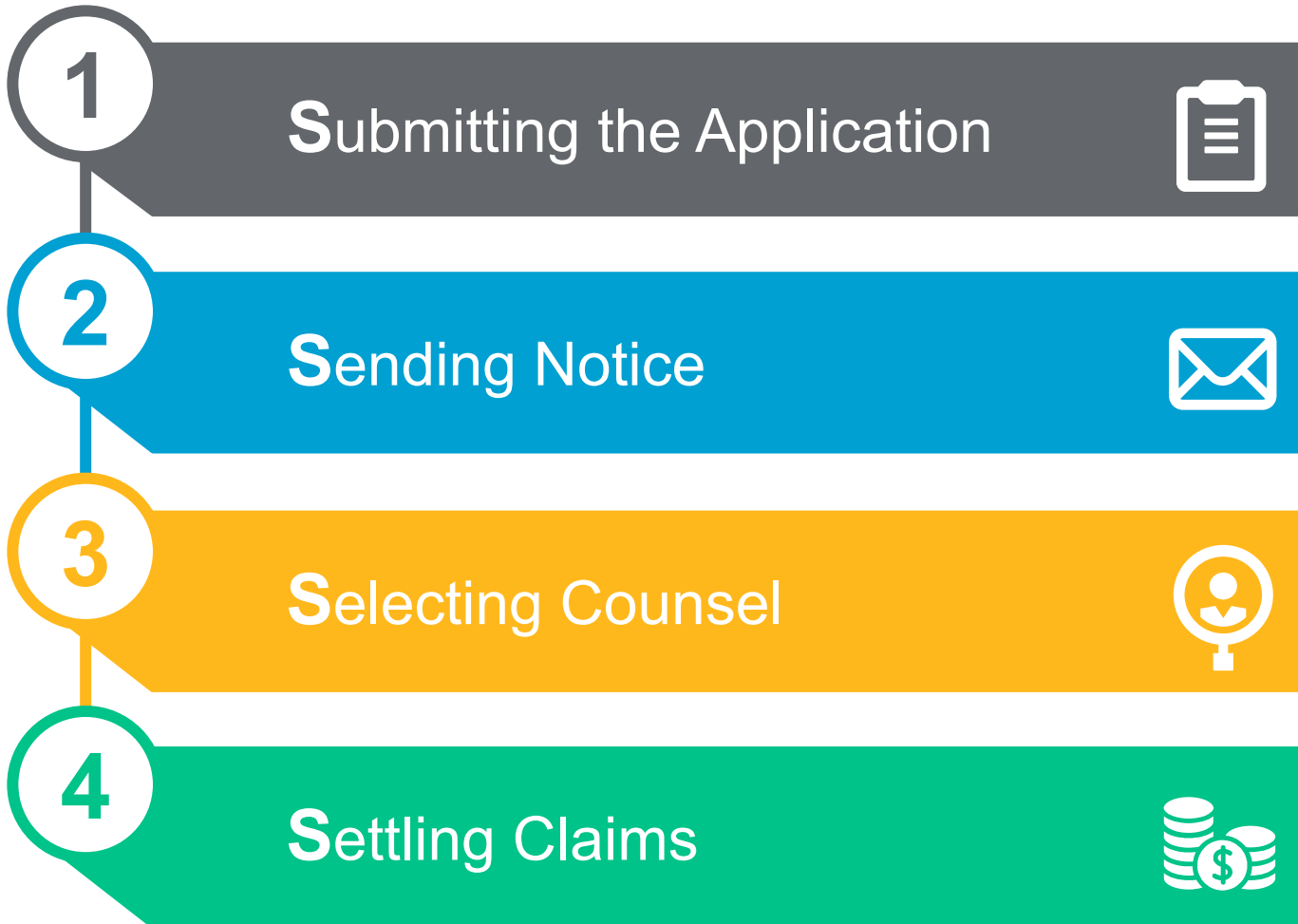


# The 4 S's of Insurance Claims

## What Every Corporate Counsel Should Know

April 26, 2019

# Four S's of Insurance Claims



# Submitting an Application

## First Of All:

- What is an application?

## 2 Specific Things:

- Catch all Question - Do applicants know of any:
  - Fact,
  - Circumstance, or
  - Wrongful act

...Which may reasonably give rise to a claim being made against them?

- Accuracy of information – particularly financial



# Submitting an Application

## Risk factors for mistakes in the application

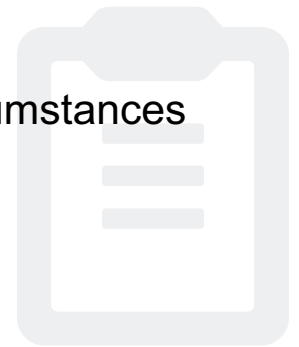
- Ignorant about act or omission
- Overlook potential for claim
- Exclusions – e.g. prior knowledge
- Concern over premium increase



# Submitting an Application

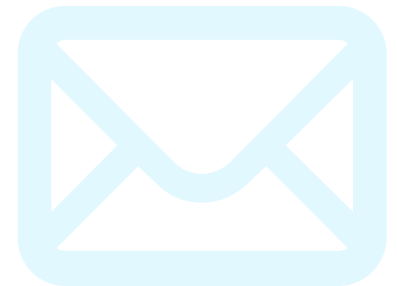
## Helping yourself

- Start the process early...In fact, maybe even have a continuous process
- Identify potential claims
- Encourage use of a good insurance broker who knows your business and knows the insurance companies
  - Meet underwriters as appropriate – this will not only help in negotiating coverage, it will also help at the time of a claim
  - Take time to understand the bigger picture – what is going on in the marketplace that can impact; what do underwriters need to see/want to see
- Remember disclosure on the application is not the same as notice of circumstances



# Sending Notice to Insurers

- Notice = Condition in Policy
- When do you send notice?
  - Events
  - Claims or suits
  - Amendments to suits
- It's not just what you say, it's how you say it
- Notice: Occurrence v. Claims Made



# Sending Notice to Insurers

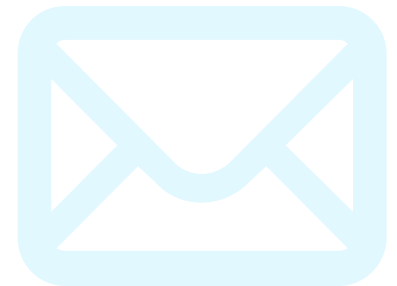
## Occurrence-Based

- Focus on when injury or damage occurs regardless of when claim is made
- Multiple policy periods may be implicated
- Notice of events, suits, and amendment to suits

### ■ Claims Made

- Focus on when claim is made regardless of when injury occurs
- Must know how “claim” is defined
- Reporting the “potential claim”
- Notice of “claims” and circumstances

### ■ Claims Made and Reported



# Sending Notice to Insurers

## Consequences of late notice? Depends on type of policy

- Occ. (Cov. A): Prejudice Required
- Occ. (Cov. B): Prejudice Required
- Claims Made: Prejudice Required?
- Claims Made/Reported Policies: No Prejudice Required





# Sending Notice Checklist

- Take inventory of company policies
- Distinguish between “occurrence,” “claims made,” and “claims made and reported” policies
- Determine how the “claim” is defined in “claims made” policies
- Identify notice provisions of each policy
- Make sure you identify all notice provisions
- List “notice” triggers of each policy
- Identify time deadlines for each notice provision
- Make sure key individuals are aware of notice requirements
- Include your broker and their Claims team early in the process



# Selection of Counsel

- Duty to defend basics (8 corners)
- Insurer's options
  - Deny
  - Unqualified defense
  - Defend under reservation of rights
  - Defend under reservation and file DJ
- In what context does selection of counsel arise?
  - Insurer defends under a reservation of rights
  - N/A when insurer provides unqualified defense



# Selection of Counsel: Insurer v. Insured Debate

## Insurer says it should select counsel

- Lawyer is independent professional
- Lawyer has ethical duties
- Lawyer cannot be manipulated

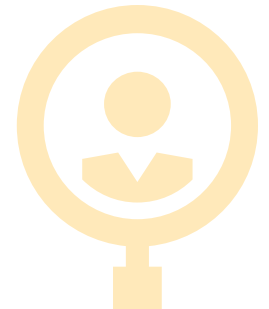
## Insured says it should select counsel

- To get loyal lawyer
- To get competent lawyer
- To get knowledgeable lawyer
- To get experienced lawyer



# Selection of Counsel: Whose Lawyer?

- Defense counsel owes the insured an unqualified duty of loyalty
- Insurer not vicariously liable for defense counsel's conduct
- Insured is primary client; insurer client too (limited)



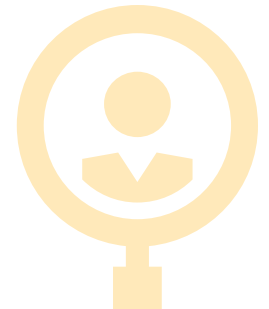
# Selection of Counsel: Texas Supreme Court Speaks

## *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004)

- When a carrier has a duty to defend, it has the right to select counsel.

### Principles:

- Under *Davalos*, when the facts to be adjudicated in the liability (underlying) lawsuit are the same facts upon which coverage depends, there's a conflict of interest that will prevent the insurance company from conducting the defense.
- Key: what are the facts to be adjudicated?



# Selection of Counsel

## Other issues

- Informing the insured of its right to select counsel – whose responsibility?
- How much does the insurance carrier have to pay?
- Should rate be capped at rate carrier could pay if it selected counsel?
- Should rate be determined under a reasonableness standard such as found in Chapter 38?
- Serving two masters
- Surviving the tension



# Selection of Counsel Checklist

- Has insurer agreed to defend the suit?
- Is insurer doing so *without* reservation?
- Is insurer doing so *with* reservation?
- What is the basis of the reservation?
- Does the reservation depend on the outcome of the underlying suit?
- What facts will be adjudicated?
- Are the selected lawyer's rates reasonable?
- Does the policy have a panel counsel provision requiring selection of certain lawyers only?



# Settlement of Claims

## When do settlement issues arise?

- When carrier controls settlement or defense
- When carrier has reserved rights
- When plaintiff demands settlement within policy limits
- When claims are potentially covered
- When settlement demand is reasonable





# Settlement of Claims: Stowers & Statutory Bad Faith

- Stowers
  - Core Requirements:
    - Reasonable
    - Within Policy Limits
    - Within Scope of Coverage
  - Supplemental Requirements:
    - Offers full release
    - Unconditional
    - Reasonable deadline
  - If Stowers triggered, limits lifted
- Texas Statutory Bad Faith



# Settlement of Claims: A Practical Approach in Making Insurers Pay

- Early notification
- Frequent communication about underlying case
- Early assessment of coverage
- Early communication about coverage
- Utilizing defense counsel
- Utilizing coverage counsel
- Assessing settlement from a business perspective
- Utilize the Broker and their relationships



# Questions?

