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Getting Coverage For Class Action Defense Despite Consumer Protection Exclusions

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Defense expenses for consumer class actions can take a devastating toll on a company. While the amendments to Federal Rule of Civil Procedure 23 that went into effect in December 2018 may decrease the cost of giving notice of class certifications and settlements, they are unlikely to significantly reduce the high cost of defending these lawsuits.

Unfortunately, insurers are also increasingly including broad exclusions in their policies for claims arising from consumer protection laws (*e.g.*, the Telephone Consumer Protection Act, Fair Debt Collection Practice Act, Fair Credit Reporting Act, and consumer privacy laws).

However, a company that finds itself with such an exclusion should not simply resign itself to having to pay the full cost of its defense. An insurer's duty to defend may apply to spare the company the high cost of defending a consumer class action, even when the policy includes a consumer protection law exclusion. Moreover, earlier policies may obligate other insurers to participate in the insured's defense.

Potential for Coverage

An insurer's duty to defend is broader than its duty to indemnify. In many jurisdictions, an insurer has a duty to defend its insured not only when coverage exists, but also when a mere potential for coverage exists. For instance, in *Scottsdale Ins. Co. v. MV Transportation*, the court stated: "An insurer must defend its insured against claims that create a potential for indemnity under the policy."

Within a cause of action for a consumer protection law violation, a single fact may be pled that raises a potential for coverage and triggers the insurer's

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duty to defend the entire lawsuit. In *Buss v. Superior Court*, the court found that, “in a ‘mixed’ action, the insurer has a duty to defend the action in its entirety.”

As stated in *Pension Trust Fund for Operating Eng‘rs v. Fed. Ins. Co.*, “[C]ourts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty.”

The pleadings may be amended based on the facts pled to assert a covered claim. While at the conclusion of the lawsuit the insurer may seek reimbursement for defense expenses related to claims that are not covered, the insurer bears the heavy burden of demonstrating which expenses benefitted solely the insured’s defense against the uncovered claims. This is a difficult and often insurmountable burden for insurers to meet. Thus, insureds should not assume based on the labels of the causes of action.

Earlier Occurrence Policies

Earlier occurrence-based policies (such as most commercial general liability policies) may also require an insurer to provide the company with a defense. If the alleged class period spans multiple policy years, and the potential for coverage exists under the policies issued during those years, the insurers that issued those policies will likely also be obligated to share in the responsibility for company’s defense. These earlier policies may not contain the same exclusions that are included in current policy and can provide additional resources for an insured’s defense.

When sued in a consumer class action, companies can take steps to mitigate the impact of defense expenses by immediately giving notice under all potentially applicable current and prior insurance policies and by having coverage counsel review those policies to determine whether the facts pled trigger one or more insurers’ duties to provide a defense or to pay the insured’s defense expenses.