2018 Annual Conference
March 14-16, 2018
Houston, TX

Chicken Tenders or Why Can't the Adjuster/Resolution Manager Cross the Road!

To many of us working in and around insurance and litigation, the concept of tendering a loss to a potentially involved third party seems simple. However, too often the process is slow and broken. What should clarify the proper target often gets muddled with finger-pointing and baseless denials. The questions to be addressed in making the tender are plain to all of us: Does a contract exist? • Is it written? • Is it executed? • Is there an indemnity agreement? • What's promised? • Any insurance obligations? • Is there an insurance requirement? • Additional insured? If this is truly the case, why do so many refused to accept a proper tender? Why do tenders get ignored, denied because of the basic misunderstanding of the relationship between contractual indemnity and additional insured status, the question of the negligence of the parties in light of those relationships or just denied! Why, as an additional insured, or as contractual indemnitee am I stuck with increased litigation costs, i.e. late tender acceptance and then the refusal to repay defense costs, commencing a DJ and hiring coverage counsel? Costs I cannot recoup. In short, why doesn't the chicken adjuster accept my darn tender? This course reviews the need to thoughtfully respond to tenders pre- and post-litigation through the eyes of the insured, the adjuster, the broker and counsel in an effort to lift the veil of secrecy and confusion and move that chicken across the road!

I. Hesitation to Tender (or Accept) Additional Insured Status

A. From the Insurance Adjuster perspective:

1. Impact of High Pending

High and rising pendings are a significant concern in the industry. It is a rare adjuster that does not complain or comments about the lack of time to fully address all concerns, including additional insured issues. Often, the adjuster may overlook their insured's possible additional insured status with hopes of a quick and easy settlement. However, that strategy often backfires, and results in the Additional Insured carrier asserting late notice and/or reporting.

2. Lack of Appropriate Training or Education

Adjusters are often expected to know and understand how Additional Insured status and endorsements apply. How the endorsements are interpreted from state-to-state. However, much of the education regarding additional insured tenders is "on the fly" and not formalized within the industry. Many adjusters profess understanding, and yet AI status is often overlooked and not properly leveraged.

3. Examples

a) Slip and fall at a condominium complex. Snow contractor was to contractually indemnify the association and property manager, and to name same as additional insured. Such was reflected on the Certificate of Insurance. Lawsuit is filed, and allegations include that snow contractor created hazard by negligent clearing such that ice melt would run across the sidewalk and refreeze. Tender demanding defense and indemnity both under contractual indemnity and additional insured was denied. Breach of contract and Declaratory judgment action filed.

b) Third party criminal used a flower truck as a ruse to get past security at gated community. The perpetrators broke into a home, tied up the resident and assaulted her in front of her child. Lawsuit filed against community as well as security company. During litigation, two different contracts were produced, one required contractual indemnity and additional insured status, another which didn't. After discovery, a completely executed contract was located, which contained all required provisions. The security company's insurer accepted the tender.

B. From the Risk Manager perspective:

1. *Fear of increasing your client's out-of-pocket exposures*

As a Risk Manager, you need to weigh both the insurance aspect and the business side. Our Risk management philosophy is to transfer the risk, in certain areas, such as snow removal and construction risks. We budget and pay based on the premise we should not have to pay claims due to the contractual obligations of the party. When we enter a contract, our standards require the contractor to have certain coverages, limits and terms and conditions such as waiver of subrogation and provide AI on a primary and non-contributory basis. Typically in addition to the AI requirement, they are required to indemnify us for their acts arising out of their work. When an incident occurs, involving allegations involving the contractor's negligence, we expect their carrier to review the facts and allegations, make a prompt coverage determination and accept their obligations.

When the carrier doesn't accept their obligations, it costs the business from a premium and claim perspective. We incur unnecessary defense costs from both the tort and coverage aspects.

2. Impacting your client's business relationships negatively

When a carrier does not properly address the coverage and contractual obligations of a business partner (vendor, contractor, etc.) it can have a negative effect on the business relationship. It also forces us to examine other avenues of recovery and recourse. Sometimes it may be to recommend changing contractors, withholding payments or filing a breach of contract claim. Many of which are difficult conversations to have because the business may not understand insurance and partly because Insurance, from my perspective, should not become an interference in our business relationships.

3. Examples

a) construction project with a subcontractor employee is injured. Company is sued and tender to the subcontractor. They accepted the tender and filed an answer on behalf of the Owner and construction manager as required.

b) A plumbing contractor works on the pipes in the ceiling of a tenant's apartment. The repaired portion of the ceiling collapses and strikes a child in the head. We are sued as the owner, along with plumbing contractor. Carrier refuses to accept the tender, as required under the contract. After several failed attempts to enlighten the contractor, we sue contractor for breach of contract, cancel all contracts and withhold payment of certain invoices. Currently in litigation.

c) An individual allegedly slipped and fell in retail parking lot due to snow and ice. Despite AI and indemnity obligations, snow removal company's carrier denies coverage. A breach of contract claim is pending against snow removal vendor. The vendor lost the contract for several locations and A DJ is being filed against the carrier. Defense costs incurred exceed $20,000 and want participation from the carrier in reimbursement of defense costs and settlement.

C. From the Attorney perspective:

1 *Lack of complete understanding of the additional insured versus contractual indemnity tenders by less experienced attorneys*

There is an ongoing issue regarding the lack of complete understanding of the additional insured versus contractual indemnity tenders by less experienced attorneys. While not all defense counsel are full-fledged coverage attorneys, it is important that you as counsel understand the mantra of risk transfer and the necessity to bring all guns to bear on the carrier and its insured who are required to provide contractual indemnification and additional insured status. A strategy to pursue the belt and suspenders that is required by contract and that your client is entitled to begins when the contract is drawn and the policy issued. As counsel, you must understand that there are two methods used by owners and upstream contractors to obtain risk transfer from downstream contractors: (1) the indemnification provision in the contract with the downstream contractor; and (2) the additional insured endorsement(s) in the GL policies purchased by the downstream contractors. Although indemnification and legal fee can be obtained using both methods, there are distinct differences.

Most jurisdictions have statutes which prohibit a party from being indemnified for its own negligence. If the indemnification clause violates the jurisdiction's statutes (NY GOL) the indemnitee cannot recover in the event it is found negligent. Many jurisdictions, including New York, allow for partial contractual indemnity if the contractual provision does not violate its indemnity statutes.

An indemnitee's status as an additional insured on GL policy(s) purchased by downstream contractors can allow for complete indemnification, even if the indemnitee is found to be negligent. Additional insured endorsements often require a showing that the loss arose out of the work of the named insured for the additional insured or that the loss was caused, in whole or in part, by that work.

It is important that the client/insured is in the best position to obtain both contractual indemnification and additional insured status. The attorney should insure, as noted above, that the contractual indemnification language in the relevant contract comports with the anti-indemnity statute for his/her particular venue and provides for partial indemnification as well. In reviewing the policy of insurance, where possible and it should be stressed that at all times it is the preferred method that a certified copy of the applicable policy with a complete list of all endorsements be obtained before the work, lease, etc. commences. This is often a herculean task and is often overlooked. But in order to avoid issues down the line, it is an important practical step that many overlook and/or fail to understand the import of. Without the complete policy when one goes to tender, the attorney and his/her client are often confronted with the problem that any coverage that applies may be illusory due to the type of endorsement and/or exclusion. Don't let your client get caught with its expensive designer pants down after the belt has broken and the suspenders have snapped leaving them exposed!

2. Appearing soft or not savvy to your client (whether insurer or company)

Appearing soft or not savvy to your client (whether insurer or company) is not an option. Once suit has been commenced. The gloves must come off and you as counsel now become the hammer. You must show your client(s) that you are pushing risk transfer with both barrels. The first step is to send a follow-up tender letter with the threat of a declaratory judgment action and commencement of a third party action will follow the failure of a contractor, lessee and/or its insurer etc. to accept the tender. Once an adjuster is looking at and weighing the costs of defending multiple suits regarding contractual indemnity and failure to procure insurance, its coverage position pursuant to a commencement of a Declaratory Judgment action and lastly the potential for repayment of the defense costs of an additional insured, well down the road, the burden falls squarely on the offending adjuster to review his/her position, or face the consequences.

3. Example.

In the construction realm, a sub-contractor's employee is injured while working at a construction site. The sub has provided, your client, the general contractor with a CGL policy for the limits set forth in its contract with you. An employee of the sub, an ironworker, falls 8 feet from a defective ladder. You tender to XYZ insurance company pursuant to your status as an additional insured. XYZ issues a denial as the policy contained an employee exclusion. The suspenders have been snapped and now your only avenue is through the belt of the indemnification provision in the general contractor's contract with the subcontractor. The sub's policy contains an employee exclusion and where you thought you had coverage, well now you have none.

II. Collecting your additional insured or contractual indemnity evidence

A. Certificate of Insurance

Often the only evidence of the additional insured status is the mention of same on a Certificate of Insurance provided to the insured. The insured should strive to secure a copy of the policy and/or any additional insured endorsement. The Certificate of Insurance is generally not evidence of insurance actually in place. The Certificate of Insurance contains language similar to:

> *If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).*
>
> *If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).*
>
> *DISCLAIMER*
>
> *The Certificate of Insurance on the reverse side of this form does not constitute a contact between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.*

Therefore, if the professionals provide a certificate of insurance, it does not confirm that such insurance coverage is in force. If the insured is named in litigation and/or the subject of a claim, in which the professionals were, or should have been, involved, be sure to tender the matter to the professional, as well as the producer and company identified on the Certificate of Insurance. As previously discussed, the failure to provide timely notice to an insurance carrier can resulted in a forfeiture of coverage.

Even if not evidence of the existence of valid insurance, the Certificate of Insurance can provide you with the next steps in your tender – the identity of the carrier and the broker that should have placed the coverage.

If you happen to have a broker engaged in the process, the broker can also be an excellent source of collecting valuable policy information that can give direction regarding additional insured status and potential contractual liability obligations. While the insurer will have the official insurance policy copies, the broker can expedite with their own copies so that reviews and immediate decisions can be made. The broker can be instrumental is protecting the insured's rights under both the primary and excess layers.

B. Contract

If the contract requires extension of the additional insured status, the failure to provide such will expose the contracting party to a breach of contract lawsuit.

If your insured is contractually owed additional insured status by contract, and the party denies such obligation, or the insurer refuses to extend such status, commencing a breach of contract action against the party obligated to provide such as well as a bad faith and/or breach of contract action against the insurer may provide leverage needed to resolve the claim.

1. Verbal or Written

2. Contractual indemnity provisions

3. Additional insured provisions

4. All contracts obtained and reviewed

III. Understanding Availability of Additional Insured status and Impact on your insured

A. Need the policy and endorsements

In order to evaluate the additional insured coverage available, and the likelihood of it being extended to your insured, one needs to secure the policy and determine whether an additional insured endorsement has been added. Second, you must determine the type of additional insured endorsement. With the volumes of policies and endorsements available, we will examine the main categories of additional insured endorsements:

1. Ongoing Operations

2. Completed Operations

3. Blanket v. Scheduled

B. Impact of Other Insurance Provisions

If additional insured status has been extended to your insured, what impact, if any, will the Other Insurance Conditions have on your insurer's obligations. The intent of procuring AI coverage on another's policy, is to protect your insured's own coverage. For that reason, it is generally understood that when your insured is identified as an additional insured on another policy, the insured's own CGL will apply on an excess basis.

The CGL policy is excess based on its "other insurance" wording:

> *This insurance is excess over:*
>
> *Any other primary insurance available to you covering you for damages … for which you have been added as an additional insured by attachment of an endorsement.*

C. Impact on the deductible(s) or SIR

IV. Impact of Litigation and Resolution

A. Defense obligation

a. Does the same duty to defend analysis apply to an additional insured tender as would apply to a tender by your Named Insured?

b. Caselaw FL, TX, CA

c. Conflict versus joint defense

B. Risk transfer

C. Impact of the Insured Contract provisions and whether the defense costs for the additional insured will erode the limits

D. Impact of a successful tender on the Additional Insured's loss runs

E. Mediation and Resolution Strategy – Examples

V. Challenging the denied tender

A. Declaratory judgment action against the denying carrier

1. Standing

2. Burden of proof

3. Expense of pursuing

B. Breach of Contract action

1. Failed to secure additional insured endorsement as required

2. Wrongful denial of contractual indemnity

3. Wrongful failure to defend (or reimburse defense costs) required by the contractual indemnity