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Don’t Be Blindsided: The 101 About Your Insurance and How To Productively Pursue Claims

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This may be shocking, but as a child I did not dream of being an insurance recovery lawyer.

In fact, my law school offered an insurance law course that I avoided with the same passion I avoided sitting in front of the classroom on the day each professor passed around the seating chart that determined my location (and neighbors) for the entire semester.

“Insurance lawyer” is not exactly the sexiest response when asked at a party “what do you do for a living?” My response is something more along the lines of “I’m a trial lawyer who sues insurance companies for not paying high profile claims.” Slightly better I suppose, but still not the full story.

It all starts with locating and notifying all potentially responsive coverages when facing a loss or claim. This article offers a 101 about what types of events commercial insurance may cover and how to go about productively pursuing an insurance recovery when disaster strikes—even if your insurance company says “no.”

Two Overarching Types of Insurance

Without getting too far into the weeds of the many different types of insurance coverage available to companies, think about them as falling into one of these two broad buckets: (1) first-party insurance coverage, and (2) third-party insurance coverage.

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First-party insurance describes coverages that respond to a policyholder’s losses, which do not involve any claim asserted against the policyholder (e.g., you, your business, your employer). First-party property policies, for example, typically insure against loss of, or damage to, the policyholder’s property (e.g., a brick-and-mortar store, electronic equipment, merchandise), as well as coverage for lost business revenue.

First-party property policies frequently are “all risk” policies meaning that they cover the policyholder’s losses unless caused by an expressly excluded peril that the insurer can prove (e.g., ordinary wear and tear). Property policies often include business interruption coverage and coverage for inventory or goods

lost or damaged in transit. Other types of first-party policies include:

- marine cargo insurance that protects property while in transit, across various modes of transportation, and while in storage;
- political risk insurance that protects against losses caused by "political" events in a foreign country; and,
- fidelity and crime insurance that insures against, e.g., loss of the policyholder's property from fraud or the dishonesty of an employee.

Third-party insurance coverage sometimes is called liability insurance. That's because it includes policies that provide insurance for the policyholder's liability to third parties alleging damages. Perhaps the most well-known form of third-party insurance for commercial policyholders is general liability insurance, which provides broad coverage for allegations asserted against the policyholder for bodily injury, property damage, personal injury (including libel, slander, and defamation), and advertising injury. Other types of third-party policies include:

- directors and officers ("D&O") insurance that protects companies and their corporate officers and directors against claims alleging wrongful acts and may cover legal fees for responding to subpoenas and search warrants;
- errors and omissions ("E&O") insurance that protects the policyholder against claims that it improperly provided (or failed to provide) professional services;
- employment practices liability insurance that protects against employee claims such as wrongful termination; and,
- cyber/data & network insurance that protects against liabilities resulting from the loss of personal and network data and information.

A single event can implicate several types of coverage found in multiple different insurance policies. For example, a fire at a factory may involve loss to:

- the policyholder's buildings and equipment covered by a property insurance policy,
- a loss of the policyholder's profits covered by business interruption insurance (and other time element coverages),
- claims by third-parties (neighbors, for example) alleging damage to their property or bodily injury from smoke that are covered by the policyholder's general liability insurance,
- claims by shareholders alleging malfeasance in allowing the fire to happen that are covered by the policyholder's D&O insurance, and,
- even workers' compensation claims relating to injured employees.

It's important to look for responsive coverage from a company's entire insurance portfolio when facing a loss or claim.

Things to Keep in Mind

Many policyholders don't productively or efficiently pursue all of the insurance that is provided by their insurance policies. An insurance company's initial coverage denial or a broker's expression of doubt regarding coverage should not dissuade policyholders from pursuing valid claims. Insurers tend to find more reasons to deny coverage the bigger the claim and brokers frequently seek to keep the peace. Here are three considerations when filing claims:

1. Be prompt. One of the most important first steps in pursuing insurance is to make sure that notice of a loss, claim, or occurrence is prompt and otherwise meets the requirements of the insurance policy.
2. Be thorough. It is important to look at all potentially responsive coverages that may be located in several different insurance policies with varying notice provisions. The general rule is that notices should be given under all possible policies that might be triggered—regardless of type, year, or layer. The old adage "better safe than sorry" never rings more true than when it comes to a company giving notice to its insurers.
3. Be diligent. As already stressed, the notice provisions in insurance policies also may specify how, and in what form, notice should be given. The policies typically identify to whom notice should be addressed, and request a statement regarding all the particulars of the underlying claims.

After a loss or claim has occurred, the policyholder should present its claim to the insurer in a way that will maximize coverage. Many legal issues, such as trigger of coverage, number of occurrences, and allocation, can significantly affect the existence or amount of an insurance recovery.

Moreover, certain causes of loss or liability may be excluded from coverage, while others are not. These are complex issues, vary by state law, and require a level of specialized legal sophistication to be understood and applied to the facts of a particular case.

The insurer may respond to its policyholder's notice letter with a request for information. Such requests may seek to have the policyholder characterize its claim in a way that will limit coverage.

Before the policyholder engages in any such communications with its insurance company, the policyholder should know what legal issues are likely to arise, and how best to describe its claim to maximize coverage.

Conclusion

For me, by far the most fun part of being an insurance recovery lawyer is the trial work. Putting my own take on an impassioned plea to the jury that may conjure up images of Harvey Spector in *Suits* or Alan Shore in *Boston Legal* commanding the courtroom to bring home the verdict in our client's favor.

However, the big wins start with understanding the basics—what type of insurance is available to provide coverage, in which insurance policies those coverages are located, making sure all insurers providing those coverage are notified, and best positioning the claim from its outset to maximize coverage.

That's what it's all about at the end of the day—getting the little things right from the beginning to avoid being blindsided and enhance the likelihood of succeeding at the finish line. As the learned Harvey Spector so eloquently told a defense lawyer: "That's the difference between you and me. You want to lose small, I want to win big." Truer words have never been said.

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