7 WAYS TO OBTAIN COVERAGE

In Business Litigation

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Authorities on insurance often speak to the relationship between an insurance company and an insured, offering guidance to defendants who declare coverage exists when they are sued. But plaintiff's attorneys also need to understand the obligations of insurance companies to their insureds. After all, in many types of suits, any damages will be paid by the defendant's insurance company, not by the defendant. If you are a plaintiff's attorney in business litigation, as we often are, there are seven steps you can take to set yourself up for success in reaching a defendant's insurance coverage.

1. Know the insurer's duties

An insurer has two main obligations to its insured in the litigation context: the duty to defend litigation and the duty to indemnify, or to pay damages. *Ledford v. Gutoski*, 319 Or 397, 400–403 (1994). The duty to defend is broader than the duty to indemnify. An insurer has a duty to defend if the complaint provides any basis for coverage. *Id.* The duty to defend is generally determined by the complaint and policy only. Even if allegations are ambiguous or poorly pled, but could be reasonably interpreted to provide coverage, or if some allegations are covered and others are not, an insurer has a duty to defend.

The duty to indemnify, on the other hand, is narrower. An insurer is only obligated to indemnify an insured on covered claims. *Id.* The duty to indemnify is generally determined by looking to all facts in a case, typically after a jury has delivered its verdict.

Key to plaintiffs is the fact the duty to defend includes a duty to "reasonably" settle within policy limits. This includes all defense costs for covered and uncovered claims. *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or 514, 518 (1985); *La Noue Dev., LLC v. Assurance Co. of Am.*, No. 04-1527-KI, 2005 WL 1475599, at *6 (D. Or. June 20, 2005). For this reason, you will want to understand a defendant's insurance policy as early in litigation as possible.

2. Ask for defendant's insurance policy

ORCP 36 requires parties to disclose: "the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;" and the parties are also required to disclose "the existence of any coverage denial or reservation of rights and identify the provisions in any insurance agreement or policy upon which such coverage denial or reservation of rights is based." ORCP 36 B(2)(a)(i)–(ii).

While the defendant is under no obligation to disclose its insurance policy or coverage until after the filing of the complaint, ORCP 36 B(2)(b), it does not

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hurt to ask, pre-filing. Understanding the policy before you file a complaint benefits both the plaintiff and a defendant if there is coverage. Both sides in litigation want the duty to defend and the duty to indemnify to exist.

3. Read and understand the policy

When you receive a copy of the defendant's insurance policy, you will want to ensure that you understand types of coverage, types of policies and the exclusions therein.

There are two main types of coverage:

- *Occurrence coverage,* which covers claims that arise out of damage or injury that occurred during the policy period, regardless of when claims are made.
- *Claims made coverage*, which covers claims first made during the policy period.

When first reviewing the policy, you will want to review (1) the type of coverage and (2) the policy period, to see if your claims are potentially covered under the policy.

You will also want to understand the type of policy you are reviewing. In our practice of business litigation, we see three main types of policies:

- *Commercial General Liability Policies (CGL)*, which protect against claims for bodily injury or property damage arising on premises, or from operations. CGL often includes defamation or "advertising injury" coverage, but often excludes products liability coverage.
- *Directors & Officers Policies (D&O)*, which protect corporate directors and officers for claims brought against them in their capacity as directors and officers. D&O is also available to non-profits.
- *Errors & Omissions Policies (E&O)*, which cover errors or omissions committed by a company or its individuals. E&O is also called professional liability insurance (PLI), and is basically business malpractice insurance.

Other types of policies may include:

- *Employment Practices Liability Policies (EPL)* (which cover potential employment claims by employees, such as harassment; age, race, sex discrimination, FMLA violations; wrongful termination; and defamation);
- *Business Interruption Policies* (which cover loss of income after a business suffers a disaster and shuts down).
- *Umbrella/Excess Policies* (Excess provides additional coverage when all underlying policies are exhausted and umbrella fills gaps in coverage in underlying policies and can also serve as excess).

In addition, an individual's homeowner's policy may provide additional coverage for speech related conduct, such as defamation.

Finally, you will want to review the policy carefully, looking for covered claims, exclusions, exceptions to exclusions and amendments to the policies.

4. Use commonly covered claims first

When drafting a complaint, you will naturally want to put your best claims first. To you, this may mean the claims with the worst facts for the defendants, such as fraud and intentional torts. But when you draft a complaint with an eye towards insurance coverage, you'll want to think about creating a duty to defend for the defendant's insurance company. Fraud and intentional torts are less likely to constitute covered claims. Obviously, if you already have a copy of the defendant's insurance policy, you will know which types of claims are covered and not covered. But even if you have not yet received the policy, you can put more commonly covered claims first, such as negligence, and incorporate your negligence allegations into a later-pled fraud or intentional tort claim. This creates an increased likelihood that an insurance company will review the complaint, see that it contains a covered claim and recognize the duty to defend exists. The last thing you want is for the insurance company to immediately conclude no duty to defend exists because the first claim is not covered under the insured's policy, and the first claim is incorporated by reference into all other claims in the complaint. Although it may seem counterintuitive, drafting the complaint in this manner could set up your client for a better outcome.

5. Consider insurer's duties, limits

As discussed above, the duty to defend applies to all claims, whether covered or uncovered, and includes a duty to "reasonably" settle within policy limits. This means an insurer has a duty to initiate settlement efforts and "determine if settlement is possible within the policy limits." *Maine Bonding & Cas. Co.*, 298 Or at 519.

In other words, unless settling within policy limits would be unreasonable, an insurer cannot refuse to settle. And settlement must be fully funded when the allegations in the complaint provide a basis for coverage, even if the complaint also includes allegations that may not be covered. *La Noue Dev.*, 2005 WL 1475599, at *6. An insurer cannot obtain a dismissal (or settlement) of covered claims and then stop defending.

When dealing with a defendant, it is important to be mindful of the policy limits. Consider writing a demand for the exact amount of the defendant's policy limits, with an expiration date on your demand so the insurer cannot wait until after trial to accept the demand. Additionally, you should also be aware of risks in a case with multiple plaintiffs. Cooperation with other plaintiffs to agree on how to divide the policy limits and to make demands (or a joint demand) within the policy limits may be critical to recovery for all plaintiffs.

6. Think about risks for trial

It also is important to be mindful of the risks posed by the duty to indemnify at trial. As discussed above, the duty to indemnify only applies to covered claims. This could affect how you draft your verdict form and jury instructions. You should consider using a special verdict or

a general verdict with interrogatories under ORCP 61 B–C, rather than a general verdict, to make sure the verdict is clear regarding whether the jury found liability for covered or uncovered claims. This will matter for your client's recovery and for any subsequent action by the insured to recover from the insurer. *See Jarvis v. Indem. Ins. Co. of N. Am.*, 227 Or 508, 511–12 (1961) ("As a general proposition, a judgment in an action against an insured may be invoked as conclusive in its favor by the insurer in a subsequent action against it, if the issue decided in the prior action was material to the judgment and is identical with the issue claimed in the later action to be res judicata, even though the insurer was not a party to the first action.").

7. Watch for excess verdict

If your client wins at trial and the jury awards your client more than the policy limits of the defendant's insurance, it may be difficult to collect the excess verdict from the defendant. Many defendants will not have resources to pay a judgment and foreclosure can be difficult. Another option may be seeking an assignment of claims from the defendant in exchange for a covenant not to execute.

Assignment may not always be available in Oregon. While assignment is allowed by statute, courts have held that anti-assignment clauses in a policy can prevent assignment. Compare ORS 31.825 ("A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered.") with *Holloway v. Republic Indem. Co. of Am.*, 341 Or 642, 652 (2006) (anti-assignment clause prohibited assignment of insured's rights or duties without written consent of insurer; case did not mention applicability ORS 31.825). When assignment is available, it can be a practical option that allows you to bring claims against an insurer for violating its duties to the insurer, such as the duty to defend, settle and indemnify.

Summary

By following these steps and considering the potential effects of a defendant's insurance on the litigation process, you may be more successful in obtaining recovery for your client.

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