

D&O INSURANCE

Policyholder's Obligations

The purpose of this article is to discuss the policyholder's obligations under the D&O insurance policy. This topic is critical for many policyholders, because the insurer's contention that the policyholders have not taken or completed required steps is at the center of many insurance disputes.

POLICYHOLDER'S OBLIGATION

When most people think of insurance, they are usually thinking about the insurer's obligation to pay claims. And rightly so, as the insurer's claims payment obligation is the very essence of the insurance agreement. Unfortunately, from time to time the insurer does not pay claims, or does not pay them completely or in a timely fashion. On some occasions, the insurer's failure to fulfill or complete its payment obligation is the result of good faith coverage disputes. But sometimes the insurer's delay or failure to pay is the result of the insurer's contention that the policyholder has not taken or completed some action required under the policy.

As a preliminary matter, it should be noted that not all of the policyholder's policy obligations and requirements are claims-related. First and foremost, the policyholder must pay the required policy premium. And there are also other D&O insurance policy obligations that impose requirements on the policyholder outside the claims context.

By way of illustration, the typical D&O insurance policy has "organizational change" provisions specifying how the

policy will respond, for example, if the company is sold. These provisions also specify how the policy will respond if the insured company acquires another company with assets greater than a specified threshold amount. These after-acquired subsidiary provisions often require the policyholder to notify the insurer in writing of the "full particulars of the new subsidiary," in order for the policy's coverage to extend to the new subsidiary. Private company policies often have similar notice requirements if the company conducts a public securities offering. In both instances, the insurer may also require the payment of additional premium.

But while there are some policyholder requirements that are not claim related, many of the typical D&O policy's other policyholder requirements *are* claims-related.

Notice of Claim

First, the policy requires the insured, as a condition of coverage, to provide notice of a claim within a specified time or time frame (that is, either within a set number of days or "as soon as practicable"). In the absence of notice or if notice is tardy, the carrier may take the position that it is relieved of its obligation to pay— although some courts require the carrier to establish that the notice failure prejudiced the insurer's rights in order to disclaim coverage.

Consent to Counsel

Second, many D&O policies require the policyholder to get the carrier's consent for the lawyers that will be defending the claim. Some policies have so-called "panel counsel," which is a list of authorized law firms, but most other public company policies allow the insured to select the lawyers, subject only to the carrier's consent. The majority of private company policies are written on a duty-to-defend basis, which obviates this issue, as the insurer selects the counsel that will defend the claim.

Though the carrier's consent should be (and often is) a very straightforward matter, issues can and often do arise. The typical carrier objections relate to the selected lawyer's or selected law firms' hourly rates. Also, the carrier sometimes objects to the number of lawyers involved. Less frequently, the carrier raises concerns about the lawyer's qualifications to handle the claim.

It may be impossible to completely eliminate these kinds of disputes, but there are certain steps policyholders can take to reduce the likelihood of disputes. The most important step is to notify the carrier as soon as practical of the names and hourly rates of the attorneys involved. (To avoid disputes this can often be addressed before any claims have arisen). It should be kept in mind that because defense expenses erode the policy limits, both the carrier and the policyholder have an interest in ensuring that the defense goes forward in the most cost effective manner in order to preserve limits for the payment of settlements and judgments.

Cooperation

Third, once the claim is underway, policyholders have another obligation, and that is the requirement to cooperate. The specifics of this cooperation duty are not usually provided, but it basically refers to the insured's obligation to take steps to support, and to refrain from taking steps that interfere with, the defense of the claim.

Though the policy does not specify, many carriers will also contend that the cooperation clause requires the policyholder to keep the carrier informed about the claim, to provide copies of pleadings and other key documents, and to provide the carrier with information related to the defense (in particular, with defense expense information and fee statements).

Whether or not these kinds of steps are truly required by the cooperation clause, taking these steps is simply good practice and is more likely to result in smoother claim resolution.

By the same token, failure to take these steps is often the source of claims handling friction and frequently contribute to issues with the carrier's fulfillment of its payment obligations.

Consent to Settlement

Fourth, the typical D&O insurance policy requires the insurer's consent to settlement. The failure to keep the insurer informed about settlement discussion is a frequent source of tension. The policyholder must recognize that the insurer's consent is actually required. Problems sometimes arise in connection with excess insurers, when settlement amounts unexpectedly pierce upper layers of insurance. These kinds of recurring disputes underscore the fact that the consent of all of the affected insurers is required, and that keeping the insurers informed about the claim really means informing all of the carriers involved and potentially involved.

Readers will be surprised that we have chosen to write about policyholders' policy obligations, as it is the carrier's claims payment obligation that is the heart of the insurance contract. Some readers may also be bothered by the fact that the insurance policy has so many policyholder requirements. But whether or not as a philosophical matter it is or is not appropriate for the insurance policy to incorporate so many policyholder requirements, the fact is that these requirements are found in most D&O policies, and so the best approach is to recognize and address these requirements.

Far too many claim disputes arise when carriers take the position that policyholders have failed to fulfill one or more of these requirements. Our hope is that by highlighting these requirements, more of these process-related disputes might be avoided.

Unfortunately, most insurance brokers only concentrate on communicating the insurer's obligations. This only leads to problems. In order for D&O insurance buyers to be assured that they have the appropriate counsel, it is critically important that they select a knowledgeable and experienced broker to assist in their acquisition of the insurance. The best brokers also have skilled and experienced claims advocates available to protect their clients' interests in the event of a claim.

CONTACT US

Conner Strong & Buckelew

connerstrong.com | 1-877-861-3220

NEW JERSEY PENNSYLVANIA DELAWARE FLORIDA