

“Litigation Insurance” To Protect Your Company

By Ryan S. Luft ¹

Company owners, directors, and officers may not realize that when their company is hit with a lawsuit alleging property damage, bodily injury, personal injury, or advertising injury, the company may have insurance coverage to pay for the costs of its legal defense (and, ultimately, for any damages it must pay to the complainant). There is a good chance that your company has purchased general liability insurance, often referred to as Comprehensive General Liability or Commercial General Liability insurance. The company may also have purchased other policies to protect the company’s directors and officers, or against other liabilities faced by the company.

General liability insurance policies, purchased by most companies, provide that the insurer must defend its insured against any “suit” seeking damages to which the insurance policy applies. Covered claims generally include allegations of property damage, bodily injury, personal injury, and advertising injury (damage from slander or false advertising).

The insurer’s defense obligation is broader than its duty to indemnify its insured for losses. Therefore, the insurer will be required to defend its insured (or reimburse its insured for the costs of defense) so long as the claim is potentially covered by the policy. In North Carolina, an insurer’s duty to defend is ordinarily measured by the facts as alleged against the insured, while the insurer’s duty to pay is measured by the facts ultimately determined at trial. In most cases, the costs of defense are paid in addition to the policy limits, and therefore do not erode the limits of indemnity.

General liability insurance policies fall into two categories: occurrence-based and claims-made. An occurrence-based policy can cover claims made long after the incident occurs – and, indeed, long after the policy period itself. These policies provide coverage as long as the *alleged injury* takes place during the policy period.

Conversely, claims-made policies provide coverage where the *claim* is made against the insured during the policy period. Claims-made policies may provide coverage only for acts alleged to have occurred during the policy period, or during some other specific time frame as set out in the policy.

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All general liability insurance policies contain exclusions, which vary, but typically exclude coverage for certain types of property and business risks. Applicability of an exclusion is heavily dependent upon individual factual circumstances—exclusions do not come in a “one size fits all” variety. Additionally, exclusions are not favored in North Carolina. Therefore, any doubt as to coverage will be resolved in favor of the insured.

Once a lawsuit has been brought against the company, or even if the company has reason to believe it will be sued, the company’s risk manager or other appropriate employee should review the company’s insurance policies to determine whether coverage is available.

If there is a possibility of coverage, the company should notify its insurer. The company will be required to cooperate with its insurer, which begins by giving prompt notice of the lawsuit or potential lawsuit, and continues throughout the litigation. The degree of cooperation required will vary on a case by case basis.

If it appears that the insurer is not living up to its end of the bargain, it may be necessary to retain coverage counsel to protect the company’s interests.

Key steps to take if your company has been, or likely will be, sued:

- Review the company’s insurance policies to determine whether the lawsuit may be covered. If necessary, engage legal counsel to provide coverage advice.
- Give prompt notice to the company’s insurer of the lawsuit or potential lawsuit.
- Cooperate with the company’s insurer throughout the litigation.
- Remember that insurers benefit from minimizing their exposure. Make sure the company’s interests are being properly represented. If necessary, engage legal counsel to ensure that the company’s rights are being protected and its coverage maximized.