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Surviving the Claims Process 101

Presenters:

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Presentation Overview

1. Notice of Claims, Lawsuits, and Occurrences
2. Presenting a Claim to Insurers
3. Coverage Position Letters & Reservation of Rights
4. Insurer Efforts to Control Defense Strategy & Settlement
5. Miscellaneous “Tips & Tricks”
6. Questions

Types of Insurance Coverage

- Concepts in Presentation Apply Across Types of Coverage
 - General Liability; D&O Liability; Professional Liability; Cyber Liability; Property Damage; Business Interruption.
- **Cyber Liability:** particularly dynamic. Many coverage issues and policy provisions not tested in court.
- **Cyber First Party**
 - Costs and expenses outside liability context, incurred in addressing a cyber breach (*e.g.* computer forensics, legal costs to analyze notification obligations, etc.).

Hunton Insurance Recovery & Reinsurance Blog

- Updates, Analysis and Breaking News for Commercial Policyholders
- Visit **www.huntoninsurancerecoveryblog.com** and sign up to receive email updates.

Speaker Information

- **Timothy M. Monahan** is Vice President and Insurance & Claims Counsel with the Washington, D.C. office of Lockton Companies, LLC. He provides strategic advice to clients regarding their risk profile and management and professional liability insurance programs, helps clients work through all aspects of complex insurance claims from inception and coverage analysis through claim resolution, and negotiates policy terms and language on behalf of clients to clarify and broaden coverage.
- **Michael Levine** is Counsel with Hunton & Williams LLP, where he is a member of the firm's Insurance Coverage Counseling & Litigation practice group. Mike represents and counsels policyholders in matters involving insurance coverage and related disputes. He frequently writes and speaks on mainstream and emerging insurance coverage issues, and currently serves as a Managing Editor for Coverage, the ABA's Insurance Coverage journal. Mike is a past co-chair of the ABA's Insurance Coverage Committee's Programming Subcommittee and past co-chair of the Emerging Insurance Issues Subcommittee. Mike handles cases nationwide and is admitted to practice in New York, Massachusetts, Virginia and the District of Columbia.
- **Matthew T. McLellan** is an Associate with Hunton & Williams LLP, where he is a member of the firm's Insurance Coverage Counseling & Litigation practice group. Matt represents and counsels policyholders in matters involving insurance coverage and related disputes. His practice focuses on complex business litigation, insurance coverage advice and related coverage litigation. Matt writes frequently on insurance coverage issues. He is admitted to practice in Virginia and the District of Columbia.

Notice of Claims, Suits & Occurrences

- Lawsuit - in general, notice immediately.
 - Especially where insurer has right and duty to control defense.
 - Insurers want to assess claim before settlement discussions take place; motions are filed; defenses are developed.

Notice of Claims, Suits & Occurrences

- Claim – some policies require notice as soon as a demand letter is received; or communication alleging or suggesting wrongdoing.
 - Typically defined as “a written demand for monetary or non-monetary relief.”
 - What constitutes a claim?
 - (1) Government Investigations/Subpoenas
 - (2) Demand Letters
 - (3) Environmental Investigations or Assessments
 - (4) Third-Party Subpoena (you are not target)

Notice of Claims, Suits & Occurrences

- Occurrence – often defined as: (1) accident causing: (a) bodily injury; (b) property damage; (c) personal and advertising injury (non-physical)
 - Policy may require notice in the absence of a lawsuit or even demand letter
 - Can be difficult to identify something you did wrong that may result in a lawsuit
 - Balance between notifying carrier of everything and complying with policy

Notice of Claims, Suits & Occurrences

- Late Notice – May *eliminate* coverage
 - One of the first defenses insurers look for
 - “Prejudice Requirement” – many states require an insurer to establish it was “prejudiced” in some way by late notice



Late Notice/Prejudice Cases

- *Rent-a-Roofers, Inc. v. Farm Bureau Property & Casualty Ins. Co.*, (Neb. 2015)
 - Insured roofer was sued for faulty work. It had submitted a similar, but unrelated case to its insurer previously, which was denied. The roofer did not notify insurer of instant suit until after it settled the case. The court held that this late notice amounted to prejudice as a matter of law.
- *Kmart Corp. v. Footstar Inc., et al.*, (7th Cir. 2015)
 - Even where notice was provided 30 months after suit was filed arising from accident in Kmart where baby carrier fell on customer, insurer could not demonstrate prejudice and owed coverage.
- *Dean Craft v. Philadelphia Indemnity Ins. Co.*, (Colo. 2015)
 - Insurer not required to show prejudice to deny coverage on late notice grounds where policy at issue had a “date certain” notice requirement – 60 days after policy ended. (Typically found in “claims made” coverage)
- Maryland Code, Insurance § 19-110
 - Insurer must establish by “preponderance of the evidence” that late notice or lack of cooperation has resulted in actual prejudice.

Notice of Claims, Suits & Occurrences

- Common Policyholder Mistakes
 1. Thinking you have done nothing wrong
 2. Thinking the case can be resolved without insurer involvement
 3. Placing the wrong carrier on notice

Presenting a Claim to Insurers

- Liability Policies
 - Review policy language to determine what must be provided (*e.g.* all suit papers; written demand; assessment of damages, etc.)
 - **Avoid Over-Sharing**
 - Important to provide what is required but avoid providing information that could limit coverage.
 - Privileged information such as internal assessments or memos should not be shared.
 - Communications with other insurers are often asked for but not always required to be provided.

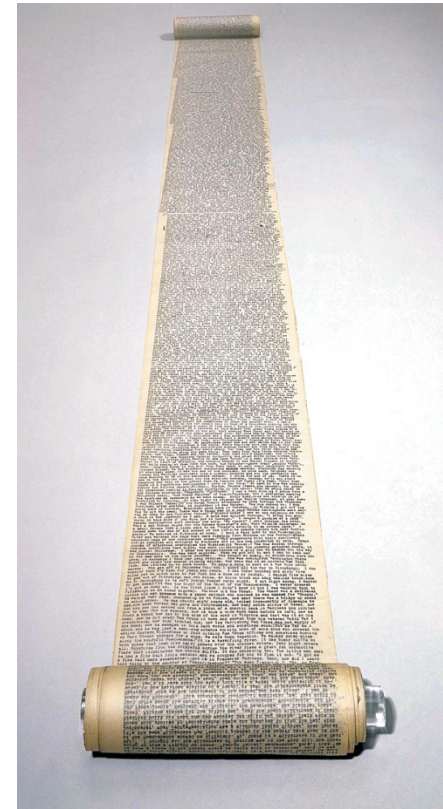
Presenting a Claim to Insurers

- Property Insurance /First-Party
 - Give prompt notice
 - Describe physical damage or loss
 - Take reasonable steps to protect covered property
 - Send proof of loss
 - Cooperate with insurer
 - Resume operations ASAP
 - Consult third-party entity to assist in valuation of loss



Coverage Position Letters & Reservation of Rights

- Reservation of Rights Letters
 - Often *over*-inclusive – many states hold insurer loses right to assert defense to coverage if not included in ROR letter
 - Based on review of general allegations in complaint. May therefore include anything that could even *potentially* apply.



Case Law: Insurer Forfeiture of Defenses to Coverage

- *Stryker Corp. v. XL Ins. Am.* (W.D. Mich. 2013)
 - An insurer waives conditions to coverage when the insurer fails to give reasonable notice to the insured that it is invoking them or reserving the right to do so.
- *Western Heritage Ins. Co. v. Asphalt Wizards*, (8th Cir. 2015)
 - While insurer waives coverage defenses by not stating them in reservation of rights, it cannot waive assertion of provision that go to the scope of the coverage provided, e.g. policy limits; deductible amounts owed.
- *Aspen Specialty Ins. Co. v. Technical Industries, Inc.*, (W.D. Louisiana 2015)
 - “Waiver of coverage defenses results when an insurer, with knowledge of facts indicating non-coverage, undertakes to defend an insured without reserving its rights to deny coverage.”

Coverage Position Letters & Reservation of Rights

- Commonly-Included Provisions
 1. **Failure to comply with notice requirement** - Insurers ask for all correspondence relating to claim to find out when it was discovered.
 2. **Fraud/ Intentional Acts Exclusion** - Insurance only covers fortuitous loss. Insurers want to assess facts that come out throughout lawsuit to determine whether intentional act was committed.
 3. **Known Loss/ Loss in Progress** - Insurers want to discover whether insured knew or should have known that a lawsuit was likely to be filed or that property damage was already taking place prior to policy period. (related: rescission due to application omissions)

Coverage Position Letters & Reservation of Rights

- Insurer Reserving Right to Reimbursement
 - Often insurers may try to include a reservation to seek back the defense costs or other payments made to an insured if they later challenge coverage.
 - Many states require an “implied in fact” contract where an insured agrees to accept a defense subject to this condition.
 - Important to object to a reservation to seek reimbursement.

Coverage Position Letters & Reservation of Rights

- Insurers often are not prompt in responding.
- Important to follow up and keep track of delays.
- Many state Insurance Codes require response within a specific period of time.
- Persistent insurer delay may be used as a bargaining chip in coverage negotiations.



Authority: Insurer Delays

- **Example of State Statute: Ohio Admin. Code § 3901-1-54(F): Response to acknowledge receipt of pertinent communications**
 - (1) Notification of a claim given to an agent of an insurer shall be notification to the insurer.
 - (2) An insurer shall acknowledge the receipt of a claim **within fifteen days** of receiving such notification. An insurer may satisfy this requirement by making payment within this ten day period. An insurer may also satisfy this requirement by providing necessary claim forms and complete instructions to the claimant.
 - (3) An insurer shall respond **within fifteen days** to any communication from a claimant, when that communication suggests a response is appropriate. In the event that a complaint has been filed by a claimant in any court, an insurer is not obligated to respond within this time period and any communication between the claimant and the insurer will be subject to the appropriate rule of procedure for the court in which the lawsuit was filed.

Coverage Position Letters & Reservation of Rights

- Don't throw in the towel!
- Coverage decisions made on scant allegations in complaint.
- Ambiguity – policy provisions construed in favor of insured.
- Prejudice – Late Notice Denial often requires prejudice.
- Reasonableness – even in states where no prejudice is required, insured afforded opportunity to explain delay (*e.g.* case stayed for months with no developments).



Insurer Efforts to Control Defense Strategy & Settlement

- Defense Efforts
 - **Panel Counsel vs. Chosen Counsel**
 - Insurers want to appoint their own “panel” counsel to defend. Insureds may want to use lawyers of their choosing – especially where large retention must be satisfied before coverage kicks in. (*e.g.* first \$1M in defense costs bore by insured).
 - Some policies, such as D&O and Management Liability policies, provide for a duty to reimburse, rather than defend, the insured. Under these policies, the insured appoints its own counsel.
 - **Rates**
 - Insurers often challenge the hourly rates of counsel appointed by the insured. Insureds should present evidence of past-payment, or surveys showing average rates in the jurisdiction to dispute this position. Some states like California have a statute that limits an insurer’s obligation to only pay rates it would pay panel counsel. Cal. Civ. Code § 2860.
 - **Bill Review**
 - Third-Party bill “audits” apply stringent codes to tediously comb through bills. Insurers rely on right to pay only “reasonable” fees. Important to challenge this. Nothing in the policy affords such a right.
 - **Independent Counsel**
 - Policyholder may be able to obtain counsel where a conflict of interest exists. Some states require independent counsel whenever insurer reserves rights. *Century Indem. Co. v. Marine Group, LLC*, (D. Oregon 2015) (Oregon statutes provide an insurer who has undertaken the defense of an environmental claim under reservation of rights or has potential liability in excess of policy limits, “shall provide independent counsel to defend the insured who shall represent only the insured and not the insurer.”) But see *Essex Ins. Co. v. RHO Chemical Co., Inc.* (N.D. Ill. 2015) (“[T]he mere fact of a reservation of rights alone does not automatically give rise to a material coverage conflict requiring independent counsel.”)

Insurer Efforts to Control Defense Strategy & Settlement

- Consent to Settle – many insurance policies contain provisions which leave insureds on the hook if they incur defense costs or settle without obtaining consent or prior to providing notice – even if settlement is reasonable or favorable.
- Duty to Settle – most states require insurer consider settlement offer within policy limits or explore settlement opportunities where liability is likely. Insurer can be on hook for many times its policy limits if it violates this duty.



Insurer Efforts to Control Defense Strategy & Settlement

- **Hammer Clause** — many policies preclude an insurer from settling without the company's consent, but permit the insurer to limit its exposure for any future settlement to the amount of a settlement it recommended. Further, defense costs may be limited to the amount incurred up until the date the insurer recommended settlement.



Insurer Efforts to Control Defense Strategy & Settlement

- Exceptions to Consent Requirement:
 - **Insurer denies coverage.** *Strkyer Corp. v. XL Ins. Am.*, (W.D. Mich. 2013) (“[W]hen an insurer breaches its own policy of insurance by refusing to fulfil its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party.”).
 - **Payments Required by Statute**
 - *First Commonwealth Bank v. St. Paul Mercury Ins. Co.*, (D. Pa. 2014) (cyberattack transferring depositor funds from bank account to foreign accounts required reimbursement of depositor by bank under statute and payment did not violate consent requirement).
 - *Federal Ins. Co. v. Purex Industries, Inc.*, (D.N.J. 1997) (environmental clean-up costs not “voluntary payments” where state statute imposed strict liability on policyholder).

Insurer Efforts to Control Defense Strategy & Settlement

- Duty to Cooperate – most insurance policies contain a vague requirement to “cooperate” with insurers. Others contain more specific language.
- Keep communications open.
- But avoid sharing privileged information.



Miscellaneous “Tips & Tricks”

- **Document Retention**
 - Important to save all policy-related documents and communications with insurers and brokers.
 - Dispute may arise over: (1) interpretation of an endorsement; (2) whether a broker obtained the requested coverage; (3) existence of policy itself.
- **Policy Renewals**
 - Consider gaps in coverage or issues with current policy.
 - Consider new risks and negotiate endorsements.
 - Make sure excess and umbrella policies all complement each other.
- **Extent of Scope of Coverage**
 - Insurance products becoming more specialized.
 - Increasing number of exclusions to transfer risk to specialized policies.
 - *e.g.* exclusions for cyber-type risks requiring specialized policy to be procured.

Questions

