its lower-level employees that the employer did not authorize or ratify.

Employment Practices Liability Insurance

- **Examples of Types of Claims Typically NOT Covered:**

- **“Wage and Hour Law”**

- Alleged violation of Fair Labor Standards Act (except for allegations of retaliation for asserting FLSA rights) – laws governing or related to the payment of wages including overtime, minimum wage, classification

- Court held California Labor Code sections which governed meal periods did not have identical FLSA counterparts, but was similar enough for coverage exclusion to apply. However, exclusion didn't apply where there was no federal counterpart at all. California Dairies Inc. v. RSUI Indemnity Co., 617 F.Supp.2d 1023, 1043-44 (2009)
- Exclusion that provides coverage: Sub-limited wage and hour coverage.

- Alleged violation of ERISA
- Alleged violation of National Labor Relations Act
- Alleged violation of OSHA
- Alleged violation of ADA

Employment Practices Liability Insurance

- General Principles for Procurement
 - Address issues up front to avoid problems when claim arises
 - Review policy terms and endorsements
 - Policy terms are negotiable
- Pay Attention to These Terms
 - Approved Counsel
 - Notice Provisions
 - Retention
 - Prior Acts Date
 - Settlement Provisions
 - Allocation

Property Insurance Coverage

Property Insurance Coverage

- **Property Insurance Overview**

- Asphalt Factory Fire Hypothetical
 - Property insurance policies are “first party” policies, unlike “third party” liability policies.
 - Property insurance policies cover both tangible and intangible property.
 - Property insurance policies come in many different types: in case of loss, review all of your policies.

Property Insurance Coverage

- Indemnifies against direct loss caused by a covered claim not exceeding the least of:
 - The replacement cost of the property at the time of loss or damage
 - The insured's interest in the property;
 - The amount of insurance specified in the declarations in respect of the property lost or damaged
- Property includes the Building ... Equipment, Stock, Contents, Property
 - Building includes fixed structures pertaining to building and located on premises
 - Additions and extensions communicating and in contact with the building
 - Permanent fittings and fixtures attached to and forming part of building

Property Insurance Coverage

- Replacement cost
 - Cost of replacing, repairing, constructing or reconstructing (whichever is the least) the property on the **same or adjacent site**, with new property of **like kind and quality**, and for **like occupancy** without deduction for depreciation
 - Not limited to replicas

Property Insurance Coverage

- Rebuilding issues
 - Permitting
 - Design/code compliance versus “improvement”
 - Replacement equipment – what if direct replacement can’t be found?
 - Proof of loss – preliminary, final and time limits
 - Who controls the reconstruction?
 - Bids versus estimates

Property Insurance Coverage

- **Business Income**

- “We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct physical loss of or damage to property. . . . The loss or damage must be caused by or a result from a Covered Cause of Loss”
- “Business Income”: designed to pay the profits and unavoidable continuing expenses caused by an interruption of the policyholder’s business
- “Period of Restoration” – Defined and limited in the policy, but can be expanded (typically from occurrence of a peril and no later than some point in time thereafter, e.g., 12 mos.)

Property Insurance Coverage

- Assume the following:
 - In a natural disaster or other mass claims situation, insurance companies facing a large number of similar claims tend to take a constricted view of coverage for those claims
 - Katrina
 - BP Gulf Oil Spill
 - If the claim is large, the insurance company will have already hired
 - an insurance industry forensic accountant
 - an “independent” adjuster (you will want to hire your own independent adjuster)
 - coverage counsel, who will oversee document demands and otherwise prepare for litigation and minimizing exposure

QUESTIONS?



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Overview

Doug is a partner in the Insurance Recovery Group, and has been representing policyholders in coverage disputes since 1995. He has litigated claims under commercial or comprehensive general liability, mortgage insurance, directors & officers, fiduciary, crime, employment practices, title insurance and intellectual property policies. His clients include companies in many different business sectors, such as national retail, telecommunications, internet, engineering and construction, medical products and devices, and mortgage banking.

Honors & Awards

- Listed in Best Lawyers in America 2012

Professional Affiliations

- Director, Los Angeles County Bar Foundation, 2009 to present