IF I "SEE TO IT" THAT THE INSURER IS TIMELY NOTIFIED OF A CLAIM, WHY IS THE INSURER DISCLAIMING COVERAGE?

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Imagine you are a property owner that leases an office and work space to a particular tenant. The tenant recently renovated the space, and is now enjoying a remodeled office and facilities. The tenant's general contractor, satisfied with a job well done, has since moved on to the next job. One day, you check your mail and find a letter from a law firm—or worse, legal papers—indicating a claim is being made against you, based on an alleged accident months earlier in the tenant's space, involving a subcontractor's employee. You had no idea any such accident took place. What do you do?

Somewhere else, in a place far, far away, there is an insurance policy that the same general contractor purchased a year or so ago, which was in effect on the date of the accident. According to the additional insured endorsement in the policy, perhaps due to requirements in the construction contracts, you are an additional insured. The policy is written on the standard occurrence-based coverage form prepared by the Insurance Services Office, or ISO, including the policy condition for timely notice.

After reviewing the claim, your first reaction is that the contracts should pass the risk of loss to someone else; either the general contractor or the subcontractor (and their insurance carriers) look like good candidates. So you get in touch with the general contractor's principal, via letter, stating the situation and enclosing a copy of the paperwork you received that morning, with a request that he contact his insurance carrier. You telephone the general contractor a week later, and he confirms that he sent the papers to his insurance broker, who, in turn, forwarded the papers to the general contractor's insurance carrier. Is this notice to the carrier sufficient?

The typical policy requires information about the nature of the accident, the name of the injured party, the identity of any witnesses, the nature of the injury and location of the injury, and that these be included in your first notice from the injured party. You provided this information in your letter to the general contractor.

Imagine for a moment a different scenario. An employee of an electrical subcontractor alleges he fell off a ladder at a project that was finished a year ago. Similar to the first example, the construction manager's first notice that anything happened was receipt of pleadings. The construction manager forwards the pleadings to its broker, who forwards the notice to the carrier. It is generally accepted that this chain of notice is acceptable. The broker is obviously acting on the insured's behalf, and the identity of the insured will be clear to the carrier.

Going back to the first situation, however, your identity and your request for coverage may not be as clear, and thus can lead to problems. An issue may arise because of the potential loss or modification of information as it passes from one hand to the other, or the "telephone game." The notice that you initiated, as additional insured, will pass through at least two hands before it reaches the carrier. When the initial claim handler reviews the claim, your initial letter to the general contractor may have already been replaced by various fax cover pages and a broker's Notice of Occurrence form.

As a result, while the insured general contractor will be identified to the carrier, you may not be, except that the original attorney's letters or the complaint will indicate that you are a target. If that is the case, the claim handler may respond to the named insured in a manner she deems appropriate, but may ignore you at this point.

As happens often enough, some event transpires subsequently that arguably prejudices the insurer. Or, if you are in a jurisdiction where the precedent is the lingering "no-prejudice" rule, the insurer need not

prove any prejudice; it is presumed. Either way, several months and several threats from the plaintiff follow before you renew your efforts and eventually the carrier responds to you, with a disclaimer for untimely notice. The issue now, at least in the carrier's mind, is whether you ever (or at best, belatedly), provided notice to the general contractor's carrier before the insurer was prejudiced.

And so, the battle lines are drawn. You, as the additional insured property owner, who had no idea as to the identity of the general contractor's insurer, forwarded the paperwork that was your first notice of an accident to the general contractor with a demand that it be forwarded to the contractor's insurer. This in fact was done, and you believe you did all that was expected of you. The claim handler at the insurance company, who received a notice of occurrence form from the general contractor's broker, argues that she only received from her insured, the general contractor. She advises that you, as an additional insured, have "an independent duty to provide notice," which you did not do here until it was too late.

Ultimately you should prevail. The path to that result may vary, because you have several arguments available to you that are generally accepted by the courts.

THE NOTICE CONDITION IN THE POLICY

As you might expect, the language of the insurance policy itself should be your primary source of guidance. That being said, however, the local interpretation of this policy may be significantly affected by statutes and judicial interpretation.

The standard notice provision in most ISO policies reads something like this: "You must see to it that we are notified as soon as practicable of an occurrence or offence which may result in a claim." If a suit is brought, you must "notify" the insurer "as soon as practicable," and "see to it that we receive written notice" of the suit as soon as practicable.

Initially, it is fairly clear that you do not have to physically walk the papers into the carrier's office. You must "see to it" that the papers reach the carrier. To paraphrase one court, "The policy does not require written notice to come directly from the insured's fax machine; it simply requires that the additional insured 'see to it' that the carrier received notice." Certainly, you should also preserve any documents evidencing notice to an insurance carrier.

In a handful of states, insurance policy notice provisions are regulated by statute. In Michigan and New York, for example, statutory language provides that "notice given by or *on behalf of* the insured…shall be deemed to be notice to the insurer." Georgia has a similar statute. Endorsements with those state-specific requirements are then incorporated into policies issued in their respective states. What follows is that those policies require that you "see to it" that the carrier is notified, and if that is not clear enough, allow notice "on behalf of" the insured.

Thus, you must see to it that the insurer is notified as soon as possible of an accident or suit. By the plain language, another person or entity can satisfy that obligation on your behalf.

JUDICIAL INTERPRETATION

The majority of courts allow for notice to come from an intermediary, such as an attorney, another insurer, a medical provider, a claims administrator, an insurance broker, or a plaintiff. Some, however, have traditionally not allowed notice from one insured to benefit another insured, where their interests are adverse, citing an independent obligation: "the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts." In other words, if *you* want something, *you* have to ask for it.

Other courts have found this view "absurd." In a case where the insurer learned of a claim from the additional insured, but the insured himself was silent, the court found that "The only difference in this case is that the appellant mailed the complaint rather than the insured. We fail to understand how the notice of a lawsuit would have been timely if the insured had done the mailing, but untimely because it was mailed by appellant."

It is noteworthy, however, that even in jurisdictions where each insured has an independent obligation to give notice, a trend is emerging concerning the word "you."

In some recent cases, several courts have incorporated the policy's definition of "you" to the policy's notice provision, i.e., "you must see to it that we are notified as soon as practicable." These courts hold that because this notice provision applies only to "you"—which is defined in the Declarations to mean only the Named Insured—the notice provision does not apply to additional insureds. As a result, where an insurance policy places the burden of notice upon a named insured, an additional insured may then rely on the named insured's notice to the insurer for compliance of any notice obligation.

SO HOW DO I ACQUIRE THE COVERAGE TO WHICH I AM ENTITLED?

Going back to the first example above, you have now been sued, and considerable time has passed since you asked the general contractor to place his carrier on notice. You have just put the carrier on notice again—this time directly—and the carrier has now disclaimed coverage to you based on late notice. How do you convince the carrier, or the court, that you have fulfilled your obligations under the policy? Keep the following in mind:

- Preserve any information surrounding the "chain of notice." Remember, this is your notice to the carrier; the general contractor did not start it, nor did the general contractor send notice to his insurer with a demand that the insurer defend the general contractor. You can prove this was your request, albeit sent through intermediaries.
- The carrier has the information necessary to defend the claim; the notice provision is not meant to be a technical trap for the insureds.
- Remember the policy does not require notice to come directly from you. Most courts allow notice to come from third-parties on your behalf, although remember that some will reject notice from other insureds.
- If a statute modifies the policy's notice requirements in your state, the state-specific endorsement should be in the policy when you review it. That endorsement is likely to help your cause.
- Some courts will rule that the notice provision applies only to the named insured, thus relaxing notice requirements with respect to additional insureds.

To recap, the general contractor's carrier received the notice you initiated; the policy's notice provision should not be a hyper-technical hoop the insured must jump through or else lose coverage. While the courts sometimes vary on how they will treat notice from intermediaries to the insurance carrier, there are several methods you can use to approach any issue that arises, and preserve your insurance coverage.

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