

Insurance Coverage for Class Action Claims: Recovery for Indemnity and Defense Costs

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Tips For Finding Available Coverage: Policyholder View

- Analysis of potential coverage no different than for non-class action lawsuits
 - Cast the net as broadly as possible
- Read the complaint thoroughly
 - Allegations need not be primary focus of complaint to trigger coverage
 - Defense obligation is particularly broad
- Be creative
 - Rules of insurance policy construction typically favor the policyholder
- Be wary of occurrence versus claims-made distinction
- Check endorsements for retentions/deductibles specific to class actions
 - Best time to address separate class action retentions is in the underwriting process
- Be timely with notice (both claim and occurrence)
 - For putative class actions, don't wait for class to be certified!
 - Don't forget about umbrella and excess policies
- Be prepared to hear no on close claims, but don't be prepared to settle for no

Tips for Evaluating Whether Coverage is Available: Insurer View

- Analysis of potential coverage similar to non-class action lawsuits
 - Evaluate facts concerning named plaintiff specifically, as well as class allegations
- Read the complaint thoroughly
 - What is the harm allegedly at issue and what relief actually is sought?
 - Defense obligation is not unlimited or untethered to the policy terms
- Be Straightforward in Applying the Policy Terms
 - The most fundamental rule of insurance policy construction is the plain meaning rule
- Check endorsements for retentions/deductibles specific to class actions
 - Best time to address separate class action retentions is in the underwriting process
- Consider timeliness of notice provided (both claim and occurrence)
 - For notice denials, many jurisdictions require more than a showing of lateness
 - Don't forget about umbrella and excess policies
- Be prepared to apply and enforce the policy terms

Types of Liability Policies That May Cover Class Actions

- General Liability (“CGL”): Policyholder View
 - Everyone buys it
 - Covers “bodily injury” and “property damage” suffered by third parties
 - Typically includes coverage for emotional distress and related injuries
 - Also typically includes “personal and advertising injury” coverage, which includes eclectic array of torts that may apply to class allegations
 - Publication of material that libels or slanders a person or organization
 - Publication of material that violates a person’s right of privacy
- General Liability (“CGL”): Insurer View
 - Covers damages due to “bodily injury” and “property damage” suffered by third parties
 - Often explicitly limits coverage to physical injury or damage
 - Also typically includes “personal and advertising injury” coverage, which includes specified offenses in a coverage part built from the ground up
 - Publication of material that violates a person’s right of privacy is not a panacea for all privacy, security, and cyber risks

What is “Bodily Injury” and “Property Damage”?

- As noted, CGL policies are written to address sums payable as damages because of bodily injury or property damage to third parties
- BI and PD typically are defined in the policy
 - “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
 - “Property Damage” means physical injury to tangible property, including all resulting loss of use of that property.
- Analysis is often whether injury or damage alleged in class action satisfies the definitions of BI or PD
 - No injury class actions
 - Covered vs. uncovered harm
- In addition, policy exclusions may be applicable depending on the facts.
 - Separate products liability limits, if purchased
 - Own product exclusions, business risk exclusions, etc.

“No Injury” Class Actions

- Plaintiffs class action lawyers increasingly are alleging so-called "no injury" claims which seek to recover for the economic damage of purchasing a product that is defective.
- Plaintiffs' attorneys have increasingly used the "no injury" claim to avoid difficulties in class certification that would be presented by individualized bodily injury or property damage claims.
- These class actions typically are filed under state consumer-protection laws in conjunction with, or in place of, traditional personal injury class actions. They specifically seek to remedy an economic, rather than physical, injury allegedly caused by defendants' conduct.
- Are these mere complaints of economic harm, not involving actual property damage or bodily injury?

Covered vs. Uncovered Harm

- Even if there is no coverage for pure "no-injury" claims, what about mixed claims -- unjust enrichment claims combined with medical monitoring claims, for instance? Some medical monitoring claims allow plaintiffs to recover monitoring costs without showing any present physical injury. Do such claims trigger a duty to defend or indemnify under "bodily injury" coverages?
- What about defective product cases where the principal damages are the costs of repair or replacement of the defective product or component? E.g., in construction cases, defective building component claims such as leaky windows, etc.?
- As will be discussed in more detail later, there also are often class actions that involved potentially covered and uncovered relief.
- Careful analysis and reservations of rights are required.

Advertising and Personal Injury Coverage: Breach Claims

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- One specific type of class action that presents important coverage questions is a privacy breach class action involving mishandling of personal information.
- Policyholder advocates may contend that CGL advertising and personal injury coverage should apply.
- Carefully review the allegations – is this even about a breach of privacy?
- Consider coverage limitations, such as “publication” of material?
- Advertising and personal injury coverage is an offense-based coverage.
- Many exclusions also may be applicable.

Types of Liability Policies That May Cover Class Actions

- Errors and Omissions/Professional Liability (“E&O”): Policyholder View
 - Typically covers “Loss” arising from “Wrongful Acts” (broadly defined) in course of providing “professional services”
 - Media liability is specialized E&O coverage for publishers, advertisers, and the like
 - Important because CGL and D&O policies typically exclude losses arising from professional services

- Errors and Omissions/Professional Liability (“E&O”): Insurer View
 - Typically covers “Loss” arising from “Wrongful Acts” in course of providing “professional services”
 - Media liability is specialized E&O coverage for publishers, broadcasters and media-related firms that is typically written on a named peril basis for specified risks
 - Important because CGL and D&O policies typically exclude losses arising from professional services

Types of Liability Policies That May Cover Class Actions (cont.)

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- Directors and Officers (“D&O”): Policyholder View
 - Like E&O, typically covers “Loss” arising from “Wrongful Acts”
 - Typically excludes coverage for bodily injury/property damage and “professional services”
 - This is the go to coverage for securities class actions
 - “Side C” coverage protects the organization against its own Wrongful Acts (separate from directors and officers)
 - Full Side C coverage not available to all organizations
 - However, even organizations that can’t get full Side C coverage often have Side C coverage for securities actions, including class actions
 - Can be enormously beneficial for organizations able to purchase it
 - Often coverage for governmental actions, investigations, etc.
 - Some D&O policies provide coverage for governmental investigations at very early stages, including initial requests for documents or interviews

Types of Liability Policies That May Cover Class Actions (cont.)

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- Cyber Liability
 - Typically protects against liability from data breaches and accidental loss of data
 - This risk obviously has become much more prevalent in recent years
 - Cyber-related losses typically limited or excluded altogether by CGL policies
 - Often sold in package policy with E&O
 - In recent years, many data breaches have resulted in class actions by affected consumers and others
 - No standard industry policy form, so terms can vary a lot from insurer to insurer
- Employment Practices Liability (“EPL”)
 - Typically protects against liability from specified employment-related torts
 - *E.g.*, discrimination, retaliation, sexual/workplace harassment, wrongful termination
 - Employment class actions tend to arise in wage and hour context
 - Most EPL policies now limit coverage for wage and hour claims (*e.g.*, to low sublimit, defense only), or exclude it altogether
 - But should be broad coverage for other types of employment-related class actions (*e.g.*, institutional discrimination or hostile work environment)

What Is A “Wrongful Act”?

- As noted, this is the triggering event for most D&O and E&O policies
- Typically defined very broadly
 - *E.g.*, any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by an insured
- Thus, analysis is not usually whether conduct alleged in class action satisfies this definition, but whether specific exclusions apply
 - Applicable exclusions vary by policy type and insurer
 - Under standard rules of insurance policy construction, exclusions interpreted narrowly
- Whether D&O or E&O (or both) are triggered typically depends on whether the allegations at issue involve the insured rendering “professional services”
 - Triggering language of CGL, cyber, and EPL is more situation-specific, but still quite broad

What Is Covered “Loss” or “Damages”

- In addition to excluding certain types of claims, most liability policies define the types of “loss” or “damages” that are covered
 - Scope of covered loss/damages varies by type of policy and insurer
- Categories of loss/damages that typically are covered include:
 - Compensatory damages
 - Punitive/exemplary/multiplied damages (if insurable under the most favorable applicable law)
 - Pre-judgment and post-judgment interest
 - Legal fees and expenses of underlying claimant(s) if awarded by court order
- Categories of loss/damages that may not be covered include:
 - Civil or criminal fines or penalties
 - Sanctions
 - Liquidated damages
 - Costs of complying with injunctive relief

What Is Covered “Loss” or “Damages” (cont.)

- Often, non-covered categories of loss are expressly carved out of the definitions of covered “loss” or “damages”
 - Courts often view such carve-out language as exclusionary and construe it narrowly
- Particularly in the class action context, disputes often arise as to the scope of covered and non-covered categories. For instance:
 - Insurers have asserted that damages fixed by statute constitute non-covered fines or penalties
 - *E.g.*, statutorily-prescribed \$500 and \$1500 awards for violations of TCPA
 - Coverage may hinge on whether statute at issue is intended to be compensatory or punitive in nature
 - Insurer may assert that there is no specific grant of coverage for administrative costs of class action settlement
 - This is often one of the costliest components of class action settlements
 - Insured should be mindful of rules of policy construction when such disputes arise

Value of Defense Coverage

- Most liability policies require the insurer to pay for costs of defending claims
 - Duty to defend versus duty to reimburse defense costs
 - Duty to defend typically means insurer has duty to:
 - Retain defense costs directly on insured's behalf
 - Pay defense counsel directly
- Duty to defend is significantly broader than duty to indemnify
 - Any possibility of coverage triggers duty to defend
 - Costs of defending claims may be greater than the underlying liability
- Sometimes defense costs are included within the policy limits (*i.e.*, “eroding” limits), and sometimes they aren't (*i.e.*, “defense in addition to limits”)
- Practical considerations
 - What if insurer and insured don't agree on choice of defense counsel?
 - When is duty to defend triggered where retention or deductible is in play?
 - Is insurer still required to retain and pay defense counsel directly within the deductible?
 - Many courts say yes – deductible does not diminish the duty or delay its trigger

Questions?

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