Submitting Claims And Cooperating With Insurers

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What is a policyholder required to do?

INSURANCE POLICIES provide insurers certain rights in connection with claims. Among other things, policies typically require prompt notice, cooperation in the defense of claims or lawsuits, and input into settlement decisions. This article outlines many of the key issues that need to be considered when a policyholder learns of a claim or potential claim and submits that claim to its insurer.

1. Prompt Notice

Most insurance policies require prompt notice of claims or occurrences. If notice is unreasonably late, the insurer may have a basis to deny coverage.

Providing untimely notice can result in a policyholder forfeiting coverage. Some states apply a prejudice standard — that is, the insurer must demonstrate that it was prejudiced by late notice in order to avoid coverage. However, other states do not apply a prejudice standard, or apply a presumption of prejudice when notice was very late or when there were substantial developments in the underlying claim or litigation for which notice was delayed. Accordingly, when a policyholder learns of a claim — even if there is uncertainty as to whether a claim is covered or whether it is sufficiently large to implicate insurance — it is critical to identify the policies that provide potential coverage and to provide prompt notice.

2. Notice Under Claims-Made Policies

Claims-made policies require that notice be given during the policy period for coverage to be triggered. If notice is not given as required under the policy, the insurer may have an absolute defense to coverage.

Claims-made policies generally require that, during the policy period, a claim be made against the policyholder and that notice of that claim be given to the insurer. Failure to give notice during the policy period (or, under some policies, within a prescribed and typically short period after the policy period ends) may result in a forfeiture of coverage. Unlike occurrence policies, a prejudice requirement generally does not apply under a claims-made policy if notice is not given during the policy period, and may not apply even if notice is given during the policy period, but is untimely.

If a claim, as defined by the policy (typically, a written or oral demand for damages or some other form of relief) is not made against the policyholder during the period of the policy, but the insured has reason to believe a claim will later be made, claims-made policies typically permit policyholders to give "notice of circumstances" that could give rise to a claim in order to lock in coverage under the current policy. These notices have the effect that later claims (even claims after the policy period has ended) should be covered under the current policy. However, such notices must meet defined minimum requirements (for example, identifying the potential claimants, types of claims, and types of damages) and therefore can be difficult to draft. In some cases, claims-made policies exclude coverage for circumstances of which the insured is aware at the inception of a policy that may give rise to claims. Applications may also request that the insured disclose information concerning such potential claims, and they attempt to exclude coverage for such claims under the new or renewal policy. In such situations, the best practice generally is to give "notice of circumstances" under the current policy before that policy expires in order to trigger coverage under that policy. This area is one of the most difficult to navigate and policyholders should seek advice concerning the best strategy to maximize coverage for potential claims.

3. When In Doubt, Provide Notice

As a general matter, the best approach is to provide notice of claims or potential claims even if the policyholder is not certain about coverage.

Business insurance policies of various types (e.g., general liability, property, D&O, E&O, and professional liability) provide coverage for a broad variety of claims, ranging from personal injury and property damage claims to tort claims arising from acts by companies and their executives. These policies can provide coverage for unusual claims, such as trade-dress infringement, defamation, construction defects, and intellectual property issues. Since many of the more arcane or obscure coverage areas are the subject of case law and are not clear from the policy language, a policyholder should consider consulting a knowledgeable insurance coverage attorney to assess potential coverage for any claim asserted against it. If there is any possibility of coverage, the best practice is to give notice of a claim, since not doing so may result in late notice problems. And even if the claim ultimately is not covered, it may trigger a duty to defend and, correspondingly, coverage for defense costs.

Policyholders at times are concerned about giving notice due to the effect providing notice may have on future premiums. While that is a valid concern, if an insurer denies coverage for a claim and does not pay the claim, merely having submitted the claim should not negatively affect future premiums. However, failing to give notice can preclude coverage, which can have long-term negative consequences.

4. Provide Information About The Claim

Once notice is given, the policyholder must provide the insurer information about the claim and generally keep the insurer informed about the claim. The policyholder will have to decide whether or not to share privileged information with the insurer.

Insurance policies usually contain "cooperation" clauses that require the policyholder to cooperate with the insurer in defending claims or lawsuits. Determining precisely what is required by this policy-imposed duty of cooperation can be somewhat uncertain; the clauses are not specific and very few courts have addressed this issue. As a general rule, cooperation clauses require policyholders to share basic information about claims and lawsuits, such as correspondence and pleadings. These provisions require the policyholder to provide reasonable access to information in the policyholder's files, but generally will not be construed to require the policyholder, or its counsel, to expend substantial effort to create materials for the insurer. Insurers often send detailed information requests to policyholders; such requests must be responded to, but the policyholder does not have to engage in unreasonable efforts to respond to such information requests.

Insurers often attempt to insist that policyholders share privileged information, such as evaluations prepared by counsel. There can be advantages to doing this — for example, it can make it easier to get an insurer to consent to and fund a settlement if privileged information is provided — but there are also risks. Insurers may try to use privileged information that is provided to them in later coverage litigation, and may use the fact that such information was provided to attempt to get other privileged information, including the files of in-house or outside counsel. The decision as to whether or not to share privileged information should be made only after considering all of the risks and benefits of doing so. The policyholder may also be able to negotiate an agreement with the insurer in which the insurer agrees not to use privileged information in later coverage litigation, or at least not to use the provision of such information as a basis to argue that the policyholder waived privilege over such information.

Policyholders also need to be very careful about providing litigation risk assessments to insurers. If the risk assessment states, for example, that a case "has no merit," is "defensible," or states that the policyholder is expected to prevail, an insurer may use that assessment as a basis not to settle a claim, or may attempt to use such statements to insulate themselves from bad faith or excess judgment liability in the event the insurer does not settle a claim and the policyholder takes a verdict in excess of policy limits.

5. Insurer Selection/Approval Of Counsel

If the insurer has the right to defend a claim, it may have the right to select defense counsel or to approve selected defense counsel.

Disputes frequently arise concerning defense costs. If the policy gives the insurer the right to select or approve counsel, insurers typically enforce that right strictly. When the policy gives the insurer this right, the policyholder should be careful to verify that defense counsel selected by the insurer is competent and is fully aligned in protecting the policyholder's interests. Defense attorneys that are selected by insurers often have long-standing relationships with those insurers that may lead to divided loyalties, even though their ethical duties are supposed to run to the policyholder as the client rather than to the insurer.

Even if the policy does not give the insurer the right to select counsel, insurers often refuse to pay many defense costs, claiming that defense counsel's rates are too high, that the work was not done efficiently, or that billed amounts violated the insurer's defense counsel guidelines. These issues typically result in the policyholder having to bear some of the defense costs. Insurers also usually refuse to pay defense costs that were incurred before notice was given and/or before they approved defense counsel. The best way to deal with these issues is to address them up front, before the policyholder starts incurring substantial defense costs. Otherwise, disputes are inevitable and can be very costly.

6. Insurer Control Over Settlement

Many insurance policies require the policyholder to get the insurer's consent before settling a claim, and some policies give the insurer the unilateral right to make settlement decisions.

Most liability policies require a policyholder to get an insurer's consent before the policyholder settles a claim for which the policyholder is seeking coverage. In some jurisdictions, failure to seek consent can be an absolute bar to coverage, even if the insurer was in no way prejudiced by the settlement (in other words, even if the settlement was objectively reasonable under the circumstances). Courts are often reluctant to hold insurers liable for settlements for which their consent was not sought or received. Thus, it is critical to try to get an insurer involved in settlement discussions and decisions, and to give the insurer sufficient information and lead time in advance of such discussions that it cannot claim it has inadequate information or time to make an informed decision.

In some jurisdictions, if an insurer has reserved its rights to deny coverage (e.g., by issuing a reservation of rights letter), the policyholder may have the right to settle the claim without getting an insurer's consent. The analysis as to whether this right exists can vary substantially based on the language of the policy, the nature of the claim, and the precise coverage position taken by the insurer. As a general rule, it is advisable to seek an insurer's consent to settle a claim even when the insurer has indicated that the claim may not be covered or otherwise has reserved its rights; at the very least, the policyholder may be able to obtain a waiver of the consent-to-settlement provision from the insurers, with both parties reserving rights on coverage.

7. What Should A Policyholder Do After A Loss Or Claim?

Problems in claims often result from the policyholder proceeding without involving the insurer in decision-making or from the policyholder not adequately documenting losses, damages, or decisions. Many of these problems are avoidable with proper planning and effort.

For example, in a property loss, the insurer had the right to inspect the damaged property so as to assess the extent of damage, to take inventories of damaged machinery or goods, and to provide input on the scope of necessary repairs. It is critical to allow the insurer's adjusters or representatives to inspect the damaged property as soon as possible, preferably before any permanent repairs are made. The policyholder should also set up financial tracking systems to document all loss-related costs, including damaged machinery, damaged inventory, disposal costs, mitigation costs, extra expenses incurred due to the loss, and business interruption losses. The policyholder may also want to give the insurer the opportunity to provide input into the scope of repair, as well as into the contractor hired to do the repair work.

Often, it is best to involve a forensic accountant at the beginning of a loss to ensure that all potentially covered costs are identified and captured. It is also critical to ensure that key personnel understand how the insurance coverage works, including identifying what types of losses are covered and what areas may be subject to coverage disputes. It is also essential to instruct personnel who may not fully understand coverage not to take actions that may jeopardize coverage, and not to make written or oral statements concerning coverage, since such actions or statements may ultimately be used by the insurer to undermine or resist coverage. Policyholders also may not be allowed to settle with potentially liable parties without the insurer's consent, since the insurer may have subrogation rights against those parties.

In the case of liability claims, involving the insurer in creating a defense strategy can also help avoid later disputes. For example, involving the insurers in significant litigation decisions (e.g., whether to file jurisdictional, venue, or dispositive motions or whether to seek alternative dispute resolution) generally avoids later disputes with the insurer concerning the decisions to take (or not take) such action. And, as noted above, the insurer may have the right to select counsel, to receive detailed information about the claim, and to be involved in settlement negotiations.

8. Discovery Of Discussions With Brokers

Because there is no privilege with brokers, discussions with brokers and brokers' comments on coverage likely will be discoverable in coverage litigation.

Although states recognize a variety of privileges that prevent many communications with attorneys from being discoverable, no state has recognized a general broker-client privilege. Accordingly, comments and opinions by brokers as to coverage almost certainly will be subject to discovery in coverage litigation. Thus, if a broker states its view that a claim is not covered, or otherwise expresses negative views about a claim, the insurer may be able to use such comments to attempt to establish that the claim is not covered in whole or in part. While many brokers are very experienced in interpreting policies and providing views on coverage, coverage frequently turns on case law interpreting policy provisions. A broker may not be familiar with the applicable case law or may not have the opportunity to research it before providing its views on coverage. Obviously, such statements can be damaging in later coverage litigation. Even communications with a broker that involve a policyholder's counsel may be discoverable, so the policyholder must proceed with great caution on any communication with the broker concerning coverage issues.

9. How Can A Policyholder Get Help?

In most instances, the key matters to address in order to maximize the likelihood of a successful insurance outcome are:

- Understanding the coverage very early in the claim process;
- Positioning the claim at the onset to maximize coverage and to avoid exclusions;
- Avoiding taking actions that may jeopardize coverage or may give the insurers coverage defenses; and
- Keeping participants in the claim (including employees and brokers) from creating bad documents or asserting incorrect coverage positions.

A knowledgeable attorney can guide policyholders through the claims process, from developing a principled and sustainable coverage position to ensuring that the claim is properly organized and documented. Identifying key exclusions and potential coverage issues, understanding the cooperation and other requirements in the policy, and using that information to establish a clear coverage strategy at the beginning of a claim can help the policyholder maximize coverage and avoid needless disputes.