

# THE POLICYHOLDER ADVOCATE/IP COUNSELOR

## NEWSLETTER

Volume 7, Issue 2: Winter 2003

### THE IMPORTANCE OF PROVIDING PROMPT NOTICE OF CLAIMS TO INSURERS

#### I. INTRODUCTION

As policyholder insurance coverage counsel, I have had occasions where I have had to impart bad news to clients that forfeited recovery of pre-tender fees, because of the “voluntary payments” provision in their Commercial General Liability policies. This was true even though there was a clear defense duty under the policy. *See Ivan Insua v. Scottsdale Ins. Co.*, No. B155799, \_\_\_ Cal. App. 4th \_\_\_, 2002 Cal. App. LEXIS 5239, at \*11 (Cal. App. Dec. 20, 2002) (“[The voluntary payment provision] typically bars ‘reimbursement for pre-tender expenses based on the reasoning that until the defense is tendered . . . there is no duty to defend.’”).



Nevertheless, not all policies contain “voluntary payments” provisions, and variant policy provisions available in umbrella policies can give rise to coverage. *See Powerine Oil Co., Inc. v. Superior Court of Los Angeles County*, \_\_\_ Cal. App. 4th \_\_\_, 2002 Cal. App. LEXIS 5220 (Cal. Ct. App. Dec. 23, 2002) (addressing Ultimate Net Loss definition of “damages and expenses” which provided coverage for environmental cleanup expenses not available in standard form primary policy).

In some jurisdictions, such as Illinois, Georgia and New York, where a draconian late notice rule applies, the consequence of a mere month’s delay in notice may result not only in the loss of pre-tender fees, but of any coverage at all.

Nevertheless, in the present hard market, many policyholders are concerned that providing notice of a claim will precipitate higher renewal

premiums and/or cancellation of their existing coverage. These fears are often not assuaged by insurance brokers who counsel clients on occasion to not tender claims because they believe them to be uncovered, or wait until the matter is significant

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*If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.*

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enough to require notice.

Unless a policyholder knows the claim is not covered and can definitively opine why, it is typically in its interest to promptly give notice of a claim. This for five reasons:

First, policy provisions require it.

Second, where insurers learn of lawsuits that are not reported, they may claim that subsequent policy applications are inaccurate for failing to disclose same.

Third, cancellation for mere claim reporting may be bad faith in many jurisdictions.

Fourth, the mere reporting of the claim is not a loss, and may never be a loss, unless the insurer is required to pay sums owed to the insured under the policy.

Fifth, if insurance is never used, there is little point in having it in place.

If notice can be established, the benefits to pursuit of claims that the insurer was apprised of can be significant. A number of states have written contract statutes of limitations of significant length: Alaska, California, Rhode Island, Texas and Vermont (four years); Florida, Kansas and Idaho (five years); Wisconsin, Washington, Utah, Pennsylvania, Oregon, New York, New Jersey, Nevada, New Mexico, Minnesota, Michigan, Massachusetts, Maine, Arizona, Alabama and Hawaii (six years); Iowa, Illinois, Louisiana, and Wyoming (ten years.) Indiana, at 20 years, holds the record, with Kentucky a close second at 15 years.

Moreover, most jurisdictions permit recovery of pre-judgment interest on attorneys' fees incurred from date of invoice at rates that exceed those presently available in the market for most companies. California, Connecticut, Iowa, Kansas, Montana, Ohio, South Dakota, Tennessee, Utah and West Virginia have 10% interest rates. Alabama, Kentucky, Massachusetts, North Dakota, Rhode Island and Vermont, as well as Wisconsin (12%), South Carolina (14%), Texas (18%) or the rates specified in the contract if a lesser rate. The remaining jurisdictions have rates that typically exceed 5%. While these rates may have seemed negligible years ago, they presently represent an excellent return on investment.

Indeed, many companies that have received insurer denials are awaiting resolution of the underlying suit so that they can enjoy the benefits of pre-judgment interest, as well as pursue coverage after they have greater clarity about what facts liability will rest on as the underlying action proceeds to trial.

## II. IS NOTICE TO THE INSURANCE BROKER NOTICE TO THE INSURER?

Where a policyholder has not reported a claim to its insurer in writing, it may yet have had conversations with and/or provided written notice to a broker who is not a captive agent of an insurer. In jurisdictions such as Texas or where Texas law applies, notice to the broker may be deemed notice to the insurer. *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 917 S.W.2d 29, 49 (Tex. App.), *aff'd in part, rev'd in*

*part*, 974 S.W.2d 51, 54 (Tex. 1998) (“A broker who . . . collects premiums on behalf of an insurer not admitted to do business in Texas is an agent for the insurer.” *Id.* at 49); *Pecan Groves Associates v. John L. Wortham & Son, et al.*, No. 01-98-01020-CV, 1999 Tex App. LEXIS 5052, at \*6 (Tex. Ct. App. July 8, 1999) (“[N]otice to an agent, *who is acting within the scope of his authority and with reference to a matter over which his authority extends*, is notice to the principal.”).

Further, where a policy specifically directs that notice be sent to an agent, notice to that agent will also be deemed notice to the principal. *Zurich Ins. Co. v. Killer Music Inc.*, 998 F.2d 674, 679 (9th Cir. (Cal.) 1993) (“[N]otice to an agent is equivalent to notice to the principal. . . . The lack of written notice alone does not excuse Zurich’s refusal to defend.”).

Where an insurer is apprized of facts, either from the broker or from another source, such that it is aware of the claim and the fact that it is being forwarded to it by an insurer or its representative, it may be obligated to defend and fees incurred prior to such notice are not pre-tender fees. *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 37 (1985) (“[T]he facts confronting the claims manager . . . were such as to put him on notice of the contractual duty to make a further inquiry. If he had made this further inquiry, he would have discovered that it was actually . . . [the insured] who had tendered the summons and complaint . . .”).

### III. CONSTRUCTIVE NOTICE

Other courts have found that an ongoing course of dealing between an insurer and its broker may estop the insurer from denying an agency relationship between the two entities, and from denying coverage based on notice sent to the broker. *Empire Fire & Marine Ins. Co. v. Faith Truck Lines, Inc.*, 178 Ill. App. 3d 356, 359-60 (1988). Indeed, forwarding of notice of lawsuit to attorneys of the insurer may satisfy the actual notice standard. *Cincinnati Ins. Co. v. Baur's Opera House, Inc.*, 296 Ill. App. 3d 1011, 1016 (1998). So too may notice to an entity associated with the insurer. *Keepers v. Powell*, 131 Ill. App. 2d 423, 427 (1971).

Finally, some jurisdictions make a broker, who is a general managing agent for an insurer, its agent for purposes of receiving notice of a claim. *Loehr v. Great Republic Ins. Co.*, 226 Cal. App. 3d 727 (1990) (Under California law, an appointed agent is presumptively the insurer's agent.); *but see Leadville Corp. v. United States Fidelity & Guar. Co.*, 55 F.3d 537 (10th Cir. (Colo.) 1995) (Discussions by an insured with an insurance broker regarding possible coverage for CERCLA actions do not satisfy policy notice requiring it.); *Hooper v. Zurich Am. Ins. Co.*, 552 N.W.2d 31, 35-36 (Minn. App. 1992) (If there is language in the policy that indicates that notice may only be given directly to the insurance companies, then the broker status as an agent is irrelevant.).

### IV. WHAT'S A POLICYHOLDER TO DO WHO CANNOT LOCATE ITS POLICIES FOR THE PERIOD IN TIME WHEN BAD ACTS ARE AT ISSUE?

Intellectual property, as well as antitrust, cases often do not state with particularity the date when the first alleged wrongful acts occurred that create liability. They may include general allegations such as "on or before x date," "within the last several years," or "at a time within the applicable statute of limitations for the claim of x."

In such circumstances, both brokers and policyholders are ill-equipped to assess how many policies will be triggered or what layers will be implicated for occurrence-based coverage. While discovery propounded in the underlying action or careful attention to additional facts that come to light in pleadings may answer these questions, direct communications to the claimant's counsel may elucidate these issues, even without the need for formal discovery. Once these facts are ascertained, the appropriate policies to be implicated can be identified.

What happens where a policyholder cannot locate earlier insurance policies? One recourse is to hire archeological specialists who seek to produce policies through investigatory techniques honed over years of practical experience. Insurance Archeology Group ("IAG") is such a company, as is Insurance Research Assoc. ("IRA").

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240 Madison Avenue  
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IAG identified policies in the attic of a retired senior executive that was pertinent to an environmental coverage dispute where the alleged conduct occurred decades before. A recent California Supreme Court case suggests that the identification of the character of the policy's coverage can be assessed by constructive evidence of its existence sufficient to permit coverage. *See Dart Indus., Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 1069-1070, 124 Cal. Rptr. 2d 142, 151-52 (2002).

Other practical techniques include the following:

- Search of home office and off-site storage facilities, as well as broker records.
- Review of accounting and banking records referencing the purchase of insurance, specifically the policy number, premium and name of carrier for whom the policy was purchased.
- Consulting proof of insurance records in connection with lease, real estate, goods transportation and employee bonding requirements.

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- Tax records and bookkeeping records.
- References to prior claims and/or coverage litigation.
- Direct application to the state insurance commission for certificate of facts or information about policies. See California Insurance Code §§ 12950-12955.
- Conferences with executives in charge of the insurance function at the time the alleged bad acts occurred.

If none of the above suffices, then review of industry groups and carriers likely to be used by companies in the line of business of the insured can suggest carriers to whom notice can be forwarded, who may have records of the insured and may acknowledge a policy's existence.

## V. CONCLUSION

The best advice is, therefore, tender early, tender often, as claims that are never brought can never be the subject of a policy benefit.

Insureds providing late notice should not lose heart. In a recent case, we were able to obtain a right to a defense reimbursement for claims arising three years after the filing of a significant antitrust lawsuit. Pre-tender fees are arguably encompassed within the "ultimate net loss" definition of policies issued over a self-insured retention, and no "voluntary payment" provisions may apply to same.

Indeed, the larger the company and the more its policies are purely excess in form, the greater the opportunity to recapture all fees reasonably incurred. Finally, there are

also jurisdictions that do not permit an insurer who denies on grounds other than late notice to avoid its defense obligations.

## PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and the supplements are available for \$160.00 plus 8.5% tax; shipping and handling are free when full payment is enclosed with the order. Call 1-800-638-8437.

## UPCOMING SEMINARS ON INSURANCE COVERAGE AND INTELLECTUAL PROPERTY

**Jan. 18-22, 2003 – IPL Midwinter Meeting - Longboat Key, FL** David A. Gauntlett is the chair of Committee 654 - Special Committee on Insurance and will be presenting the Committee Report.

**Feb. 20-22, 2003 – ABA TIPS Insurance Litigation Committee Meeting - Miami Beach, FL** David A. Gauntlett to speak on Friday, Feb. 21, 2003. Topic - *Just When You Thought It Was Safe To Go Back In The Water: Advertising Injury - The Year In Review*

**Mar. 6-8, 2003 – Insurance Coverage Litigation Committee Midyear Meeting - Tucson, AZ** - David A. Gauntlett is the Vice-Chair of The Computer/Technology Subcommittee and will serve as Discussion Leader representing the policyholder perspective on *Insurance Coverage for IP Claims* at the Luncheon on Friday, March 7, 2003.

David A. Gauntlett was one of two attorneys interviewed by **LAWCAST** to look back at 2002 and forecast changes for 2003. Mr. Gauntlett's analysis will

be heard on all editions of **LAWCAST** as part of their Special 2002 Year In Review Discussion under "A Year in Sound Legal News" and will also appear in the Jan. 13, 2003 edition of **Intellectual Property LAWCAST**, of which Mr. Gauntlett is a member of the Board of Editors.

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