

Northeast Ohio RIMS Chapter Meeting
November 9, 2010
(8:00 am – 9:00 am)

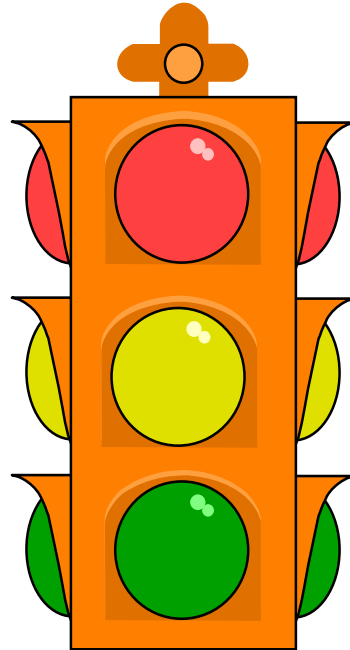
Ultrafine Print: How to Read an Insurance Policy

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Overview

- Basics of Insurance
- Insurance Company and Policyholder
- Other Interested Parties
- Reading and Interpreting an Insurance Policy
- Legal Issues

How to Read an Insurance Policy **Warning!**



**Insurance policies are not
written in plain language!**

Words Don't Matter (?)

**“I don't care what the words in the policy say,...
Policy language is pretty irrelevant, but I'm
curious about how a policy will respond.”**

Princeton was recently sued and it was clear the defense costs were going to exceed policy limits. The school's insurance company denied the claim, even though it was clear—from the company's own marketing materials—that the company supplied coverage for the risk,

**“The bottom line is will the policy be there
in the worst case?”**

Peter G. McDonough, General Counsel, Princeton University, *National Underwriter Online News Service*, Sept. 24, 2010.

Rule

- **Insurance *Lore***
- **Not Just Insurance *Law***

(e.g. law on “Insured v. Insured”)

Advertisement

Risk: There are multiple claim situations that could pit insureds against each other in court, such as when various board members disagree on policy matters. Hence, excluding any claim made by one of the policy's insureds against another leaves a not-for-profit defendant susceptible to serious losses.

Solution: Not-for-Profit Protector eliminates the industry-standard "insured versus insured" exclusion, instead omitting coverage only in the exceedingly rare event that a claim is made by the organization against an individual insured (a situation in which a not-for-profit would probably not want coverage to apply anyway).

When a Claim Comes in, You Get the Call.



People want an answer quickly.

First Step



Familiarize Yourself Ahead of Time
Where Are The Relevant Provisions?

Insurance Policy

- Policyholder and the insurance company.
- Promises triggered when certain events occur:
 - Theft under a crime policy
 - Fire under a property policy
 - A breach of duty under a D&O policy, etc.

Example: Grouping Together Related Claims

- Definition of **Claim**
- Definition of **Loss**
- Definition of **Related Claims**
- Definition of **Interrelated Wrongful Act**
- Definition of **Occurrence**
- Batch Clause
- Provisions relating to limits and deductibles.
- Provisions relating to trigger and notice

Why Buy Insurance

- Financial Protection
- Risk expertise of insurance company:
 - E.g., defense in foreign forum; kidnap ransom perils, etc.
- Statutory Requirement
- Service Agreement/Contract requirement
- Cash Flow/Investments
- 5% Pretax Profit Rule of Thumb
- Opportunistic Breach

Who Are The Interested Parties

- Named Insured
- Additional Insureds
- Those indemnified (family members, estates too?)
- Insurance company
- Reinsurance company
- Excess insurance company
- Captive insurance company
- Broker

Who Interprets the Policy?

- Policyholder?
- Underwriter?
- Broker?
- Insurance Claims Supervisor
- Insurance Company Lawyer
- Policyholder Lawyer
- Courts – Judges are Human Beings

Insurance Policies Are Different

- Do Policies Mean What They Say?
- Rules of Construction
 - Reasonable Construction
- Exclusions & Exceptions
- Burdens of Proof
- Imbued with Public Interest

Key Parts of An Insurance Policy

- Declarations Page
- Insuring Agreement
- Exclusions
 - Exceptions to Exclusions
- Conditions
- Definitions
- Endorsements
- Who Is an Insured
- Limits of Insurance

Declarations

Identifies Key Information

- Name Insured and Address
- Limits
- Policy Term or Period
- Retroactive Date (If Applicable)
- Business Description
- Lists Endorsements?
- Policy
- Renewal Information
- Schedules of Locations?

Insuring Agreement

- Grants Coverage
- Sets Parameters For Coverage
- Bodily Injury and Property Damage
- Wrongful Act
- Loss or damage to insured property
- Outlines Defense Obligation

Exclusions

- Expected or Intended – Consequences vs. Act
- Contractual Liability (sometimes)
 - Tort and Contract
- Professional services (sometimes)
- Pollution (sometimes)
- Fraud, Intentional Acts
 - In-Fact, final adjudication

Who Is An Insured

- Corporate entity, association, governmental authority
- Individuals
- Owners
- Executive Officers/Directors
- Tort victim, bankruptcy trustee, FDIC, creditors?
- Are the “insureds” interested? Are they paying?

Limits Of Insurance

- Tells How Limits Apply
- Per Occurrence or Claim
- Aggregates
- Products vs. Non-Products
- Defense Erodes Limit?
- Retentions or deductibles

Conditions

- Claim/Occurrence Notification
- Legal Action Against The Insurance Company
- Cooperation (approach)
- Proof of Loss (timing)
- Representations
- Subrogation Rights

Definitions

- Occurrence
- Loss
- Personal Injury vs. Bodily injury
- Property Damage
- Coverage Territory
- Computer Virus
- Wrongful Act

Occurrence

- Occurrence is “like a pretzel.”
- Occurrence is always ambiguous.¹
- Occurrence v. Trigger
- “Claims-made” Policy

1. The First Circuit has noted that “occurrence” is a “malleable word.” *Commercial Union Ins. v. Swiss Reins.*, 413 F.3d 121, 128 (1st Cir. 2005)(applying New York and Massachusetts law).

Bodily Injury

- What constitutes bodily injury?⁴
 - Bodily injury defined in policy as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” *Id.* at 491. Court held that *biological* injury was bodily injury. *Id.* at 493.

4. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487 (Tex. 2008).

Personal Injury

- Policies that cover personal injury are distinct from those covering bodily injury; i.e. coverage for personal injury is triggered by one of the offenses listed in the policy.⁵
 - Issue was whether distributing students personal information resulted in an invasion of privacy that constituted a personal injury under the policy. Court held that it was.

5. *State Farm Fire & Cas. Co. v. Nat'l Research Center for College and University Admissions*, 445 F.3d 1100 (8th Cir. 2006).

Endorsements

- Add Coverage
- Delete Coverage
- Modify Coverage
- Annotate Your Policy

Annotating Your Policy

- Start with Endorsement 1
- See what provisions it replaces, edits, or supplements
- Make an appropriate note at that provision.
- Repeat for every amendment.



Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a side-track agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

★ COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY ← End. 20

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit seeking those damages". However, we will have no duty to defend the insured against any "suit seeking damages for "personal and advertising injury"" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

Def. 18
Pg. 15

Def. 14
Pg. 14

Note:
Excl. i
& its
exception

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

Other Exclusions

- ① Asbestos Endt. 7
- ② Lead Endt. 8
- ③ Prof. Liability Endt. 10
- ④ Abs. Pollution Endt. 11
- ⑤ Emp. Related Practices Endt. 15
- ⑥ Nuclear Energy Liability Endt. 21

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
- Entt. 12 a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - Entt. 13/b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - Entt. 14 c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
- Entt. 5 a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
 - Entt. 9 (a) "Bodily injury" or "personal and advertising injury":
 - (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

- (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
 - (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
 - (d) Arising out of his or her providing or failing to provide professional health care services.
- (2) "Property damage" to property:
- (a) Owned, occupied or used by,
 - (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
- c. Any person or organization having proper temporary custody of your property if you die, but only:
- (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
- d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:
- a. "Bodily injury" to a co-"employee" of the person driving the equipment; or
 - b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.

You're Done

1. Shouldn't take long.
2. Often done only once.



Applications

- Part of Policy
- Representations Upon Which Insurance Company Relies
- Can Be Used To Void Coverage
- Broad Answers
- Rarely Helpful

Application Question

- Question: Please describe all written contracts where the company has assumed liability.
- Answer: The company as part of its ongoing business frequently enters into contracts and leases where it assumes the liability of others.

Defense

- Defense Promise
- Conflicts Counsel
- Tripartite Relationship
- Right to Independent Counsel
- “Cumis Counsel” - Cal. Civil Code § 2860(a) requires insurance company to pay for independent counsel if conflict of interest arises.
- Texas – *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004);

WHAT SHOULD POLICYHOLDERS DO?

- 1. READ - Know What You Are Buying**
- 2. Work with a great Insurance Broker**
- 3. Be Aggressive and Extra-Contractual**
- 4. Obtain and Review policies when purchased**
- 5. Review Existing Claims at Renewal**
- 6. Pursue Bad Faith Claims Where Appropriate**
- 7. Don't Take No for an Answer**

THANK YOU

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