EXECUTIVE LEGALADVISER

July/Aug. 2007 • www.executivelegaladviser.com

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INSURANCE LAW

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When Not to Accept the Insurance Company's Chosen Lawyer

A GENERAL LIABILITY POLICY PROVIDES A CORPORATION with two important benefits: indemnification (payment of covered claims) and defense of claims. These benefits are separate and independent. If a business faces a suit asserting multiple claims and the policy potentially covers at least one of the claims, the insurance carrier is obligated to defend all of the claims — the ones that might be covered as well as the ones that might not be. Executives need to be familiar with certain basic insurance concepts so that they can ensure the best possible defense of their businesses.

Occurrence policies: Most liability policies are triggered by an occurrence. That is, the policy provides coverage and defense for accidents that occur during the term of the policy, no matter when the policyholder eventually brings the claim.

In a typical general liability policy, there is no monetary limit on the insurance company's obligation to pay for a legal defense. In addition, unlike most claims-made policies — such as director-and-officer liability policies — the cost of the defense does not diminish or erode the policy limits.

Notice: It is important for the exec's business to give timely notice of a claim to the carrier. Most policies require giving notice promptly or "as soon as practicable."

If the business does not give timely notice, the carrier may claim that the notice was late and deny coverage. However, the carrier must prove that the allegedly late notice prejudiced the carrier in some material manner — a very high burden.

Another reason to notify the carrier promptly: Any attorneys' fees that the business incurs before tendering the defense of the claim to the carrier are typically not covered. Only post-tender defense costs are covered in typical situations.

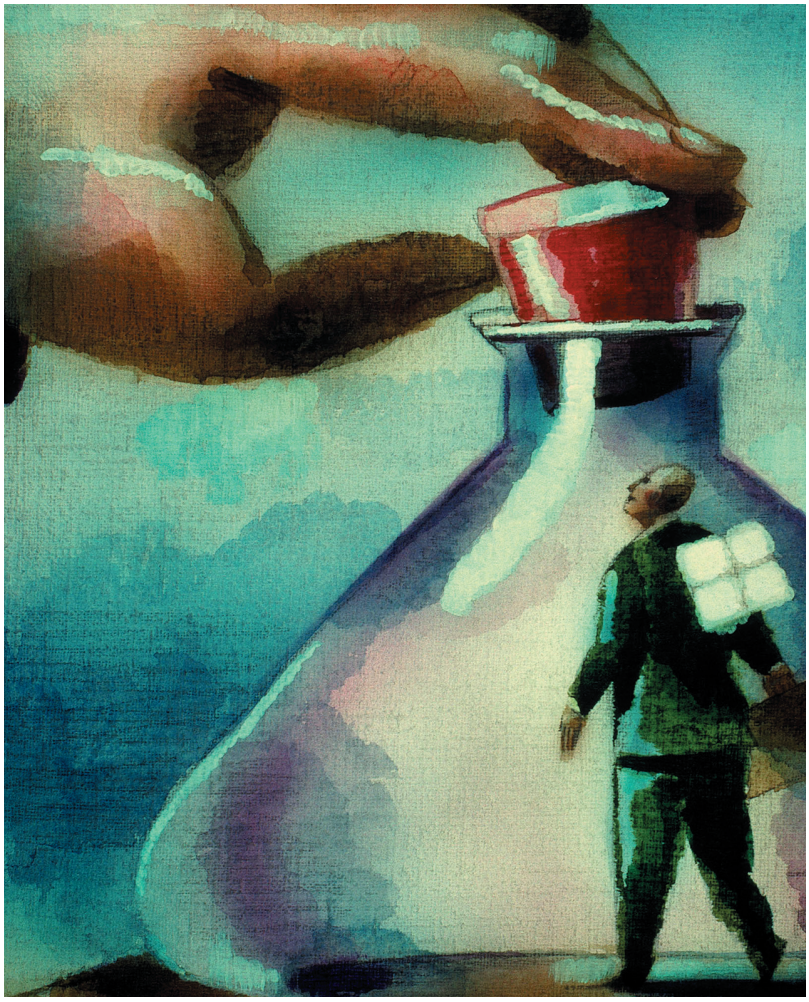
Many litigation-savvy, *Fortune* 500 corporate clients are not aware of their right to select and retain their own defense counsel at the expense of their insurance carrier.

Reservation of Rights: Frequently, once it receives notice, the carrier issues a reservation of rights. A reservation of rights is a letter that says that the carrier is going to provide a conditional defense, but it is reserving its rights to later deny coverage after further investigation or trial. The carrier must explain in the reservation all of the potential exclusions or conditions known by the carrier at the time of the reservation upon which the carrier might deny coverage. If it does not, and there is prejudice to the policyholder, a court could find that the carrier waived its coverage defenses.

Selection of counsel: A policy typically states that the carrier "has the right and the duty" to defend. This contractual duty to defend generally includes the right to select and retain counsel. This usually means that, when a business notifies the carrier of a loss, the carrier assigns the defense of the claim to a panel or approved counsel. Panel counsel are firms retained by the carrier who frequently have

CHOOSE OR LOSE

- EXECS NEED TO KNOW SOME BASICS OF INSURANCE COVERAGE LAW.
- INSURANCE COMPANIES TYPICALLY HAVE THE RIGHT TO CHOOSE LAWYERS TO REPRESENT THEIR INSUREDS IN CASE OF A SUIT.
- HOWEVER, IN SOME CIRCUMSTANCES, THE INSURED CAN CHOOSE ITS OWN COUNSEL AND STILL REQUIRE THE INSURANCE COMPANY TO PAY.



an established, on-going relationship with and meet certain criteria of the carrier.

On the other hand, however, the business may have an established relationship with a firm that the execs trust and that knows the execs' business. Understandably, for many reasons, the execs may want that firm to defend the claim.

If the carrier issues a reservation of rights, and if the reservation goes to the heart of the coverage issues, then Texas law says that a potential conflict exists between the carrier and your company. The carrier's panel counsel could theoretically steer the development of the underlying liability facts in such a manner that would avoid coverage. In that situation, Texas law says that the insured business can retain its own counsel and then require the carrier to pay the fees.

Many litigation-savvy, *Fortune* 500 corporate clients are not aware of their right to select and retain their own defense counsel, at the expense of their insurance carrier. It is a right that Texas law provides, in certain circumstances, and may be critical to defense of the claim.

Checklist

How can execs exercise their businesses' rights to select and retain their own chosen counsel?

- Provide timely notice of the claim to the carrier.
- Require the carrier to respond and provide its coverage analysis, including any reservation of rights, promptly.
- Send the reservation of rights letter to an insurance lawyer, called coverage counsel, for evaluation.
- If the reservation of rights goes to the heart of the coverage — that is, the same facts needed to prove liability are needed to prove coverage — then a potential conflict exists between the insurance company and the execs' business.
- Have coverage counsel write the insurance carrier and demand that the carrier retain counsel of the execs' choice and pay that lawyer's reasonable fees and expenses.

Why is this important? Execs may have an established relationship with counsel who knows their business and has represented it in the past. In addition, the carrier's panel counsel may be in a difficult position. They may have an established, ongoing relationship with the carrier and may want additional future work from the carrier. While many panel counsel are aggressive, ethical and focused on the needs of the true client — the insured — the law recognizes that there may be a theoretical conflict of interest or divided loyalties. It protects the policyholder by giving the policyholder the right to retain its own counsel at the expense of the carrier. ELA

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