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Is the "Never Pay Policy" Making a Comeback? How to Fight It – Part III

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"In your policy it states quite clearly that no claim that you make will be paid. You unfortunately plucked for our Never-Pay Policy, which if you never claim is very worthwhile - but, uh, you had to claim - and there it is."

-Mr. Devious to Reverend Morrison about the letter from the insurance company refusing to pay the Reverend's claim for damage to his car that was hit by a lorry while standing in a garage. Monty Python and the Flying Circus, *circa* 1971.

The first article in this series discussed the apparent comeback -- based on my admittedly subjective observations -- of the proverbial "never pay policy," or the practice of insurers in taking aggressive coverage positions and reserving rights and denying claims. If these observations are correct, the negative effects on businesses, claimants, and, ultimately, society, are readily apparent.

The second article of this series discussed some basic steps businesses and individuals can take to fight the return of the "never pay policy." This article will go further and discuss what to expect in the event of a claim, how to tell if an insurer is acting like a "never pay" carrier, and some of the things an insured can do about it.

1. If you have a claim, or an event that may give rise to a claim, report it promptly. If an event happens that may give rise to a claim, *notify* the carrier. If there is a lawsuit, *notify* the carrier. In order to avoid disputes, provide notice in writing and keep a copy.

As noted in the second article, you should have access to a copy of the policy. *Review* the policy for the notice requirements and comply with the requirements.

Insureds often provide notice to their agent or broker. If you provide notice through the broker, make sure that the broker confirms in writing that no further notice is necessary. Then demand that the *carrier* confirm in writing that no further notice is necessary. Why? Because even when carriers *receive* notice from a broker, they will sometimes claim that notice to a broker is not in technical compliance with the policy.

Why the concern? Because *insurers claim late notice all the time.* Many insurers seem to raise late notice as a defense simply as a matter of course, regardless of whether the notice was really late or regardless of whether they were prejudiced by the claimed late notice.

Sometimes, carriers are successful in avoiding coverage on this ground. In an ideal world, insureds can cut off this issue by giving notice that cannot be challenged, and, importantly, *documenting* that they have given notice.

2. Until the carrier performs, be weary and very careful. The notice issue points out an unfortunate reality in the "never pay" era: *Do not assume your insurer is on your side.* Remember that the claims adjuster assigned to handling the claim will also be looking for coverage issues to raise.

Particularly in liability claims, there is an inherent conflict of interest (or, at the very least, a strong potential conflict of interest) in a claims adjuster handling a claim and also looking at coverage issues. In handling a first party property damage claim, for instance, a claims adjuster is *supposed* to be making sure that the insured is protected, that temporary assistance (such as temporary housing, a rental car, etc.) is provided, and that the insured's life or business is put back together as soon as possible.

In a liability claim, the adjuster is *supposed* to be making sure that the incident is properly investigated, and that a lawyer is promptly appointed to defend the insured. Ultimately, it is the duty of the insurer to make all reasonable efforts to resolve the claim within policy limits. The claims adjuster will typically be privy to privileged information, including confidential reports and evaluations of defense counsel, some of the most sensitive information generated in defending a lawsuit.

Obviously, if an adjuster is looking for ways to deny or limit coverage, it runs counter to the insurer's fundamental obligations in either a property damage or liability claim. In some instances (but usually only coverage issues are squarely in play), the insurer will adopt a "Chinese Wall," meaning that there will be separate adjusters appointed for handling the underlying claim and the coverage issue. Theoretically, at least, the adjusters will not be able to communicate with each other which should prevent the use of confidential information to deny coverage.

In most cases, unfortunately, the carrier will not adopt a "Chinese Wall." For this reason, there is *always* the potential of a conflict of interest. Accordingly, until the insurer performs, be very careful.

3. Cooperate with the insurer. While an insured must be weary, it must also cooperate with the carrier. Almost all policies have a "cooperation clause," which provides that the insured must cooperate with the carrier in defending a claim. If the insured does not cooperate, the insurer may raise breach of the cooperation clause as a defense to coverage, and sometimes courts will deny coverage on this basis.

It may seem odd, to say the least, to be weary and to cooperate at the same time. Nevertheless, this is the line an insured must walk, particularly in the "never pay" era.

4. What to expect if you submit a claim.

a. An Acknowledgement letter. Within a few days to a week after the claim is reported, the insured should receive an acknowledgment letter. This letter should confirm that the claim has been received and that the carrier is working on it. The letter should also provide the name of a claims adjuster and a claim number. Future communications should be addressed to this adjuster and should reference the claim number. The acknowledgment letter may say that the insurance company reserves its rights pending further review and investigation of the claim.

If you do not receive an acknowledgment letter within 10 days, it is a cause for concern. Check with your broker and consider sending further notice. If you send additional notice, be sure to reference the prior notice.

If the initial acknowledgement letter states that the insurer is generally reserving its rights, it is generally not a cause for great concern, as it is typically contained in the form used for such letters. If specific issues regarding coverage are raised, the acknowledgment should be treated as a reservation of rights letter, discussed below.

b. A Reservation of rights letter. An insurer may later provide a more detailed letter that is called a "reservation of rights" letter. As noted above, some acknowledgment letters should be treated as a reservation of rights letter. In this letter, the carrier will (1) set forth the facts of the claim, (2) quote policy provisions that may be applicable; and (3) will tell the insured what it plans to do. These letters are typically at least 3-4 pages long, and, in some instances, much longer.

In many instances involving liability claims, the insurer will say that it will "provide a defense," but that it reserves all rights to withdraw the defense and not pay the claim. What this means in ordinary terms is that the carrier, for the time being,

will appoint and pay for a lawyer to defend the insured, but may cut off the defense at a later date. The insurer may also refuse to pay for any settlement or judgment (the indemnity obligation).

If you get a reservation of rights letter, it is a cause for concern. If the claim is at all significant (meaning that it is a claim that would be a burden to handle without insurance), it is time to consult with an insurance coverage lawyer.

In this regard, a few words should be said about the lawyer appointed by the insurance company to defend the underlying liability claim. This lawyer will, in most instances, be chosen by the carrier and will be paid directly by the carrier.

There is again the potential for a conflict of interest between the insurance carrier and the insured regarding the defense lawyer. Unlike the claims adjusting process (at least absent a "Chinese Wall"), however, there are some checks and balances on this potential issue. It is clear under Georgia law that any lawyer appointed by the carrier is the *insured's* lawyer. The lawyer owes all professional obligations to the insured, despite being paid by the insurer.

In this day and age, *most* "insurance defense" lawyers understand that they owe their primary obligations to the insured and will not cross the line. The lawyer appointed by the insurance company and defending the case cannot get involved in the coverage determination, either for the carrier or for the insured. If an insurance defense lawyer crosses this line and appears to be wading into the coverage issues, particularly on behalf of the carrier, it is a cause for great concern and the insured should consult with coverage counsel immediately.

Whether there appears to be a coverage issue or not, insureds should insist on being copied on all communications from the lawyer to the carrier, including any regular reports on the case. This demand will not only help the insured stay informed, it will help make sure that defense counsel sticks to its primary obligations.

c. A denial or declination letter. A denial or declination letter that means that, so far as the insurer is concerned, it is not going to pay the claim, or even defend a liability claim. A denial letter looks much like a reservation of rights letter: It typically summarizes the facts, and quotes provisions of the policy at length. The letter states, however, that the insurer is not going to provide a defense or pay the claim.

If an insured gets a denial letter, it should immediately consult with a coverage lawyer if it has not already done so. If there is a liability claim, the insured must also make sure that any litigation is answered and otherwise defended.

If there is a denial, the insured has essentially three courses of action: (1) the insured can accept the denial and deal with the claim itself; (2) the insured can

respond to the letter with additional information or analysis and urge the carrier to reconsider its position; or (3) the insured can institute litigation against the insurer.

d. A declaratory judgment action. Sometimes, almost always involving a liability claim, a carrier will file a "declaratory judgment action" action against its insured. In a declaratory judgment action, an insured claims to be "uncertain" of its duties and asks a court to determine if it must defend a lawsuit and pay a claim. Often, the insurer will continue to defend the underlying claim under a "reservation of rights" pending the result in the declaratory judgment action.

A declaratory judgment action may sound innocuous, but do not be misled. This is a *lawsuit* in which the carrier is seeking the court's blessing to deny a claim. It requires the insured to engage coverage counsel at the insured's expense to defend the claim, and possibly to assert counterclaims.

In many situations, an insurer filing a declaratory judgment action has already determined in its mind that there is no coverage, and is looking for the court to approve its determination. In other situations, the insurer may legitimately be unsure of its obligations. In other situations, an insurer may have determined that there probably is coverage, but perhaps its adjuster acted too aggressively. In such a situation, a declaratory judgment action may be used, ironically, to avoid or defend a claim that the insurer acted in bad faith.

This is a matter of opinion, but in my view, declaratory judgment actions are also sometimes also used as a weapon to conduct economic warfare on the insured. Carriers know that many insureds lack the resources to defend a lawsuit (ironically, that is *why* they purchased insurance), or that defending a declaratory judgment action will be a large financial burden. What the carrier may well be aiming for is capitulation or a settlement under which it lives up to less than its full obligations.

If a declaratory judgment action is filed, an insured has little choice but to hire a coverage attorney and defend the claim. This is simply the reality in the "never pay" era.

Conclusion. This article has covered some more of the steps you should take to fight the "never pay" policy. The next article will cover how to find a coverage attorney, and some of the legal steps that can be taken to fight the "never pay" policy.

pursuant to written engagements. Legal issues require the consideration of your particular circumstances and the law in your jurisdiction. Consult competent counsel in your jurisdiction for legal advice about your particular circumstances.