Commercial Insurance Update

Topics Affecting Buyers of Commercial Insurance

MSP C 08/2002 – "Reservation of Rights Letters" August, 2002

Reservation of Rights Letters

By Alan Rogers and Spence Taylor

A reservation of rights defense is a means by which a liability insurance carrier agrees to protect and defend its insured against a claim or suit while reserving the right to further evaluate and perhaps even deny coverage for some or all of the claim. It is most commonly used when the claim or suit contains both covered and non-covered allegations, when the allegations are in excess of policy limits, or when the insurer is still investigating its defense and coverage obligations. For the insurer, a reservation of rights provides the flexibility to satisfy its duty to defend without committing to coverage. For the business owner who ultimately may have to pay for an adverse judgment, it requires careful monitoring and attention.

Friction

Usually under a reservation of rights, the insurer retains defense counsel for the insured while monitoring the case and coverage claim either itself or through counsel. Although the defense counsel owes complete allegiance to the insured, the insurance company may separately challenge coverage, even while continuing to retain defense counsel for the insured. In this sometimes-confusing scenario, the insured should take certain basic steps to protect its interests:

1. Pursue all possible coverage – Different insurance policies from different carriers may provide coverages that fill gaps left by other policies. Give notice of the claim to all of your potential carriers. Failure to do so can kill coverage. The mere fact that one carrier agrees to defend under a reservation of rights does not mean that other carriers should not be notified. If other carriers remain silent or are slow in responding, continue to request their involvement and do it in writing.

2. Make sure your answer is timely filed – Immediately coordinate with the insurer to make certain an answer to a complaint is filed quickly, otherwise a default judgment could be entered against you. If the insurer is slow in responding to your notice of lawsuit, retain counsel to file an answer on your behalf, and notify your insurer that you will seek reimbursement for these costs.

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Published by

Cavignac & Associates

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3. Understand why the insurer is disputing coverage – Understanding your insurer's coverage position will help you monitor events in the lawsuit that affect coverage. Carefully review your reservation of rights letter (possibly with the aid of independent counsel) until you fully understand your insurer's coverage position. Your insurer has a duty to identify every possible basis for denying coverage, and as a result, the reservation of rights letter may be difficult to comprehend. Notify your insurer in writing of any points you do not understand. A prudent insurance carrier will completely explain its coverage position.

4. Consider retaining independent counsel – Separate counsel can monitor the lawsuit and coverage and help you fully understand the coverage issues. An outside eye may prove important in making sure that developments in the lawsuit do not adversely affect coverage. If a coverage dispute later develops, your counsel will be an important part of your effort to deal with the insurer's coverage position.

5. Monitor all case developments, including settlement – Make certain that your defense counsel updates you on a regular basis and immediately in the event of a significant development. Request copies of all correspondence and pleadings filed by any party. If settlement becomes possible, consider making a written request to the insurer to settle the case within policy limits. This keeps you from getting stuck with the unpleasant prospect of an uninsured verdict down the road. If mediation or a settlement conference is scheduled, attend or have independent counsel attend. Personally monitoring these developments will safeguard your interests.

Keep the Lines Open

The reservation of rights defense requires heightened attention on the part of the insured. Given the specter of a future coverage denial, the insured should also closely monitor and participate in the defense until the conclusion of the lawsuit. With this in mind, instant communication between parties is vital to ensure that a reservation of rights defense is adequately presented.✳

Disclaimer: *This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

Record Retention

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Our clients regularly ask us how long their records should be kept. Although technically this is a legal question, we could not find a standard answer. The key appears to be a reasoned and legally supported policy that your firm understands and follows. Also take into consideration the changing technology. Your record retention policy needs to become a part of your firm's overall risk management program.

If you're getting started developing a policy, or are revising an existing policy, your first step should be to talk with your attorney. Although not everyone agrees on how long firms need to keep their records, some factors must be taken into consideration, especially the length of the statute of limitation in the states where you are located (generally speaking, ten years in the State of California). Many firms set their record retention policies to match the longest applicable statute of limitation or repose, plus an additional year or two as a safety margin.

Consider, too, making an exception for documents that are, or are likely to be, the subject of litigation. If problems arise on a project, if your client

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has been sued – or files a suit – with regard to a project you have worked on, these documents should be kept virtually indefinitely. This is true even if your firm has not been named in the suit.

Also, documents pertaining to difficult clients, clients declaring bankruptcy, or high-risk projects, such as condominiums, should be kept beyond the standard retention period.

What to keep? Once again, talk with your attorney. He or she may recommend that in addition to records of telephone conversations, meeting minutes, contracts, approvals, final drawings, specifications, calculations, reports, design criteria and standards, advisory letters, product research, submittal logs, site visit reports, correspondence, change orders, and close-out documentation, your firm's policy should specifically address computer records, email, voice mail and CADD issues.

If you're using a project web site, you – along with your client, key project team members and the web site service provider – should agree on a data retention policy. How long should the data be kept, and by whom? What will happen to the data if the service provider goes out of business? Consider, too, how long electronically stored data can be accessed because of changing software and hardware, and the potential degradation of the electronic medium.

Put your data retention policy in writing and advise your staff and clients about the details. Your policy should be revisited and updated periodically to reflect rapidly changing technology and the laws that apply to it. Some firms address their data retention policy in their contracts to make sure their clients are aware of it.

Stick to an established schedule. All documents covered by the policy should be destroyed according to the schedule you have set, unless they fall into an exception. As a matter of courtesy, some firms have a practice of contacting clients or former clients prior to destruction of their records. They give their clients an opportunity to retrieve selected non-confidential documents, have them sign an itemized list of the documents transmitted, and maintain a list of the documents being destroyed.

Good records can be crucial in defusing disputes and the potential for claims. Remember, a well-crafted and implemented record-keeping plan is an important part of your firm's overall risk management program.

DPIC is a leading provider of professional liability insurance and risk management services for architects, engineers and environmental consultants. For more information, please visit our loss prevention library at www.dpic.com✳

Workers Compensation Benefits to Increase in 2003

Effective January 1, 2003, the State of California has enacted legislation (Assembly Bill 749) that will significantly increase certain workers compensation benefits over the next four years.

Specifically, the new benefit package results in the following benefit changes in 2003:

- Increases the maximum temporary total and permanent total weekly benefit from $490 to $602
- Increases the maximum partial permanent disability benefits for certain permanent disability rating intervals
- Increases benefit minimums
- Provides for annual cost of living adjustments, and weekly life pension and weekly permanent total benefits beginning with injuries occurring in 2003

Because these increased benefits will increase the cost of providing workers compensation coverage, you will in all likelihood see an interim rate adjustment to your policy effective January 1, 2003. This amount will be determined by the Insurance Commissioner.

Note that rates for policies incepting or renewing after January 1, 2003 will fully reflect the legislative benefit increases.✳