



THE IN-HOUSE ATTORNEY'S GUIDE TO INSURANCE

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ACC Association of
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TIP #1: UNDERSTAND THE BASICS

FIRST-PARTY VS. THIRD-PARTY INSURANCE

First-Party Insurance: Covers loss or damage sustained by the insured.

Third-Party Insurance: Covers an insured for claims or suits by third parties alleging that they suffered injury caused by the insured or for which the insured is otherwise responsible.

- **Some policies, often referred to as “package” policies, combine first-party and third-party coverages.**

TIP #1: UNDERSTAND THE BASICS

THE RULES OF CONSTRUCTION

Generally viewed as contracts of adhesion

All terms are to be given meaning and effect, rendering no term superfluous

Exclusions are construed narrowly

Exclusions do not apply unless they are clear, unmistakable, and unambiguous

Ambiguous drafting construed against drafter/insurer

TIP #1: UNDERSTAND THE BASICS OCCURRENCE VS. CLAIMS-MADE POLICIES

- An *occurrence* policy covers the insured's liability for injuries or damage that happens during the policy regardless of when the claim or suit is asserted against the insured.
- A *claims-made* policy “limits coverage to claims made against the insured during the policy period. Coverage does not depend on when the ‘actual or alleged negligent act, error or omission’ occurs ... The event that triggers ... [coverage] is transmission of notice of the claim.”



TIP #2: DO NOT OVERLOOK ANY SOURCES OF COVERAGE

- Check all potentially applicable policies
 - Different lines of coverage
 - Different policy periods
 - Named insured and additional insured status
- Check all contracts and indemnity agreements
- Certificates of Insurance

TIP: Always get the full policy when being named as an additional insured

TIP: Give thought to which insurance is primary

TIP #3: PROVIDE TIMELY NOTICE

- **When notice is required**
 - Generally, as soon as is practicable once you are aware of a loss, suit, or claim
 - Some policies impose stricter reporting deadlines, so review your policies carefully
 - Claims-made and reported policies
 - Crime and Cyber policies
 - Notice of Circumstances (i.e., notice of anticipated claims)
 - Review policies to determine when claims must be noticed or reported

TIP #3: PROVIDE TIMELY NOTICE

- **How to give notice**
 - Follow requirements in policy strictly
 - Insurance brokers often will assist
- **What happens if there is not “timely” notice?**
 - Prejudice requirement often applies, but not always
 - Result depends on jurisdiction
 - Insurer may dispute coverage for pre-notice costs and expenses
- **Concerns re increased premiums**

TIP #4: EVALUATE THE INSURER'S RESPONSE

- **Potential insurer responses**
 - Accepting coverage unequivocally
 - Accepting coverage under a reservation of rights
 - Denial of coverage
- **Understanding the Burden of Proof**
 - Insureds generally bear the burden of proving a claim falls within the policy's coverage grant
 - Conversely, insurers bear burden of proof on exclusions and other coverage limitations
 - Ambiguities in policy language generally resolved in favor of insured

TIP #4: EVALUATE THE INSURER'S RESPONSE

- **When to respond to an adverse coverage position**
 - Strategic considerations
 - Respond now or later?
 - Deferred response generally does not waive rights
 - Negotiations and mediations as option
 - Careful re deadlines to file suit or commence arbitration
 - Statutes of limitations
 - Contractual limitations provisions

TIP #5: UNDERSTANDING THE RESERVATION OF RIGHTS

- Significance of reservation of rights
- Reservations may trigger right to independent (or “*Cumis*”) defense counsel
 - Test varies by jurisdiction
 - California: reservation of rights coupled with control of issue affecting coverage dispute

TIP: Carefully review reservations to determine rights

TIP #5: UNDERSTANDING THE RESERVATION OF RIGHTS

- The insured's role in the appointment of independent defense counsel
- Disputes regarding independent counsel's hourly rates
 - Factors differ from state to state
 - Cal. Civil Code § 2860: Insurer must pay rates which it actually pays in the defense of "similar" actions in the "community" where action is pending or claim arose
- Understand your rights and your options

TIP #6: STRIVE TO COMPLY WITH POLICY CONDITIONS

- **Notice and reporting requirements are the first—but not the only—policy conditions**
- **First-party insurance conditions**
 - Proof of loss requirement
 - Examinations under oath
 - Deadlines to sue
- **Third-party insurance conditions**
 - Cooperation
 - Consent
 - Deadlines to sue



TIP #6: STRIVE TO COMPLY WITH POLICY CONDITIONS

- **Consequences of failure to comply strictly with policy conditions**
 - Non-compliance may be excused
 - Waiver and estoppel doctrines
 - Substantial compliance may suffice
 - Prejudice requirement may limit insurer's ability to enforce

TIP #7: HOLD INSURERS TO THEIR OBLIGATIONS

- **The duty to pay first-party claims**
 - Must pay undisputed sums
 - Cannot condition payment on broader release
 - Coverage limitations are strictly construed
 - Exclusions
 - Sublimits
 - Deductibles
 - Role of experts, consultants, and counsel in the claims and adjustment process

TIP #7: HOLD INSURERS TO THEIR OBLIGATIONS

- **The liability insurer's duty to defend**
 - “Potential for coverage” standard
 - Complaint plus extrinsic evidence
 - Understanding the scope of the duty to defend
 - Duty is immediate and complete
 - Selection and retention of defense counsel
 - Control of defense
 - Hourly rates
 - Includes all reasonable and necessary “defense costs”
 - Duty to defend vs. duty to pay defense costs

TIP #7: HOLD INSURERS TO THEIR OBLIGATIONS

- **The liability insurer's duty to settle**
 - Obligation to attempt to resolve potentially covered claims to avoid risk to insured
 - As a general matter, dispute over coverage is not ground for insurer to refuse to fund settlement
 - Allocation of settlement payments
 - Larger settlement rule
 - Consider allocation issues when drafting settlement agreements
 - Caution re consent for settlements
 - Scrutinize requests for contribution

TIP #8 : SCRUTINIZE ADVERSE COVERAGE POSITIONS

- COVID-19 Coverage
- Wage and Hour Coverage
- Fraud
- Coverage for Subpoenas and Government Investigations
- Defamation

Warning: Must keep tabs on all deadlines to file suit or commence arbitration proceedings.

POLICYHOLDER MAXIMS

Before a Claim

- Know the risks and READ THE POLICY
- Review the application carefully and answer truthfully
- Pay attention to notice provisions, time to file a claim, deductibles
- Consult with a broker
- Purchase adequate limits
- Cross-check contractual requirements regarding insurance
- Read the sample policy and any proposed endorsements

After a Claim

- Consider all possible insurance coverage
- Read all policies
- Provide proper notice under all potentially applicable policies
- Consider pushing back on anything less than a full acceptance of the claim
- Make no offers or concessions without first confirming coverage and insurer's position
- When in doubt, consult coverage counsel

QUESTIONS?



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