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## Welcome To The Land Of Liability: An Insurance Recovery Primer For Non-U.S. Businesses With U.S. Operations

**William G. Passannante  
and Cort T. Malone**

**ANDERSON KILL & OLICK, P.C.**

The tort and liability insurance system in the United States often makes non-U.S. business owners feel like strangers in a strange land. It can leave them at a loss for words or uttering words that we cannot print in this publication.

Non-U.S. corporations that have U.S. operations through subsidiaries eventually will face the U.S. tort system. Claims for asbestos, environmental harm, lead exposure and many other long-term exposure or “toxic tort” situations all should be covered by insurance. We provide herein a primer on core insurance concepts for non-U.S. businesses with U.S. operations.

### **General Liability Insurance Provides Full Coverage For Costs Of Defense**

The general liability insurance policy provides *litigation insurance* in the form of a very broad “duty to defend.” Five general propositions of duty to defend law are clear and unquestioned in virtually all jurisdictions:

1. An insurance company’s duty to defend is *exceedingly broad*.

*William G. Passannante is a Shareholder and Co-chair of Anderson Kill’s insurance recovery group. Mr. Passannante is a leading lawyer for policyholders in the area of insurance recovery. He has recovered hundreds of millions of dollars for policyholders and has represented policyholders in litigation and trial in major precedent-setting cases. Cort T. Malone is a Shareholder in the Stamford, Connecticut office of Anderson Kill. Mr. Malone’s practice focuses on insurance recovery and corporate and commercial litigation.*

2. An insurance company has a duty to defend whenever the allegations of the underlying complaint suggest a *reasonable possibility* of coverage or the *potential* for coverage; that’s true when *even one interpretation* of the allegations could arguably result in coverage.

3. The allegations of the complaint must be *liberally construed* in determining the duty to defend.

4. Any doubts about coverage on account of ambiguous, vague or incomplete allegations in the complaint are resolved in the policyholder’s favor.

5. An insurance company cannot avoid its duty to defend unless it meets the *heavy burden* of proving *with certainty* that there is no possible legal or factual basis for coverage under any interpretation of the underlying allegations.

Well-settled law regarding an insurance company’s defense obligation requires that any insurance company with potential liability for underlying long-term liability claims must provide a complete defense to its policyholder up front and in full, to the extent necessary to make the policyholder whole. Not only can a policyholder seek its outstanding defense costs from any of its insurance companies for potentially covered claims, but the policyholder also is entitled to a defense of the entire action where a complaint is potentially covered – even if the complaint includes uncovered allegations.

### **Policyholders Are Entitled To A Full Defense, Not A Partial Defense**

Once the duty to defend is triggered, the insurance company must pay such costs in full *before* seeking any contribution from other insurance companies that also may be liable for the policyholder’s loss. It is well established that insurance companies have a duty to pay defense costs up front rather than arguing over coverage or allocation issues to the policyholder’s detriment.

It is not uncommon for U.S. subsidiaries of non-U.S. businesses to buy insurance policies from several different insurance companies or to have switched companies over time. In such instances, the non-U.S. parent should seek a complete defense from any one of its insurance companies, despite likely arguments that the insurance company should be liable for only a portion of the losses suffered.

Where lawsuits name both a non-U.S. parent corporation and its U.S. subsidiaries, or any combination thereof, insurance companies may seek to limit their obligations based on the inclusion of entities not named as insureds. However, case law demonstrates that so long as a single named insured is faced with at least one potentially covered claim, the insurance company must pay that entity’s defense costs in full for the entire action – a complete defense – as promised under the policies.

### **Right To Select Independent Counsel Where A Liability Insurance Company Creates A Conflict Of Interest**

In certain circumstances, an insurance company announces that it reserves its rights to deny coverage but continues to pay for the defense of an action. Where the insurance company denies coverage, or where the insurance company has less at stake than the policyholder with respect to the underlying action, the policyholder probably is entitled to appoint independent counsel loyal to the policyholder and its interests rather than loyal to the competing interests of the insurance company.

### **Improper Attempts To Reduce Or Eliminate Insurance Coverage Via Allocation**

Insurance companies often use the subterfuge of allocation in an attempt to avoid all or most of their responsibility or improperly shift liability to the policyholder. Most jurisdictions reject attempts to avoid liability

*Please email the authors at [wpassannante@andersonkill.com](mailto:wpassannante@andersonkill.com) or [cmalone@andersonkill.com](mailto:cmalone@andersonkill.com) with questions about this article.*

by improper allocation, though the fights continue every day.

In the early years of long-term products liability, the insurance industry itself acknowledged that each insurance company over a span of policy periods could be fully responsible for the costs of defense and settlement, that is, responsible for *all sums* as the policies state. Many U.S. jurisdictions have adopted the all-sums view of liability insurance in long-term injury cases.

Allocation defenses play an important role in key issues such as the best method for submitting claims and the choice of jurisdiction if and when litigation becomes necessary.

### **Insurance Companies Must Pay To Settle Cases Consistent With Defense Counsel's Advice**

An insurance company must make settlement decisions in good faith or be in breach of contract. In *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company* (Cal. Super. Ct. Aug. 6, 2002), a policyholder debtor brought an action against its primary, excess, and umbrella liability insurance companies for a declaratory judgment on their duties for its asbestos-related liabilities after reorganization. The court held that California cases "have found that an umbrella or excess insurance company has an obligation to participate in settlements when the potential settlement may invade the insurance company's limits of liability, even though the insurance underlying the excess insurance policy is not yet exhausted.... An umbrella or excess insurance company has obligations that pre-exist and are independent of actual exhaustion by payment of the underlying limits. These obligations include the duty to participate in settlement negotiations, the duty to accept a reasonable settlement, the duty of good faith and fair dealing . . ."

An insurance company that fails to participate in settlement negotiations or refuses to consent to reasonable settlement terms can be liable for punitive damages in excess of policy limits.

### **Five Steps For Non-U.S. Businesses To Take To Protect Insurance For Their U.S. Operations.**

#### *1. Think insurance after a loss*

Whenever a lawsuit or claim letter arrives in the company law department, or whenever the company suffers a significant financial loss, ask whether it is covered by insurance. In addition to the various types of insurance purchased by the company or any of its predecessors, risk managers and counsel should also analyze other sources of insurance that may potentially cover a

claim, e.g., contractual indemnitor or other companies' insurance policies that may list the company as a named insured under a vendor endorsement or pursuant to a contractual coverage endorsement. In environmental matters, a company alleged to have generated waste at a Superfund site should look to not only its own liability insurance but also that of the transporter of the alleged waste and the owner of the site.

#### *2. Give notice of claims*

Insurance policies usually contain notice provisions regarding claims against the policyholder. Too often, policyholders get so caught up in defending underlying claims that they delay giving notice to their insurance companies. When you are faced with a claim or loss, notify the insurance company (often through the broker) as soon as possible in accordance with the policy's instructions.

Generally, there are two types of notice provisions: (1) Notice of an event or happening (an "occurrence") that may lead to a claim, and (2) Notice of an actual or potential claim. Notice should be given to every potentially applicable insurance company. If the claim for coverage is related to a product, the policyholder should give notice to every insurance company that sold the policyholder coverage from at least the date the product was first marketed to the date of the "occurrence" or of the actual or potential claim. Have your insurance agent or broker give written notice to all possibly implicated insurance companies. Do not rely on the broker's or agent's word that there is no insurance coverage. Insist – and verify – that the insurance broker or agent immediately forward written notice of the claim to all potentially applicable insurance companies.

The insurance industry has developed standardized forms for giving notice. "Plain vanilla" notice often is best. For first notice of an event that may lead to a claim, all that is required is a copy of the document that the policyholder received alleging its liability. The first notice of claim might also state that additional insurance policies may be involved and request that the insurance company provide a list of all policies that have been sold to the policyholder. Additionally, the notice can request that the insurance company provide a defense or agree to pay for defense costs, provide indemnification for any past or future liabilities, and advise the policyholder of all possible legal and factual bases that would support a finding of insurance coverage.

#### *3. Preserve and locate insurance policies*

Old insurance policies are extremely valuable because they tend to provide coverage for any damage or injury that took

place during the policy period, no matter when the damage or injury is discovered, and with no aggregate limits. These valuable corporate assets should be searched for, collected and cataloged. If a particular policy cannot be found, secondary sources may be used to demonstrate that the policy was purchased. Insurance archaeologists, companies specializing in locating old insurance policies, are often cost-effective. And keep in mind that, despite repeated insurance company statements to the contrary, insurance companies should have copies of the policies purchased from them.

Copies of current policies also should be collected and cataloged. Make certain that copies of policies issued to corporations and other entities that are acquired by your company through purchase, merger or otherwise are turned over to your company.

#### *4. Pursue insolvent insurance companies*

A policyholder should consider taking these actions if its insurance company files for protection under bankruptcy or insolvency law: (1) File a proof of claim as a creditor in the insurance company's bankruptcy or liquidation case and in the cases of any subsidiaries that also have file petitions; (2) file a claim against the state guarantee fund in one or more possible jurisdictions (complying with stated time limits for filing such claims); (3) if the insolvent company was the policyholder's primary insurance company, ask the first layer excess insurance companies to "drop down" and take the place of the primary insurance; and (4) consider whether litigation against other entities (the insurance company's reinsurers, brokers who placed coverage with an unstable insurance company, or managers of the insolvent company) is a viable option. Because of the complexities involved, it is advisable to seek the advice of counsel specializing in insurance insolvencies.

#### *5. Don't accept "no" for an answer*

Insurance companies routinely deny claims, even if they have no basis for doing so. There is little downside to challenging a denial of coverage. Make your insurance company spell out the basis for the denial. Read your policy to see if it says what the insurance company says it does; and then read it again to see if any other provisions alter the insurance company's interpretation. The difference between coverage and non-coverage often directly reflects the determination and persistence of the individual policyholder.

Now that we've welcomed you to the land of liability, we hope that this insurance recovery primer helps to protect your U.S. operations from loss.