

The Law Offices of
BERGMAN & DACEY, INC.

INSURANCE COVERAGE AND LITIGATION

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INSURANCE COVERAGE AND LITIGATION

Understanding the nuances of your insurance coverage, the governing legal precedents, and the ability to develop viable legal positions, has never been more vital to the continued success of your professional endeavors and your organization's risk management. When you have been sued by a third party seeking a multi-million dollar judgment, or when your property has been damaged in a catastrophic event, it is imperative that you identify and evaluate all available insurance policies to obtain the financial peace of mind to which you are entitled. Your resources can then remain focused on the operation of your professional endeavors. **Bergman & Dacey, Inc.** stands ready to assist you in locating, analyzing, and pursuing your coverage benefits.

HOW BERGMAN & DACEY, INC. CAN ASSIST YOU

A. Our Extensive Insurance Coverage and Litigation Background.

Bergman & Dacey, Inc. has wide-ranging, extensive knowledge and experience in insurance litigation and related coverage matters. We have stayed on the cutting edge of insurance issues and have provided both coverage advice and legal representation to clients at the trial and appellate court levels in many complex insurance matters. The following highlight our areas of expertise:

- Insurance coverage for claims arising from the human resources sector (sexual harassment, racial discrimination, wrongful termination, etc.)
- Insurance coverage for construction defect actions, including mold.
- Insurance coverage for additional insureds who are sued by third parties.
- Insurance coverage for intellectual property claims, such as patent, copyright and trademark infringement.
- Insurance coverage for mass toxic tort actions.
- Insurance coverage for claims arising from earthquakes and other natural disasters.

- Insurance coverage for the costs of remediating hazardous waste sites and groundwater.
- Insurance coverage for corporations that purchase the stock or assets of predecessor corporations. Insurance coverage for claims arising from business transactions and officer/ director actions.
- Recovery from insurance carriers for attorneys' fees paid in the pursuit of policy benefits in a bad faith action (Brandt fees.)
- Defending against claims by insurance carriers to recoup allegedly non-covered fees and expenses (Buss fees.)

B. How Bergman & Dacey, Inc. Utilizes its Insurance Expertise for Each Client's Benefit.

1. Coverage Analysis and Other Pre-Litigation Assistance.

When a client asks for our assistance regarding an insurance matter, one of the first things we do is ensure we have a complete understanding of the relevant insurance history. To achieve this first step, we:

- Search for all policies in effect during the time of loss or injury and, if necessary, review policies in the pre-loss years to understand the extent of the available coverage.
- Develop a coverage chart.
- Analyze the policies for the scope and amount of the applicable coverage and any potential exclusions.
- Interview the risk managers and brokers involved in placing the account.
- Interview other key witnesses familiar with the coverage history.
- Provide the client with a coverage opinion that also outlines options for the resolution of the dispute. To the extent litigation is necessary, we have the experience to try a case to judgment, and pursue the matter through the appellate courts if necessary.

2. Development and Implementation of a Litigation Game Plan.

Our years of experience in this field, as well as our long-term representation of both public and private clients, provide us with special insights into handling insurance litigation. **Bergman & Dacey, Inc.** has a developed proven game plan that allows it to do the following:

- Work with the client to evaluate the strength of its legal positions.
- Develop litigation goals.
- Plan and execute budgets.
- Manage and control voluminous sets of documents.
- Develop key facts.
- Analyze cutting-edge and first-impression issues of law.
- Engage in effective and cost-efficient discovery.
- Work with the client to retain and utilize experts and consultants to aid in strategies where appropriate.
- Resolve issues and narrow the litigation through tailored motion work.
- Strengthen the client's negotiating and settlement positions.
- Develop persuasive themes and presentations of evidence to the court and jury during trial, if necessary.

In short, **Bergman & Dacey, Inc.** has the requisite experience, teamwork, drive, and organizational skills to provide you with quality legal service for all your insurance litigation needs.

3. Our Ability to Manage Complex Insurance Litigation.

Bergman & Dacey, Inc. is at the forefront when it comes to handling complex construction, products liability, and environmental-related matters that have insurance

coverage implications. For example,

- We have represented governmental entities and corporations, both in the liability and the insurance coverage phases in cases with multiple parties and with in excess of 1 million pages of documentation.
- We have served as lead defense trial counsel in environmental actions with over 3500 plaintiffs.
- As plaintiff's counsel, we have developed proven litigation game plans for vigorously pursuing multiple defendants simultaneously.

Given our experience and track record, **Bergman & Dacey, Inc.** stands ready to provide its clients with a quality legal representation that is cost-effective.

BERGMAN & DACEY INC.'S REPRESENTATIVE CASES

The following are examples of particular matters that involve various insurance coverage and litigation:

1. **Bergman & Dacey, Inc.** provided coverage opinions and litigation support on behalf of a governmental entity facing potentially in excess of \$50 million in damage claims. The case involved many complex insurance issues such as the rights of additional insureds, the completed operations coverage, and the applicability of the professional services extension. Shortly after associating in as counsel of record, we were successful in negotiating a favorable settlement.

2. **Bergman & Dacey, Inc.** is both defense counsel and coverage counsel for an insured who, among many others, has been sued by plaintiffs in a document intense complex litigation for unfair competition, fraud, negligent misrepresentation, interference with prospective economic advantage, and various other business-related torts. Plaintiffs estimate their damages at \$1 billion. We have countersued the insured's carriers for declaratory relief, bad faith, and breach of contract. Trial is scheduled to start in August of 2005.

3. **Bergman & Dacey, Inc.** represented a multi-billion dollar international chemical company in a lawsuit in which over 600 plaintiffs claimed injurious exposure on

the job-site to hundreds of chemical products. Our client was one of thirty different companies that had been sued for manufacturing defects, design defects, failure to warn, and negligence. The case involved many complicated legal and factual issues such as causation, whether an inherently harmful product can be deemed defective, and when the plaintiffs sustained their claimed injuries. Our aggressive discovery and trial tactics led to a very favorable settlement for our client, whereas those defendants who remained in the case were held liable for nearly \$1 billion in damage.

Following that successful resolution, **Bergman & Dacey, Inc.** then attempted to recoup the settlement and defense attorneys' fees from its client's insurers. A lawsuit was filed against numerous insurers while the case was declared complex given the number of intricate legal/factual issues involved.

In light of the complex nature of the case, the trial court divided the trial into discrete phases. At the conclusion of the first phase, the court ruled in our favor that our client's self-insured retentions were not the equivalent of primary insurance, and that only one self-insured retention needed to be exhausted in order to trigger the obligations of the excess insurers. Following this success, we were able to negotiate a settlement with our client's insurers.

4. **Bergman & Dacey, Inc.** has been hired by a multi-national chemical corporation to seek policy benefits from a predecessor corporation's insurers for hundreds of third-party asbestos cases. Our client purchased the assets of the predecessor corporation and has been defending it against the asbestos cases throughout the country.

5. **Bergman & Dacey, Inc.** has been retained by a non-profit corporation to provide coverage advice and to monitor the litigation brought by a plaintiff who is suing for libel, slander, interference with contractual relations, and interference with prospective economic advantage.

6. **Bergman & Dacey, Inc.** provided insurance coverage advice to a former water supplier that had been sued as a cross-defendant in fifteen lawsuits brought by several hundred homeowners. The homeowners sued for over \$40 million in damage to water pipes allegedly due to the use of soft water. We helped reach a settlement in which our client's share of the settlement was completely funded by his insurers.

7. **Bergman & Dacey, Inc.** successfully represented a school district in a binding arbitration dispute concerning the availability of insurance proceeds to settle a sexual harassment lawsuit. The arbitrator found that \$2 million in policy limits were available to the district to help resolve the underlying lawsuit.

8. **Bergman & Dacey, Inc.**'s client, a structural steel subcontractor on a hotel and casino project, recently obtained a \$2 million settlement from the general contractor's payment bond surety shortly before the case was set to begin trial.

9. **Bergman & Dacey, Inc.**'s client, a general contractor specializing in the construction and remodeling of new luxury homes was recently sued by an owner. Without having to file any lawsuit against any insurance carriers, **Bergman & Dacey, Inc.** was successful in having two insurance carriers pick up the client's defense, as well as prosecute the client's cross-complaint against the owner.

10. **Bergman & Dacey, Inc.** represented a governmental entity in a declaratory relief and bad faith lawsuit arising out of the ongoing re-mediation of the Stringfellow Superfund site. This was a document-intensive (excess of 4 million pages of documents) action that involved complex insurance coverage issues. The total amount of our client's claim was estimated at hundreds of millions of dollars. **Bergman & Dacey, Inc.** proved during the first phase of a multi-phase trial that the subject policies did not contain a pollution exclusion. During this first phase, **Bergman & Dacey, Inc.** utilized a state-of-the-art computer system that combined videotaped deposition testimony and easy-to-follow graphics, which aided the Court in ruling that the parties never intended to endorse a pollution exclusion to the policies. During the second phase, the Court ruled that there was no aggregate limit to the defendants' policies and no limit to the number of occurrences. In a published opinion, the Court of Appeal held that our client did not own groundwater for purposes of applying the owned property exclusion.

11. **Bergman & Dacey, Inc.** defended a company in a bad faith action alleging that an insurance policy had been wrongfully terminated. **Bergman & Dacey, Inc.** assembled documentation showing the probability that our client would prevail at trial on certain disputed issues. The matter was settled for a nominal amount without costly law and motion or discovery.

12. **Bergman & Dacey, Inc.** was brought into ongoing federal litigation by one of several partners who had invested in the construction of a 100-unit condominium complex and who had also been sued in state court by the condominium homeowner's association for construction defects. When **Bergman & Dacey, Inc.** became involved, the general partners' insurance carriers were offering limited settlement dollars to resolve the state court action and had filed a declaratory relief action against the general partners in federal court. **Bergman & Dacey, Inc.** threatened a bad faith action against the insurance carriers, successfully brought the insurance carriers to voluntarily dismiss the federal declaratory relief action, and within six months had successfully convinced the insurance carriers to contribute an additional \$2,750,000.00 to a global resolution of the underlying

litigation and all claims among the insurance carriers and their insureds.

13. **Bergman & Dacey, Inc.** represented an insurance company that had been sued for breach of contract, bad faith, and punitive damages following the insured's refusal to defend and indemnify the insured in a suit for patent infringement. At trial, **Bergman & Dacey, Inc.** proved that (1) there was no potential for coverage since patent claims do not fit within the definition of advertising; (2) plaintiff's activities were willful and that Insurance Code §533 barred coverage for such conduct; (3) plaintiff's acts predated the policy period so that the known loss rule (Insurance Code §§22 and 250) precluded coverage; (4) the notice prejudice rule eliminated any potential for coverage; and (5) the insurer did not act in bad faith when it investigated and declined plaintiff's tender of defense. The court ruled in our client's favor following a three-week trial.

14. **Bergman & Dacey, Inc.** served as coverage counsel for a governmental entity in the litigation involving the Hollywood Boulevard claims. **Bergman & Dacey, Inc.** was successful in resolving issues regarding the applicability of Civil Code Section 2860; the bad faith of the insurer in its dealings with our client and its Cumis counsel; and the duty of the insured to cooperate with its insurer.

15. In a first-party breach of contract and bad faith action involving the interpretation of a homeowner's policy, **Bergman & Dacey, Inc.** proved on summary judgment that there was no duty on the carrier's part to indemnify the homeowner insured for damage caused by a landslide.

16. In a third-party breach of contract and bad faith lawsuit involving the interpretation of a claims made error and omissions policy, **Bergman & Dacey, Inc.** demonstrated that our client was under no duty to defend its insureds against claims of fraud and professional negligence.

17. In a declaratory relief action (and a cross-complaint for breach of contract and bad faith) involving a comprehensive general liability policy, **Bergman & Dacey, Inc.** proved on summary judgment that our client was under no duty to defend or indemnify its insured in an action for wrongful termination.

18. In a declaratory relief action (and a cross-complaint for bad faith) involving the interpretation of multiple general liability policies, **Bergman & Dacey, Inc.** proved on summary judgment that our client was under no duty to defend its insured in an action involving claims for breach of fiduciary duty, disparagement of title, and negligent misrepresentation.

19. After a fire loss claim made by the owner of an office building against its insurer, the building owner claimed an inordinate sum to restore the office building, much of which was to upgrade the premises and comply with new building codes, but none of which was found to be covered under the insurance policy. After protracted negotiations, **Bergman & Dacey, Inc.** brokered a favorable settlement.

20. **Bergman & Dacey, Inc.** participated in the massive Big Rock landslide litigation in actions against certain governmental entities for subsidence damage to homes. Evidence revealed that homes constructed at Big Rock were built on the site of a prior landslide, that inadequate drainage of underground water created a buildup of excess water causing ground slippage, and that when the Pacific Coast Highway was built, it compromised the lateral support for the hillside, allowing the land to subside and shift. In addition to representing our client's interests, our firm participated on various committees that jointly defended homeowners from the claims and public entities. Since the conclusion of this case, our firm has been called upon in various other matters involving subsidence, earth movement, and expansive soil claims throughout California.

21. **Bergman & Dacey, Inc.** sued two carriers for contribution toward the defense and indemnity of an insured in a trade name infringement case pending in the Federal Court. Summary judgment was entered on the issue of coverage under one defendant's policy, at which point a settlement was entered whereby both carriers paid two-thirds of all monies expended by our client in the defense of the insured, plus interest thereon, for a total of approximately \$110,000.00. In addition, both carriers agreed to reimburse our client for their pro rata share of any further expenses. One carrier subsequently sued the other for bad faith, seeking additional attorneys' fees incurred in its defense in the underlying action. We settled that case by way of a global settlement whereby the three carriers combined paid only a third of the bank's total claim, with our client paying only 27% of the settlement in lieu of one-third.

22. In a declaratory relief action arising from an underlying construction defect action, **Bergman & Dacey, Inc.** settled on behalf of one carrier by participating in a global settlement with the other carriers involved in the suit, for a total of \$550,000.00. Our client made the smallest contribution (\$50,000.00) of any of the carriers to the settlement.

23. **Bergman & Dacey, Inc.** convinced an insurance carrier who had filed a declaratory relief action in Federal Court against a well known public official to stipulate to the dismissal of the action.

24. In two cases of first impression in California regarding allegations of unfair competition and unfair business practices, several clients asked **Bergman & Dacey,**

Inc. to intercede and pursue coverage and defense issues. The clients' carrier had, after a lengthy delay, provided a defense with a full reservation of rights and instituted a declaratory relief action against our clients. **Bergman & Dacey, Inc.** filed a cross-complaint and aggressively pursued discovery. Shortly thereafter, the declaratory relief action settled. The clients' carrier agreed to defend the underlying litigation (with no limits), waived its right to seek reimbursement of defense costs and fees, and paid the clients' attorneys' fees incurred with **Bergman & Dacey, Inc.**

25. **Bergman & Dacey, Inc.** successfully obtained a summary adjudication wherein an insurer had a duty to provide its insureds with a defense in an action seeking damages arising from a series of business tort allegations.

26. Our client was sued for potentially in excess of \$100 million for clean-up costs for hazardous waste. Through our pre-litigation efforts, **Bergman & Dacey, Inc.** convinced one of our client's insurers to provide a full defense.

27. **Bergman & Dacey, Inc.** represented an employer who was sued by her former employee for various causes of action including sexual harassment, retaliation, and invasion of privacy. We responded with a complaint against the employee and a third party which prompted the plaintiff to dismiss her case immediately for a waiver of costs and fees and a dismissal of the cross-complaint. After our tendering of the defense to the employer's insurer, the carrier ultimately reimbursed the client for its defense costs.