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PROTECTING YOUR INSURANCE PROTECTION E-UPDATE

INSURANCE COMPANY COVERAGE DISCLAIMERS - NOT THE END OF THE LINE

By Henry L. Goldberg, Esq. & W. Richard Kroeger, Esq.

OCTOBER 2011

A disclaimer of coverage due to an allegedly late notice of an "occurrence" is a far too frequent response by insurance companies today. In these difficult times, preserving coverage is all the more essential. It appears that as their investment portfolios shrink, carriers are increasingly seeking to stop their financial hemorrhaging by attempting to limit their exposure to loss. It is not difficult to simply allege a pretext not to extend coverage. For their part, construction companies, often their own worst enemies in this regard, can be slow to react to an "occurrence." Notices to carriers are frequently inadequate both in response time and content. This only plays into the hands of carriers looking for an out.

However, construction companies should never simply "take no for an answer" regarding insurance coverage determinations. There are, indeed, avenues of relief against insurance carrier disclaimers, but they must be effected promptly and determinedly. You simply can't allow your carrier to wear you down.

First the big news: For insurance policies issued on or after January 19, 2009, New York State no longer applies the "no prejudice" rule. Under the old rule, the carrier did not need to show any prejudice and could deny any claim, simply because notice of the claim was untimely under the terms of the policy. Under the new rule, if the notice was provided within two years of when it was required, the carrier bears the burden of proving that it was actually prejudiced under the policy. If notice is not provided for more than two years after the policy so requires, then the insured must prove that its insurer was not prejudiced by virtue of the late notice.

However, although the law has changed, the insurance companies' response to untimely claims often has not. Accordingly, some carriers continue to deny claims as they did before, forcing their insureds to sue them in order to get the coverage to which they are entitled.

The following example shows why it is still important to notify your insurer immediately. This example can apply equally to a subcontractor, general contractor, construction manager, or property owner. It should sound familiar.

A company, Pronto Plumbing, is a sub-contractor which was engaged to rough plumb a 12 story condominium complex. While working for Pronto, its employee, Carl Clutz, falls down an unguarded elevator shaft. Carl is injured and taken to the hospital for treatment. Carl's employer, Pronto, reports the incident to its Workers' Compensation carrier, completes the necessary C-2 Employer's Report of Injury, and has another employee cover for Carl until he can return to work which is within only a couple of days. Since Carl cannot sue Pronto (due to the Workers' Compensation Law), Pronto believes that there is no need to report this incident to its CGL carrier and that Carl's injuries are minimal.

From his hospital bed, however, Carl hires a lawyer who promptly sues the general contractor, construction manager

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and property owner. Each of them turns the claim over to their CGL carrier, which hires counsel to defend them.

Nine months later, the general contractor, construction manager and property owner each demand that Pronto defend and indemnify them under the terms of their respective contracts. At this point, Pronto feels it has to report this incident to its CGL carrier.However, Pronto's carrier denies any duty to defend the claims because Pronto failed to report the occurrence as soon as reasonably practicable. The carrier contends that it has been actually prejudiced by the delay of nine months.

Now what? If witnesses have moved to another state, disappeared or died in the interim, doesn't that help the carrier's "prejudice" argument? How can it be determined what the job site looked like at that time of the "occurrence" if the project is now completed and occupied? If a product was also involved (a ladder, barrier or other piece of equipment), where is it now and what condition is it in?

To make matters even worse, aside from your own lack of coverage, if your insurer rejects your demand to defend the others whom you are contractually obligated to defend and indemnify, you will likely find yourself paying for: (1) your own defense out of your own resources, and (2) the defense of all others you contractually agreed to defend and indemnify, also out of your own resources. In addition you will also have to pay for insurance coverage counsel to sue your carrier in order to obtain the insurance benefits for which you have already paid substantial premiums.

So, how can you protect yourself from this situation? We'll be discussing these very concerns (and how to avoid them) in this and future updates.

One strategy to pursue is to attempt to justify the delay in reporting the incident to your insurer. As under the old "no prejudice" rule, under the right circumstances, an insured could explain its failure to send immediate notice of an incident to its liability carrier if the insured had a "good faith belief of non-liability".

The belief of non-liability argument can be greatly enhanced where the insured is wisely counseled to conduct a contemporaneous investigation of the occurrence and follows that advice. If the contractor (insured) looked into what actually happened, contemporaneously gathered relevant information and then concluded, reasonably, based upon such investigation, that it was not liable, or that the injured party did not evidence an intention to make a liability claim against it, it could prevail. How to conduct such an investigation will be discussed in an upcoming article.

Likewise, such an investigation could go a long way toward defeating an insurer's claim of prejudice. With a proper investigation, the insured can present its insurer with witness statements, photographs and any involved equipment.

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Because arguments about prejudice and a "good faith belief of non-liability" are so fact specific, insurance companies often refuse to change their positions when their disclaimers for allegedly late notice are challenged. Why not? They have nothing to lose. Until a court orders the insurance company to extend coverage, the carrier will sit idly by as the costly accident litigation proceeds.

G&C Commentary:

When confronted with an accident on the job, and, in particular, a disclaimer of insurance coverage for late notice of an "occurrence", you must react immediately. Since you most likely will have to become involved in two lawsuits, one to defend the underlying liability (accident) action and one against the insurance company to compel coverage (at least to enforce the broad "duty to defend" the accident case), you will need experienced insurance counsel who can handle both the defense of the underlying personal injury lawsuit and the insurance coverage (declaratory judgment) litigation.

It's all about knowing your rights and "protecting your insurance protection."

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