

AVOID THE CONSEQUENCES OF UNTIMELY TENDER

Millions of dollars in insurance policy benefits are likely forfeited each year by policyholders who fail to tender third-party claims in a timely manner.

It cannot be over-emphasized how critical it is to tender a liability insurance claim in a prompt and proper manner. Tendering is the first step in the claims process and one taken far too lightly by many policyholders. Simply stated, a failure timely to report a liability claim in accordance with a policy's terms and conditions could result in a complete forfeiture of coverage.

Set forth below are several steps a policyholder should take to ensure a liability claim is properly reported under all potentially triggered insurance policies.

1. Do Not Delay

When a policyholder receives any third-party claim or lawsuit, the following question should be asked: "*Might this be covered by insurance?*" The claim or lawsuit should be immediately evaluated for insurance coverage and tendered under any policy that is potentially triggered.

This need for immediate action holds particularly true with "claims-made-and-reported" policies, such as most Directors & Officers, Professional Liability, and Employment Practices Liability policies. These policies require, as a condition of coverage, that a claim be reported to the insurer *during the policy period* or within a short grace period thereafter. As such, even one day late in tendering a claim beyond a claims-made-and-reported policy's reporting deadline will almost certainly result in the insurer issuing a denial of coverage. Murphy's Law being what it is, that deadline could be only days after the claim is made, or perhaps just hours. *See, e.g., Root v. American Equity Specialty Ins. Co.*, 130 Cal. App. 4th 926 (2005) (attorney sued by former client on the Thursday before the Sunday on which the attorney's claims-made policy expired).

Under an "occurrence" policy, such as a standard Commercial General Liability ("CGL") policy, the consequences of delaying tender may be less severe. Under occurrence policies, pursuant to California law, an insurer will have to demonstrate it was "substantially prejudiced" by a delay in order to deny coverage on the ground of late notice. *See, e.g., Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-306 (1963). That said, even absent a showing of prejudice by the insurer,

a delay in tendering a claim under an occurrence policy may still result in a partial loss of policy benefits. For example, an insurer will not be responsible for any pre-tender defense fees and costs voluntarily incurred by the insured. *See, e.g., Tradewinds Escrow v. Truck Ins. Exch.*, 97 Cal. App. 4th 704, 710-712 (2002).

2. Identify The Types of Policies Potentially Triggered

Under California law, it is the factual allegations, and not the legal theories of liability, that determine whether a liability policy is triggered by a third-party claim or lawsuit. *See Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 654 (2005). Therefore, a claim or lawsuit's factual allegations should be scrutinized to determine which liability policies are potentially triggered. While this step may quickly rule out certain policies, if there is any doubt about whether a particular policy may be triggered, the best practice is to err on the side of tendering.

3. Ascertain Which Policy Periods Are Potentially Implicated

An occurrence policy, such as a standard CGL policy, is triggered by the occurrence of “bodily injury,” “property damage,” or an “advertising or personal injury” offense which happens during the policy period. *See Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 655 (1995). So, for example, if a claim or lawsuit alleges a “personal injury” offense (such as libel or slander) occurring two years ago, the claim or lawsuit should be tendered under the occurrence policy in effect when the defamation is alleged to have occurred. If a claim or lawsuit alleges continuing injury or damage over a period of time, then tenders should be made under all occurrence policies in effect during the relevant time period. *Montrose, supra.*

An entirely different analysis applies to “claims-made” policies. As the name suggests, a “claims-made” policy is triggered by the making of a claim, not by the occurrence of the underlying injury or damage. *See Pacific Employers Ins. Co. v. Superior Ct.*, 221 Cal. App. 3d 1348, 1356-1357 (1990). As such, the relevant claims-made policy under which a tender should be made is the one in effect when the claim was first made.

4. Comply With Reporting Provisions

The next step is to review the policies' reporting provisions, and then comply with them to the letter. Whether expressly required by the policy or not, to ensure the tender arrives promptly, it is good practice where permissible to send the tender

letter and accompanying documentation by overnight mail using a tracking number as well as via email.

The tender should transmit a copy of the claim or suit, as well as any other evidence that may support a showing of potential coverage. This is important because under California law, an insurer has a duty to consider extrinsic evidence in evaluating its defense obligation. *See Scottsdale, supra*, at 655 (duty to defend arises “[i]f any facts stated or fairly inferable in the complaint, *or otherwise known or discovered by the insurer*, suggest a claim potentially covered by the policy”).

5. Additional Considerations

Excess policies, which also have notice requirements, should not be overlooked. Excess policies provide additional limits, and Umbrella Excess policies may even insure additional risks not covered by primary policies. *See Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 812 (1982). Policyholders should also consider whether they may qualify as an Additional Insured on anyone else’s policy. If so, tenders should also be made under these additional policies.

To sum up, upon receipt of a third-party claim or lawsuit, tendering should be attended to immediately and with great care. By following the steps described above, policyholders will go a long way toward securing the policy benefits to which they are entitled.