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Pitfalls to Avoid When Handling a New Claim

I. Early Stages of the New Claim Investigation

Too often a claim professional and an attorney handling a new claim miss the opportunity in the early stages of the new claim investigation to confirm if the client has maintained all relevant evidence, what support a retained expert can provide, if the new claim has the potential to exceed the policy limits, and if the excess carrier should be put on notice (if there is excess coverage). These missed opportunities can lead to misjudgments of the potential value of the claim, a missed opportunity for early resolution and can threaten a successful defense going forward.

A. Preservation of Relevant Information

In the initial communication with the insured, it is imperative that there is an understanding that the insured must preserve any item and information associated with the loss. This can include, but is not limited to, photographs, videos, equipment, documents, identification of witnesses, and property. The lack of preservation of any item and/or information can lead to inability to effectively determine the value of the claim, hinder the defense of the claim and may lead to motion practice associated with spoliation of evidence.

B. Support From a Retained Expert

In some circumstances, it is crucial to identify the type of technical expert that can assist in the assessment of a new claim. A qualified expert can assist in isolating the key issues and developing an initial strategy by performing a site inspection, advise on initial liability issues, and provide defense recommendations. Additionally, an expert's participation in a new claim can also lead to a roadmap to an early resolution.

C. The Potential to Exceed the Policy Limits

There are various steps a claim professional can take to determine if a new claim has the potential to exceed policy limits. These steps include, but are not limited to, identifying the estimated value of the loss through communicating with the insured regarding the facts, identifying the location of information outside of the insured's control that may contain relevant information, and potentially initiating the involvement of counsel and/or experts that have the necessary expertise. Every claim is different and will involve different approaches in evaluating the potential to exceed policy limits.

D. Notice to the Excess Carrier (if there is excess coverage)

There are potential risks when one does not timely notify the excess carrier of the claim. Sometimes the decision to notify the excess carrier is easily decided when plaintiff makes a demand in excess of the primary policy. In other circumstances, an informative decision will have to take place based upon the information obtained from the claim professional's initial investigation. Either way, an understanding of the claim is imperative.

II. Risk Transfer

It is important early on to identify sources of risk transfer in order to timely tender a claim to other parties who may be obligated to defend or indemnify an insured, and to understand potential exposure based upon contractual liability and Supplementary Payments provisions. It is also important to identify who may have additional insured rights, and to determine whether different types of insurance policies may be obligated to respond to a loss.

A. Additional Insureds

It is important for an insurer when evaluating its rights and obligation under its policy to consider whether its insured may qualify as an additional insured under policies issued to other parties. It is also important for an insurer to consider whether it may owe additional insured obligations to those with whom its named insured is doing business. Examples of the type of parties which may qualify as additional insureds are landlords; tenants; contractors; product suppliers; municipalities; vendors; building owners; and any party to a written contract that requires additional insured status in favor of one or both parties.

It is also important to evaluate the scope of coverage available to an additional insured. Additional insured coverage for liability "arising out of" the work or operations of an insured will be interpreted broadly in favor of coverage when possible. Limitations to additional insured status include those limitations which might be set forth in a contract between an insured and another party. This may include that additional insured status ends once an insured's work or operations for another party have concluded. Additional

insured coverage may be afforded in an amount not to exceed the amount required by the contract. A contract between parties such as a contractor and subcontractor may also specify that additional insured status is required for a number of years after an insured subcontractor's work has been completed. Further, vendors coverage for additional insureds may only apply to vicarious liability, and not a vendor's own negligence in promoting or packaging products.

B. Contractual Indemnity

Many contracts between parties include indemnity clauses which require one party or both to defend and/or indemnify each other in the event one is sued in connection with the other's actions, errors, omissions or products. Although liability policies generally exclude coverage for contractual liability of the insured, they will usually contain an exception for liability assumed by an insured in an "insured contract." Policies will generally spell out what will constitute an "insured contract," which typically includes lease agreements and written contracts between the insured and a third party wherein the insured agrees to accept the tort liability of the other party in connection with the insured's business. Under policies that contain these exclusions and exceptions, an insurer will generally be obligated to pay those amounts incurred by the third-party indemnitee, which will generally count as damages awarded against the insured. This type of contractual indemnity obligation does not create a direct relationship between the insurer and the contractual indemnitee. Rather, the insurer's obligations are to its own insured to pay those covered amounts its insured is found to owe. These amounts will apply to erode the limits of the policy. In looking at the big picture, insurers would be well served to consider what contractual obligations may be owed by its insured as well as whether other parties may owe defense and indemnity to the insured.

Insurers should also consider what rights and obligations may arise under the Supplementary Payments provision in many policies. Under these provisions, insurers agree to defend an indemnitee of their insured if both the insured and indemnitee are named in the same suit and certain conditions are met. Such conditions are generally:

- a.** the "suit" against the indemnitee seeks damages for which the Insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
- b.** this insurance applies to such liability assumed by the Insured;
- c.** the obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the Insured in the same "insured contract";
- d.** the allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears

- to exist between the interests of the Insured and the interests of the indemnitee;
- e. the indemnitee and the Insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the Insured and the indemnitee; and
 - f. the indemnitee:
 - (1) Agrees in writing to:
 - (a) cooperate with us in the investigation, settlement or defense of the "suit";
 - (b) immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) notify any other insurer whose coverage is available to the indemnitee; and
 - (d) cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) obtain records and other information related to the "suit"; and
 - (b) conduct and control the defense of the indemnitee in such "suit."

In the event a defense is owed, defense fees and costs will be paid in addition to limits.

C. Other Insurance

An insurer should consider the extent to which other insurance may be available to respond to a loss. This includes insurance available in other years to cover a continuous loss, insurance as an additional insured under another party's policy, and insurance available to an insured as an indemnitee under a contract with a third party. Tenders early on to those parties who may have an obligation to defend and/or indemnify an insured are important. In some jurisdictions, such as Illinois, a targeted tender to a specific insurer may be made. In most states, all insurers whose policies have potentially been triggered will be obligated to defend.

It is also important to consider what types of policies may be available to cover certain losses. For example, in a construction setting, there may be general liability, wrap or OCIP policies, and professional liability policies which may be obligated to defend and/or

indemnify. In an environmental setting, general liability, environmental impairment, contractors pollution legal liability, and/or environmental premises liability policies may be available to cover a loss.

Finally, it is important to consider the impact of SIRs and deductibles on the insured's obligation to pay. Some states, such as Illinois, will require an insured to pay a separate SIR for each triggered year in a continuous loss setting. Many other states will require that only a single SIR be satisfied per loss.

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