Have Reservations? 10 Tips for Coverage Position Letters

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The overall premise of a Reservation of Rights letter is straight forward — a letter advising of coverage issues that may result in a denial of coverage. There are however many ways that a letter can fall short of its intended purpose. In some jurisdictions, a minor technicality can render an entire Reservation of Rights defective and waive all coverage defenses. Even absent such draconian consequences, minor inconsistencies in the preparation of a Reservation of Rights letter can compromise the coverage position.

Outlined below are 10 tips for preparing Reservation of Rights letters.

1. Know What kind of Coverage Position Letter You are Writing

There are actually four categories of Coverage Position Letters (CPL) that deal with the preservation of coverage defenses. The most common is the Reservation of Rights, which identifies potential coverage defenses pending further investigation or other activity. This letter identifies coverage defenses, but does not disclaim coverage altogether. As such, the recipient of a Reservation of Rights letter is not excused from all of the conditions of the policy. On a first party basis, the letter identifies coverage defenses pending further investigation into the claim. On a third party basis, the letter identifies coverage defense while agreeing to either retain or reimburse defense counsel, or investigate the claim, pending clarification of coverage issues.

A Disclaimer letter advises the insured that there is no coverage for the claim. Generally, it means that the insurer will conduct no further investigation, nor provide a defense. The insured may argue that a disclaimer letter excuses it from complying with any policy conditions, such as forwarding amended pleadings or other new information on a claim. The insurer may be able to maintain the insured's cooperation through a paragraph requesting further cooperation but the risk that the conditions are no longer enforceable should be considered.

A Denial letter is generally a pre-suit letter issued by an insurer to an insured or a claimant advising that at that stage in the claim, the insurer does not consider the insured to be liable and that a pre-suit payment will not be contemplated. Denial letters and Disclaimer letters are terms that are often used interchangeably. Avoid the misconception that a denial of liability excuses the insurer from retaining counsel in the event that a complaint is brought against the insured should the complaint trigger a duty to defend. It is therefore a good practice to avoid using the terms interchangeably as confusion can result.

A Non-Waiver letter is a Reservation of Rights that is executed by the insured. It confirms that the insured is aware of the coverage defenses and consents to the insurer's continued investigation or retention of counsel on its behalf. The letter will often set forth the terms of the relationship between the insurer and the insured pending resolution of the coverage issues. Some jurisdictions require a Non-Waiver letter for an insurer to preserve its coverage defenses.

2. Know the Rules of the Jurisdiction

While the general format of a CPL is fairly standard from insurer to insurer, there are many jurisdictions that have statutory requirements. Many jurisdictions also have common law

requirements for format, content, parties to be noticed and timeliness. Many of these requirements, if not followed, can result in a full waiver of the coverage defenses. As such, it is important to know what laws will govern the content of your CPL. Remember also, that it is not always the state where the letter will be issued, or even the state in which the policy was issued that will determine what state's law will govern.

3. Who Should Send the Letter

The CPL may be issued by the specific insurance company on which the policy at issue is written. It may also be issued by a parent company, a holding company or another corporate entity. It may be issued by a third party administrator, managing general agent, independent adjuster or counsel. What is most important, particularly for those entities sending letters on behalf of another, that it is clear who is sending the letter, and to be consistent in referencing that entity throughout the letter.

Another issue is who will sign the letter. Often, the signature represents the actual author of the letter, but it may also be a manager or specifically designated individual within the entity that sends the letter. It is helpful for the signer to have some familiarity with the matter and to have read the letter in full before executing and sending it.

4. Who Should Receive the Letter

Generally, a CPL is issued to the first named insured on the policy. In some jurisdictions, the claimant must receive a copy depending on the type of claim. Many CPLs will provide for a copy to the agent or broker on the policy. Other parties may receive a copy based upon their status or demand as a putative additional insured, an additionally named insured or a party otherwise satisfying the policy's definition of an insured.

Often a CPL letter will be addressed to counsel. A good rule of thumb is that if a tender is received from counsel, then the responding CPL maybe addressed to that attorney, whereas if an attorney is merely identified in the file, then the CPL should be addressed to the named insured with a copy or a separate addressee line to the attorney. If the letter is addressed specifically to counsel, it is a good idea to note in the beginning of the letter that it is addressed to that attorney as he or she is understood to be counsel for the insured and requesting that the author be notified if that is not the case.

5. Scope of Coverage Defenses

Some CPLs will note only that coverage issues exist, though whether these general letters preserve coverage defenses should be carefully evaluated. On the other end, some letters will identify every potential coverage defense, even where some are not likely to be at issue. In this regard, the preferences of the insurer, as well as the law of the controlling jurisdiction are the best guide in determining the manner in which the coverage defenses are raised. One principal is clear, though, the purpose of the CPL is to inform the insured of the coverage issues thus the coverage defenses should be clearly identified in as plain language as possible

6. How to Incorporate Policy Terms

There are three schools of thought on how to incorporate policy terms into a CPL letter. One, every term and associated definition should be set forth in full in body of the letter. Two, policy terms and conditions, particularly lengthy ones, should be set forth in a separate addendum or at the end of the letter. Three, policy terms need not be expressly reproduced, but may be incorporated by reference.

Very few jurisdictions mandate that one or another of these approaches be used. Usually, the requirement is only that the recipient of the letter should be fairly apprised of the coverage defenses and the policy provisions that give rise to them. In all approaches, consistency is important.

7. Summarizing the Complaint or the Claim

A CPL should have some kind of identification of the claim or the pleading that it is referencing. Most letters contain a summary of the claim to provide the reader with a context for the terms of

the letter. The amount of detail of a summary is up to the author, however a letter should always note that the claim is an allegation against the insured and that the letter should not be construed as an admission of any of the facts and circumstances set forth in the claim or pleading. Some letters will emphasize this in layman's terms in advance of the summary, so the recipient is not led to believe that the author is endorsing or giving any credence to the allegations. This can avoid an unnecessary pushback letter, where the recipient misses sight of the coverage defenses and instead contests the specific content of the claims.

8. Consistent Terminology

While CPL letters will often follow a standardized format, the author should review the letter to ensure that a form field is not inconsistent with the terms of the letter. A common example of this is where "date of occurrence" is a field in the Re: section of the letter, and then the letter goes on to challenge whether the claim constitutes an "occurrence" under the definition of that term in the policy.

It is difficult to anticipate every manner in which an inconsistency can arise in a CPL, what is important is to be consistent. If references are mixed throughout the letter, it can be confusing to the reader. Nearly all inconsistencies can be caught and fixed simply by carefully reading the letter all the way from the letterhead down to the last cc: prior to sending.

9. Multiple claims/Policies

Sometimes a CPL must address multiple claims on a single policy, or multiple policies potentially responding to a single claim. The author should consider whether it is more effective to reference all of the issues in one letter, or break it out into multiple letters. The goal is to preserve all coverage defenses in a manner that most effectively communicates them to the reader. In this regard, a one-size-fits-all approach is not always the most effective. Sometimes the author can try both methods, and see which one best preserves the defenses to a reader who is unfamiliar with the topic. This can add time, but ultimately can save confusion to the recipient.

10. Timing

Timing is the most critical issue in virtually every CPL letter. This is not to say that a letter issued months or even years after a claim is not valid and proper. Circumstances in the investigation or litigation of a claim may not reveal a coverage defense until well after the claim is reported. On the other hand, a coverage defense may be apparent to an insurer immediately upon tender. What is common among all CPL letters is to be aware of the timing requirements for the jurisdiction involved. Timing is without question the number one ground for waiving a coverage defense. It is important for the author of a CPL letter to be aware of all of the timing requirements that can apply to your letter. As a default, however, being reasonably prompt is always the next best thing.

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