

WHAT YOUR LIABILITY CARRIER EXPECTS FROM YOU

BY MARK A. BUSH

You've just been sued. The summons and complaint have found their way to your desk. As a prudent person, of course you have liability insurance in place, but in the past you have led a blissful, litigation-free life. Not having been a defendant before, what can you expect from your liability insurance carrier? More importantly, what will it expect from you?

Whether you are a physician, lawyer, or other professional with professional liability coverage, a business with commercial general liability coverage, or an individual with homeowner's or auto coverage, you have heard that giving notice is important. That's right. Virtually all types of liability insurance policies require the insured to immediately provide written notice that a claim or suit has been made, including by forwarding the suit papers if they are available. In today's world, many insurance policies are on a "claims-made" basis, essentially meaning that the claim made against the insured, and the subsequent report of the claim to the insurer, are in fact the events which trigger the very coverage that you hope exists.

Significantly, a claim may be something other than an actual lawsuit – it could be a demand letter from the claimant's law firm or even a written or oral statement from a claimant indicating that he or she intends to sue or otherwise make a financial recovery against you or your business. Timely notice gives your insurance company the opportunity to investigate the claim

while witnesses are available and their memories are vivid, which may well inure to your benefit in defending the claim.

You've done your part by giving notice and forwarding the suit or claim papers to your insurance agent or, better yet, to the carrier directly – what can you expect to happen next? You can expect that the carrier will, in writing, acknowledge receipt of the claim that you have forwarded. This correspondence often will describe the amount of coverage available for the particular type of claim

and the deductible, if any, that will apply to the claim. If the carrier has "hedged" on its coverage obligations by sending what is known as a "reservation of rights" letter, it is wise to contact your personal legal counsel for a coverage review to

"In the event of a dispute between you and your insurer as to the proper coverage to be afforded, there exist proper legal avenues to secure your rights..."

make sure that you will obtain all of the rights and coverage available under your insurance policy. In the event of a dispute between you and your insurer as to the proper coverage to be afforded, there exist proper legal avenues to secure your rights—one being the initiation of a special type of ancillary lawsuit, known as a declaratory judgment action, in which the court decides whether coverage should be provided for purposes of the claim.

You may expect that a claims specialist will meet with you in person or call you to obtain further facts regarding the nature of the claim. You may also expect that the carrier will appoint legal counsel to defend you in the lawsuit and so advise you, often in the initial correspondence you receive acknowledging receipt of the claim. This lawyer is YOUR lawyer for purposes of the case even

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though he or she reports to, and is paid by, the insurance company. As the case proceeds, you may expect to receive regular correspondence from defense counsel addressed to both you and the insurer describing the progress of the case to date and providing legal advice as to whether the case should be settled, tried, or whether the potential exists for the court to dismiss the case outright.

Regardless of the nature of your policy, it likely has a “cooperation clause” in it. While these clauses vary in content, you may expect that it provides that you shall not make any payment, admit any liability, waive any rights, or settle the case without the prior written consent of the insurer. In other words, your insurance policy likely provides the insurer with the contractual right and opportunity to control the defense of the claim. Since liability insurers specialize in defending claims and lawsuits, it is only natural to expect that it, and not you as the insured, will determine the proper legal steps to take in your defense.

Your insurance policy, either in the “cooperation clause” or elsewhere, will likely require you to meet with defense counsel or the claims representative when requested, to provide them with evidence, usually in the form of documents or your own deposition testimony, and to personally appear at a trial to assist in your own defense. These legal obligations are not to be taken lightly. Indeed, there are many legal precedents in which the courts have found that insureds have disqualified themselves from coverage by failing to reasonably cooperate with their insurers.

Under Michigan law an insurance company may be excused from its coverage responsibility if it can demonstrate that the conduct of its insured materially injured the insurer’s ability to contest the merits of the case. In other words, if you were to refuse to provide a deposition or appear at trial, it is highly likely that your insurance company will write to you and indicate that it longer intends to pay a settlement or judgment on your behalf and that you or your business will be liable for any judgment imposed by the jury or court.

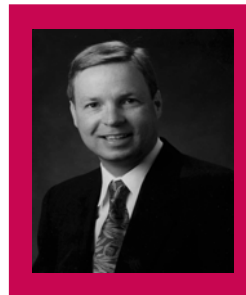
You should read your policy carefully to see whether you have the right to approve (or veto) a proposed resolution of the case, e.g., a financial settlement paid to the claimant from the proceeds of your insurance policy.

This not a right that you are likely to have under the typical commercial general liability or homeowners policy, but you may well have this “consent to settle” right in a professional liability policy, e.g., a malpractice policy.

In conclusion, whether you are facing your first legal claim or your last, it is extremely important to work closely with your liability insurance company and the legal counsel provided to you and give them your full cooperation, particularly since the very coverage for which you have paid your hard-earned premium dollars may depend upon it!

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Mr. Bush has been a shareholder at Fraser Trebilcock Davis & Dunlap, P.C. for nearly twenty years. He specializes in trial work, complex litigation, and insurance coverage analysis and litigation. Mr. Bush may be reached at 517/377-0815 or mbush@fraserlawfirm.com.

TEN FTD&D ATTORNEYS NAMED “MICHIGAN SUPER LAWYERS”

Ten shareholders in the Michigan law firm, Fraser Trebilcock Davis & Dunlap, P.C., have been named “Michigan Super Lawyers” for 2007 by the Publishers of *Law & Politics*.

Each year, *Law & Politics* uses a rigorous selection process, inviting more than 30,000 Michigan

SUPER LAWYERS CONTINUED...

lawyers to nominate the best attorneys they know; then *Law & Politics'* own research department searches for outstanding Michigan lawyers by reviewing national and local periodicals and trade journals; searching professional databases and online sources; and conducting in-person and telephone meetings with law firms.

Through a rigorous judging process, only 5% of the total lawyers in Michigan are listed in *Super Lawyers*.

The ten "Michigan Super Lawyers" at Fraser Trebilcock include: Michael S. Ashton and Michael C. Levine, Administrative Law; Mark A. Bush, General Litigation; Peter L. Dunlap, Alternative Dispute Resolution; David E. S. Marvin, Utilities; Graham K. Crabtree, Appellate Law; Michael E. Cavanaugh and Thaddeus E. Morgan, Business Litigation; Darrell A. Lindman, Employee Benefits/ERISA; and Michael H. Perry, Environmental Litigation.



ANITA FOX JOINS FDCC

Anita G. Fox, shareholder with Fraser Trebilcock Davis & Dunlap, P.C., has been honored with membership in the Federation of Defense and Corporate Counsel (FDCC). Founded in 1936, the FDCC is an elite, international association of insurance companies, self-insured corporations, and defense counsel.

FDCC members are experienced attorneys in private practice, corporate counsel and other executives from throughout the world with national, regional or company-wide responsibility, judged by their peers to have achieved professional distinction, and committed to promoting knowledge, fellowship, and professionalism in the course of justice.

Total membership world-wide is approximately 1,400 and includes members from the United States, Australia, Canada, Europe, Puerto Rico and other areas. Of the 31 members in Michigan, only 2 are women. Of the approximately 1,000 members in the United States, only 146 are women.



FTD&D LAWYERS NAMED TO "AMERICA'S BEST"

The 25th Anniversary edition of *The Best Lawyers in America*® has selected nine Fraser Trebilcock shareholders for inclusion.

The attorneys named to the list and their practice areas include David E. S. Marvin, Administrative Law; Peter L. Dunlap, Alternative Dispute Resolution; Michael E. Cavanaugh, Commercial Litigation; Stephen L. Burlingame, Corporate Law; Darrell A. Lindman, Employee Benefits Law; Nan Elizabeth Casey, Family Law; Mark R. Fox, Intellectual Property Litigation; Douglas J. Austin, Real Estate Law; and Iris K. Linder, Securities and Corporate Law.

Selection to *The Best Lawyers in America*® is based on an exhaustive and rigorous peer-review survey that utilizes more than 2 million confidential evaluations by the top attorneys in the country. The publication has been described in *The American Lawyer* as "the most respected referral list of attorneys in practice."



DUNLAP RECEIVES "RESPECTED ADVOCATE AWARD"

The Michigan Trial Lawyers Association (MTLA) has named Peter L. Dunlap the 2007 recipient of their "Respected Advocate Award." Dunlap is a shareholder in the firm of Fraser Trebilcock Davis & Dunlap, P.C., His practice is devoted to alternative dispute resolution, client representation in appellate law, arbitration, legal malpractice defense, and mediation.

Dunlap was recently elected as the President of the Michigan Defense Trial Counsel (MDTC), the counterpart to the MTLA.

"Each year MTLA and the MDTC select one attorney from the other's organization for the purpose of recognizing and honoring that individual's history of successful representation of clients and adherence to the highest standards of ethics," said Madelyne Lawry, the Executive Director of the MDTC. "In so doing, we promote mutual respect and civility."



LAW *and* BUSINESS

REPORT

"No law or ordinance is mightier than understanding."
Plato

ATTORNEY ACTIVITIES OF NOTE

■ Dave Marvin, shareholder with FTD&D, was selected to serve as a judge for the Chamber of Commerce's "10 Over the Next 10: The Next Generation of Business Leaders."

The awards recognize young business leaders under the age of 35 who are expected to play significant leadership roles the Capitol area business community over the next decade.

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