

LIABILITY INSURANCE QUICK REFERENCE

GIVING NOTICE OF A CLAIM

When should I start thinking about potential insurance coverage? As soon as a matter becomes adversarial, start considering coverage. Proactive and early investigation is essential to maximizing protection.

What is the risk of waiting to give notice? Many kinds of liability insurance are provided on a "claims-made" basis, requiring: 1) a "claim" to have been made during the policy period or extended reporting period; and 2) notice of the "claim" to be given by the policyholder within a specified time—often no later than the end of the policy period. Failure to give timely notice can lead to the insurance company denying all coverage. Each year, policyholders nationwide incur the significant costs and aggravation of fighting for coverage put at risk by late-notice defenses.

What is a "claim"? The term "claim" is commonly defined as "a written demand for monetary or non-monetary relief." But some courts have interpreted "claim" to include any third-party assertion that a policyholder may be liable for damages. Thus, waiting for a lawsuit to be filed to give notice can be too late.

How can I be proactive about identifying possible claims? Train key employees to recognize issues that could give rise to a claim or lawsuit. Empowering your team can help ensure that notice requirements and coverage are assessed at the earliest stages of a matter.

How do I provide notice? Notice can be handled by your insurance broker, risk manager, or outside counsel. It is important to follow the directions in the policy as to how and where to deliver the notice. Simply attach the related claim (i.e., demand letter) or complaint to your notice along with a letter to your insurance company seeking all available coverage, including defense coverage, under all applicable policies. Recommended best practice is to notify all potentially applicable excess and umbrella carriers at the same time as your primary, first-level insurance company.

Beware of privilege issues. Many policyholders initially contact their insurance broker when faced with a claim. But keep in mind that broker communications may not be protected by the attorney-client privilege.

UNDERSTANDING YOUR POLICIES

What is the scope of my insurance coverage? Understanding the substance of your policies early on will help you communicate with your insurance company in a way that protects your interests. It will also help you set expectations regarding potential recovery and defense protection. Ensure that you are informed on these key issues:

- the operative insuring agreement(s);
- the policy limits and how they apply;
- applicable deductibles or self-insured retentions;
- the type of defense coverage provided;
- potentially applicable exclusions;
- any contractual limitations period that might limit the time to take legal action;
- cooperation, consent, and subrogation provisions; and
- claim reporting and notice provisions and deadlines.

What are the common oversights? Businesses often overlook insurance protection and assume coverage is limited to certain policies (i.e., a CGL policy). When faced with a potential claim or suit, it is important to thoroughly review your insurance program for potential coverage. For example:

- **Prior policies:** Don't assume your current policy is the only one that might apply. For insurance policies written on an "occurrence" basis, providing notice under prior policies to historical insurance companies can be imperative. Sometimes coverage should be requested under both claims-made and occurrence-based policies.
- **D&O insurance:** Remember that this is not only for directors and officers. Many D&O policies are written with broad "C-side" coverage for claims against the business and are packaged with coverage for employment liability, fiduciary liability, crime risks, cyber risks, and more.
- **Coverage for regulatory matters:** Don't forget to provide early notice for regulatory matters. A regulatory investigative demand or subpoena that precedes a formal enforcement action may constitute a "claim" under your policy and could trigger coverage for attorneys' fees and costs.

LIABILITY INSURANCE QUICK REFERENCE (continued)

RESERVATION OF RIGHTS

A reservation of rights letter is a communication from an insurance company providing notice to the policyholder that a claim may not be covered. The letter can be confusing, but it often communicates that the insurance company will provide a defense for the time being while it continues to evaluate coverage. It could be a signal that the insurance company is going to take positions contrary to your interests. When considering whether or how to respond, involve an insurance coverage lawyer to position yourself for the best possible outcome should litigation occur.

CHOICE OF DEFENSE COUNSEL

Does my insurance company have the right to choose my defense lawyer if it agrees to cover my defense? It depends. Insurance companies providing defense coverage often want to dictate selection of the policyholder's lawyer. Insurance companies may want to control defense-lawyer selection because they have pre-existing "panel counsel" relationships with law firms, which agree to work at discounted rates based on volume. But an insurance company's presumptive right to select defense counsel in connection with a "duty to defend" is not a hard and fast rule. Do not assume you do not have a choice.

What are my options for choosing my own defense lawyer? Policyholders should understand and assert their rights before acquiescing to the insurance company's control. A panel lawyer may have divided interests because of a financial interest in future work and may not be the best lawyer for the job. Where there is a potential conflict of interest between the insurance company and the policyholder because, for example, the insurance company asserts that some of the claims against the policyholder are not covered, the policyholder may have the right to select counsel.

DENIAL OF COVERAGE

Insurance companies often aggressively deny coverage initially and benefit, in the aggregate, from policyholders who walk away from coverage. Many states' laws are set up to favor the policyholder and try to correct the power imbalance between insurance companies and policyholders.

How should I respond to a denial of coverage? If you receive a denial of coverage, contact an insurance coverage lawyer for advice on your rights and options for pursuing insurance recovery. The legal expense is relatively modest, and the minimal work to review and contest a denial of coverage can deliver substantial value to your bottom line.

Should I consider litigation against my insurance company? When necessary, coverage litigation can be an effective and efficient way to protect your rights. And depending on applicable state law, policyholders have strong remedies available to them, including the right to recover attorneys' fees, substantial prejudgment interest at double-digit rates, bad-faith penalties, consequential damages, punitive damages, and more.

CONTACT US

Maslon has one of the nation's top insurance recovery practices. Whether obtaining coverage for the defense or settlement of a lawsuit, maximizing insurance proceeds for a catastrophic loss, or litigating a coverage dispute, we help clients ensure the coverage they bought is there when they need it.



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