Your Coverage Advisor

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The Limitations of Policyholder's Duty to Cooperate

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Liability insurance policies have historically imposed on policyholders a duty to cooperate with insurers in the defense of actions. More recent policies have expanded this duty, obligating policyholders to cooperate in the investigation of claims as well. Insurers often investigate claims or defend actions under a reservation of rights which can create an adversarial relationship between the policyholder and insurer. As a result, courts have recognized limits on the duty to cooperate; protecting the policyholder's right to select and control defense counsel and to have confidential, privileged communications with defense counsel regarding matters which could affect the coverage dispute.

In evaluating its obligations, a policyholder should first determine whether the duty to cooperate exists. Most standard form policies — particularly more recent ones — impose such a duty, although certain historic policies may not. If a policy purports to impose a duty to cooperate, then the parties must determine whether the insurer is fulfilling its policy obligations or whether the insurer is in breach.

Insurers can breach their obligations in a number of ways, such as by refusing to defend to the full extent required by the policy and applicable law; by taking positions on trigger, allocation, or deductible/retention issues that are unwarranted; or by issuing

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an improper denial of indemnity obligations, which would amount to an anticipatory breach. If an insurer is in breach, it cannot insist upon performance by the policyholder of any duty under the policy, including the duty to cooperate. If the policy imposes a duty to cooperate and the insurer is not in breach, then the parties must determine the extent of the duty and any limitations by focusing on the specific language in the policies.

Impact on the Selection and Control of Defense Counsel

Disputes often arise between the policyholder and insurer regarding the parties' respective rights to select and control defense counsel. When an insurer agrees to defend under a reservation of rights, it generally loses the ability to select counsel, or to control the defense. These limitations on the insurer largely derive from the ethical rules that govern the conduct of defense counsel.

In situations where there is a dispute between the policyholder and insurer, the defense counsel must be careful to identify who is actually the client because this will guide the defense counsel in conducting itself within the rules of professional conduct and ethics. In most jurisdictions, courts have held that when an insurer has reserved rights and/or partially denied claims, the defense counsel's client is the policyholder, not the insurer. Some of the rules that are particularly important in this situation require that: (1) the client gives informed consent; (2) the third party does not interfere with the attorney's independence of professional judgment or with the client-attorney relationship; and (3) the information relating to the representation of the client is protected.

Defense counsel owes a policyholder an unqualified duty of loyalty and must at all times protect the policyholder's interests, without being compromised by an insurer's instructions. It is important that the attorney exercise independent professional judgment on behalf of his or her client and render candid advice. An attorney's loyalty to the client cannot be compromised by allegiance to others or by the attorney's personal interests.

It is not unusual for an insurer to provide defense counsel with certain litigation 'guidelines' that test the loyalty, zeal, and independent judgment of such counsel. Further, insurers may insist upon policyholder acquiescence in such guidelines on the basis of policy 'cooperation' clauses. Litigation guidelines, however, may impinge improperly upon applicable ethical rules, which are absolute, by attempting to impose restrictions upon the professional judgment of defense counsel. Generally, an attorney may comply with such attempted restrictions only to the extent they do not interfere with the attorney's independent professional judgment in representing the policyholder and cooperation clauses cannot be used to force policyholders to consent to such ethical violations.

Impact on Privileged Communications

Insurers also may use the cooperation clause to test the limits of the attorney-client privilege between policyholders and their defense counsel. Ethical rules limit the extent to which an insurer may obtain information from defense counsel. As discussed above, when an insurer has reserved rights and/or partially denied a claim, defense counsel can function as counsel only for the policyholder. An attorney cannot reveal confidential information relating to the representation of a policyholder client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. Absent such consent or authority, the attorney must maintain in confidence information provided by the policyholder. Correspondingly, an attorney is

forbidden from using information relating to representation of a policyholder client to the disadvantage of the client, unless the client gives informed consent.

The privilege analysis is complicated because in some respects an insurer is not a third party, usually in regards to the defense of the underlying claim. However, that common interest does not extend beyond the defense of the underlying claim and, in instances where the information being exchanged relates to the coverage dispute, there may be some issues.

A situation may arise when an insurer files an action seeking a declaration that there is no coverage for a claim and seeks production, based on the policy's cooperation clause, of documents generated during the investigation of the underlying case. In these situations, courts have generally held that as long as the documents relating solely to the underlying claim are produced, then the duty to cooperate under the insurance policy has been fulfilled. Courts consistently have held, however, that policyholders need not produce documents or other communications concerning legal advice or other information transmitted with a reasonable expectation of confidentiality, such as communications between policyholders and their defense counsel relating to coverage disputes.

Conclusion

Cooperation clauses are common in liability insurance policies. Although it is important for both policyholder and insurer to review such clauses carefully to determine their precise, expressed scope, it also is important for the parties to recognize that ethical rules and decisional law may serve to limit the stated scope of any duty to cooperate. ■

Sexual Harassment in the Workplace – Are you Covered?

By Kerri L. Keller
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Anyone who has watched the news recently knows that sexual harassment in the workplace is a hot topic — every day there is a new story breaking. A trickle-down effect is likely to be seen and employers should know where to look for insurance coverage if they are confronted with allegations or claims of on-the-job sexual harassment.

Limited coverage for claims arising from sexual harassment may be found in Commercial General Liability (CGL) policies. CGL policies generally provide coverage for 'bodily injury' or 'property damage' arising out of an 'occurrence.' Absent a physical injury to the claimant, allegations of emotional distress alone may not bring a sexual harassment claim within the realm of a CGL policy. A policyholder should examine its policy, however, to determine whether it defines 'bodily injury' broadly to include emotional harm. Moreover, in addition to 'bodily injury,' CGL policies provide coverage for 'personal injury,' which is defined to include, among other things, claims arising from libel, slander, or publication of material that violates a person's right to privacy. Depending on the specific circumstances surrounding a claim, allegations of sexual harassment may fall within the 'personal injury' coverage of a CGL policy.

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However, CGL policies generally contain exclusions that could come into play, and typically contain exclusions for claims brought by employees for 'bodily injury,' as well as for any claim arising out of employment-related practices, including harassment. Other exclusions may also apply to certain insureds, such as exclusions for expected or intended injuries and willful and malicious acts. Though a policyholder should carefully evaluate whether these exclusions apply to a particular claim, coverage under a CGL policy for claims arising from sexual harassment may be quite limited.

As with CGL policies, employers seeking to find coverage under workers' compensation policies may find that various exclusions operate to bar coverage in these circumstances. For instance, workers' compensation policies likely provide coverage only for physical injury to employees. And, the same exclusions that might operate to bar coverage under a CGL policy could also bar coverage under a workers' compensation policy, depending on the circumstances surrounding the claim.

Directors and Officers (D&O) liability policies, however, may provide coverage for sexual harassment claims. D&O policies typically provide coverage for 'wrongful acts,' which is broadly defined as an actual or alleged act, error, omission, misleading statement, or breach of duty of the insureds. D&O policies typically provide coverage to officers and directors of the company while acting on behalf of the entity. Coverage for the entity itself may also be included. D&O policies generally do not, however, provide coverage for non-officer employees. Moreover, D&O policies include an exclusion for claims brought by one insured against another insured and, accordingly, there could be no coverage for claims asserted by officers or directors of the company. Nonetheless, a company facing a sexual harassment claim should carefully review its D&O coverage to determine whether they are covered by the policy.

The best option for coverage in this situation is likely going to be found in an Employment Practices Liability Insurance (EPLI) policy. EPLI coverage can be purchased in the form of an endorsement or as a stand-alone policy. EPLI coverage is typically broader than the coverage found in CGL and D&O policies, and is prevalent in the insurance market today. Policy terms vary. For example, some policies cover claims asserted by third-parties (such as vendors or customers), some provide coverage for acts that occurred prior to the policy period, and some permit the policyholder to select and control defense counsel. Thus, policyholders should carefully evaluate the scope of coverage being purchased.

In today's climate, coverage for claims of sexual harassment is a protection few companies can afford to ignore. EPLI policies provide the best chance of coverage for sexual harassment claims, although businesses without it should not assume that there are no coverage arguments to be made under other types of policies, as the facts and circumstances surrounding such claims will often guide whether there is any available coverage. ■

Commercial Real Estate Due Diligence: Premises Environmental Insurance Options

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You found the right property for your project, the price makes sense, the purchase agreement is signed, and due diligence review is underway. There are two weeks until closing.

The lender-required Phase I Environmental Site Assessment report just came in. Uh-oh, you didn't anticipate this news. Site history indicates an auto repair shop. Two underground storage tanks were present during the 1970s, one containing gasoline and one containing waste oil. An active dry cleaner is up-gradient. Now what?

Next steps will be carefully orchestrated by your deal attorney and environmental consultant. The historical records search will be stepped up. Are tank closure reports available, including analytical results? Perhaps a Phase II Subsurface Investigation will be commissioned. Your lender may be asking for a personal environmental indemnity.

In the example above, the buyer may encounter existing contamination. Future site activities could result in a new release or exacerbation of an existing condition. Premises environmental insurance is an effective tool to transfer this risk.

Environmental insurance products pay the expense of remediating unknown existing or new pollution releases. Coverage includes legal defense expense and damages in the event of third party bodily injury (BI) claims and/or third party property damage (PD) claims such as loss of use, diminution in value, and natural resource damage. Coverage applies on your property and/or when conditions have migrated off-site.

Typical coverage add-ons include liability associated with off-site recycling, waste treatment, disposal activities, and spills during transportation. Third-party claims due to exposure to asbestos, lead paint, mold, or virus are insurable. Disinfection, midnight dumping, business interruption losses, media/public relations emergency expense and even green standard property replacement costs are available.

Premises environmental insurance is customized according to site conditions. Coverage is negotiated and placed through your specialty insurance broker who prepares a submission for bid by qualified insurance carriers including Allied World, Beazley, Berkley, Chubb, Great American, Ironshore, Navigators, Tokio, XL/Catlin, and Zurich, to name a few.

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Your broker will interview you to benchmark insurance objectives including policy term, insurance limits, and deductibles. Claims-made policies are available with up to 10 years of coverage term (13 years for lender programs). Expect a sizable retention before the insurance triggers and a $7,000–$10,000 per year minimum premium, fully paid at policy inception. Policy limits up to $25 million are readily available with excess layer options for very large projects.

The broker submission to the marketplace will include current and past site facts. This information is presented in an application including environmental site assessments and compliance reports. A description of future site use, loss history, named insureds, and purchase agreement terms are important to the carriers' risk evaluation. Coverage terms are negotiated specifically in correlation to site conditions and insurance objectives.

Expect unknown pollution conditions to be readily (and fully) insurable. Suspected conditions intimated in site assessments will undergo a deeper review. Carriers make risk determinations based upon the merits of the technical reports. They verify that site facts support unlikelihood of a past release. They evaluate how future use will expand or mitigate exposure. In the event of suspected site conditions, and absent sub-surface studies, carriers may propose coverage limitations, such as no remediation response in the event of a voluntary investigation after insurance is placed. Other examples of limitations include remediation only in the event of a governmental mandate (frequently applied when background levels are positive, yet below regulatory thresholds), or a capital improvement exclusion. In these examples, complete third-party protections (BI/PD) should be intact.

Even known conditions may be insurable to some extent. In complex transactions, it is possible to insure known conditions for the new owner excess of a responsible party's financial indemnity. If remediation of the known contaminant is excluded, value remains in having protection should third-party BI/PD claims arise. Remediation exclusions are often written with an add-back provision – meaning, once a 'no further action' ruling is secured, remediation coverage is added back in the event of a future reopening event such as vapor intrusion.

> ⟦It⟧ is not what you know about a site that will disrupt the transaction, it is what you didn't expect.

Expect policy form nuances and custom-written endorsements to vary per carrier, deserving careful review and understanding to determine how coverage is best designed to protect your bottom line. Premises environmental insurance should be placed by a broker specializing in this market.

As showcased in our example, it is not what you know about a site that will disrupt the transaction, it is what you didn't expect. Prior site evaluations are not guarantees. Neighbor activities could be impacting your property and vice versa. Planned remediation of known conditions can reveal unknown contaminants and raise the ire of neighbors/tenants. Long forgotten releases can be exacerbated by new operations or new development.

Environmental due diligence considerations are vital to your purchase analysis. Environmental claims may be low frequency, yet they are high severity. Can you afford not to have premises environmental insurance? ■

Q&A: Cease and Desist

By Anastasia J. Wade
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Q: I received a cease and desist letter regarding my use of a competitor's trademark. Should I give notice to my insurance company?

Lawyer answer: It depends on your policy language. Practical answer: Yes. As advertising injury insurance has evolved, insurance companies have imposed additional requirements on policyholders to preserve coverage. One of these requirements is giving the insurance company notice of the potential for a claim, even if coverage is not yet triggered and the claim may never come to fruition. That is what one policyholder discovered in the recent case of Allstate Insurance Co. v. Airport Mini Mall, LLC, Case No. 1:15-CV-3086, 2017 WL 4280628 (N.D.Ga. Sept. 25, 2017). Although the court held that the policyholder was not entitled to coverage under the terms of the policy, the court continued its analysis and concluded that, even if the claim was covered, the policyholder failed to give timely notice when it received a cease and desist letter six months prior to the date the lawsuit was filed and that delay relieved the insurer of any duty to defend. The policy required the policyholder to give notice "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The court determined that this was a condition precedent to coverage and required the policyholder to give notice at the first indication of the potential for a claim. The cease and desist letter, according to the court, indicated a potential for liability related to an occurrence under the policy and the six-month delay between receiving the letter and providing notice to the insurance company was not "as soon as practicable," as required by the policy. To the extent adopted by other courts, the decision imposes an additional burden on policyholders. Companies in highly competitive markets or that host third-party sellers may receive many cease and desist letters that are unsubstantiated and will never result in actual litigation. Requiring them to provide notice to their insurance company each time they receive a cease and desist letter could be a heavy burden in some instances. It is, however, a burden that some policyholders may need to meet to preserve coverage for their claim. Policyholders, of course, may be able to argue that certain cease and desist letters can't reasonably be understood to "result in a claim." And policyholders in most jurisdictions may still

argue that the insurer has not been prejudiced by the timing of the notice, thus preserving coverage. Nevertheless, the best approach is to give notice to the insurer every time you receive a cease and desist letter to avoid a defense of late notice from the insurer. ■

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Attorney Highlights

Christopher J. Carney, Clair E. Dickinson, Meagan L. Moore and **Paul A. Rose** were named to the Best Lawyers in America© 2018.

Lucas M. Blower, Bridget A. Franklin, Kerri L. Keller, P. Wesley Lambert, Amanda M. Leffler, Paul A. Rose and **Anastasia J. Wade** spoke at the Brouse McDowell 2017 Annual Insurance Coverage Conference on October 12, 2017 at Embassy Suites in Independence, Ohio.

P. Wesley Lambert spoke at the NBI Seminar titled "Construction Law: Advanced Issues and Answers" on December 5, 2017 in Cleveland, Ohio.

Kate M. Bradley, Christopher J. Carney, Kerri L. Keller, P. Wesley Lambert, Amanda M. Leffler, Caroline L. Marks and **Paul A. Rose** were listed as 2018 Ohio Super Lawyers® through a peer- and achievement-based review conducted by the research team at Super Lawyers, a service of Thompson Reuters legal division.

Lucas M. Blower, Alexandra V. Dattilo, Gabrielle T. Kelly, Meagan L. Moore and **Anastasia J. Wade** were listed as 2018 Ohio Super Lawyers® Rising Stars™ through a peer- and achievement-based review conducted by the research team at Super Lawyers, a service of Thompson Reuters legal division.

Amanda M. Leffler was named in the Top 100: Ohio, Top 50: Cleveland, Top 50: Women Ohio and Top 25: Women Cleveland Super Lawyers Top List for 2018.

Alexandra V. Dattilo and **Meagan L. Moore** spoke at the Akron Bar Association Insurance Coverage Seminar titled "Environmental Liability Insurance: The Risks You Never Considered" on December 15, 2017.