

Are You Covered for ADA Lawsuits?



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Introduction

Among the most common lawsuits filed in San Diego County are cases alleging violations of the Federal Americans with Disabilities Act and similar state statutes designed to protect the rights of disabled people. The defense and settlement of these cases can be quite expensive, yet many businesses overlook the fact that their existing liability insurance policies may cover these claims. The purpose of this article is to review the insurance policies that most commonly cover these claims and a number of coverage issues that often arise.

Commercial General Liability Policies

Most businesses carry commercial general liability (CGL) policies that cover "bodily injury" claims. Plaintiffs in ADA lawsuits frequently seek recovery for their physical pain, discomfort and emotional distress resulting from inability to utilize restrooms or other facilities. Such physical discomfort may fall within the bodily injury coverage. Emotional distress, particularly when accompanied by resulting physical symptoms, also may be covered by bodily injury.

Many CGL policies also cover "personal injury," which is often defined to include "wrongful entry, wrongful eviction or other invasion of the right of private occupancy" and, sometimes, "discrimination or humiliation" and "invasion of privacy." Any of this policy language may apply to an ADA claim, depending on the specific facts of the case (e.g., tenants complaining of wrongful eviction, customers complaining of humiliation or discrimination, and employees complaining of invasion of their privacy rights).

A number of insurers routinely defend these types of claims in San Diego and pay for the plaintiffs' pain and suffering damages. But, obviously, they have no obligation to conduct a defense until they are put on notice of such claims.

The more difficult issue is whether insurers have

a duty to pay for remediation costs, such as structural alterations necessary to bring buildings into compliance with state and federal law. Surprisingly, there are no published decisions in California or elsewhere in the United States addressing this issue. Insurers commonly deny they have any obligation to pay ADA remediation costs because these costs are not awarded to the claimants as money damages. The insurance policies, they point out, only cover the policy holder for sums it is "legally obligated to pay as damages."

However, a convincing argument that ADA remediation costs are covered can be made by analogy to the California Supreme Court's decision in *AIU v. Superior Court* (1990) 51 Cal.3d 807. In *AIU*, a government agency sought injunctive relief and reimbursement of environmental cleanup costs from the insured. The issue was whether the remedies sought by the government were "damages." The court took a liberal view of the "as damages" clause, and held that the cost of an agency-ordered environmental cleanup may constitute damages. In reaching this conclusion, the court first rejected the insurer's argument that "legally obligated to pay" does not include equitable relief. The court next rejected the insurer's argument that "as damages" does not cover injunctions. Ultimately, the court adopted the insured's position holding that "injunctions requiring remedial and mitigative action result in costs that constitute 'damages' under CGL policies." (Id. at 841).

The Supreme Court expressly rejected the insurer's argument that the cost of complying with a regulatory statute is an uninsurable cost of doing business. Id. at (831-32). The court also rejected the insurer's argument that mitigative expenses are uninsurable because they are preventative rather than compensatory. The court stated, "It would be illogical for mitigation costs not to be covered and remedial costs to be covered." Id. at (833, fn. 14).

The holding of the *AIU* court has been followed

by courts in California and numerous other jurisdictions in pollution-cleanup cases. Significantly, at least two courts also have applied the holding in discrimination cases. In *City of Pomona v. Employers' Surplus Lines Ins. Co.* (1992) 5 Cal.Rptr.2d 910, 918 (unpublished decision), the court held that the cost of complying with a potential injunction to remedy racial discrimination is covered "as damages." Noting that injunctive costs incurred in redrawing district lines would be similar to the injunctive response costs discussed in AIU, the court held that the costs of complying with an injunction to remedy the discrimination would have been covered as "damages," which the city was "legally obligated" to pay. See also *Lopez v. New Mexico Public School Ins. Authority* (N.M. 1994) 870 P.2d 745, 748. (The policy defines "personal injury" as including discrimination and violation of civil rights, and arguably includes coverage for injunctive relief in civil-rights and personal-injury cases.)

Umbrella Policies

Many companies carry umbrella policies, which contain broader coverage than their CGL policies. Umbrella policies often contain coverage for "discrimination and humiliation," even if the CGL policy does not. Like the CGL policies, these policies may also apply to remediation costs.

Errors and Omissions Policies

A number of reported decisions from other jurisdictions have addressed the issue of coverage for ADA claims under errors and omissions (E&O) policies. These policies are typically issued to professionals to protect them from liability for malpractice and similar claims. However, in at least two cases, insurers conceded that their E&O policies afforded coverage for ADA claims. *North Clackamas School Dist. No. 12 v. Oregon School Boards Ass'n Property and Cas. Trust* (Or.App. 1999) 991 P.2d 1089, 1092 (as OSBA explains "...the policy...clearly covers...claims...arising under the Americans with Disabilities Act"); *Canutillo Independent School Dist. v. National Union Fire Ins. Co.* (5th Cir Tex., 1996) 99 F.3d 695, 706-07. ("National Union...offers several examples of claims for which it would be liable to indemnify (the insured)...for example...claims...under the American with Disabilities Act").

Employment Practices Liability Policies

In recent years, many companies have begun purchasing employment practices liability policies (EPLI). These policies commonly cover ADA discrimination claims by employees and, sometimes, by third parties. Unfortunately, many of them expressly exclude remedial costs and thus cover only litigation costs and pain-and-suffering damages.

However, by comparing the express exclusion for remedial costs in the EPLI policies with the failure to exclude such costs in a company's other policies, the argument that the other policies were intended to cover such remediation costs may be enhanced.

Conclusion

As with any lawsuit, defendants sued for ADA violations should promptly and thoroughly review their insurance policies to determine whether they may have insurance coverage applicable to the claim. If in doubt, they should consult their insurance broker or an attorney specializing in insurance coverage. Given the significant expense of ADA claims and the risk that belated notice may be used by insurers as an excuse to deny policy benefits, notice of such claims should be made immediately. Depending on the facts of the case, and the language of the applicable policies, policy holders should consider insisting that their insurer pay for remediation costs in addition to defense expenses and pain-and-suffering damages.

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