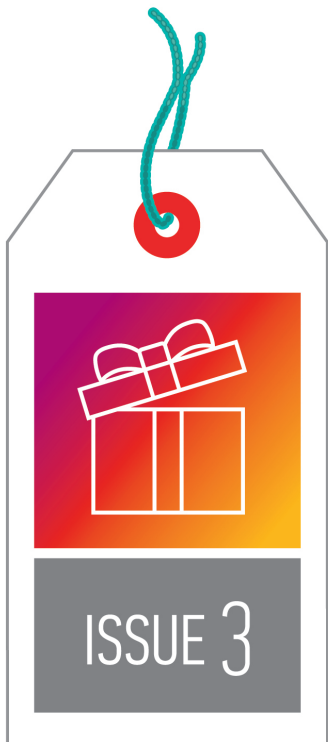


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November 18, 2022

This Year Don't Let the Grinch Steal Your Insurance



Forfeiting insurance coverage on a covered claim is a quick way to ruin the holidays.

Every year, tens of thousands of covered claims are left unpaid due to clerical mistakes by policyholders or their brokers. These unpaid claims are not a matter of legal interpretation (e.g., "does the 'flood exclusion' preclude

coverage for windstorm damage?" or "is my insurer obligated to defend me in copyright litigation?").

Rather, we are addressing a far-too-common situation in which an insurer—playing the Grinch as usual—weasels out of paying on an *undoubtedly* covered claim purely because of an administrative error by the policyholder or its broker. These can result from a late notice, failing to include a building on a schedule of locations, or missing a proof of loss deadline.

And before you stop reading, comfortable like a warm blanket that this could never happen to you, be aware that even the smartest elves can forfeit coverage on a covered claim. Just last month, *The New York Times* reported that Harvard University, a pretty good school near Boston, after having received \$25 million in coverage from its primary insurer for defense costs in a class-action lawsuit, may have forfeited an additional \$15 million in coverage from its excess insurer. This occurred because the university failed to provide the excess insurer timely notice of the lawsuit. Put down the eggnog and read that again slowly: the primary insurer was paying *for years* on a covered claim, but the excess insurer—with the exact same policy language—can escape its crystal-clear coverage obligation because someone did not copy the excess insurer on a notice letter. The mistake is simple, and the ramifications are huge. Trust us; there is no quicker way to get on the Naughty List!

Four Steps for Coverage

So, this holiday season, we suggest you give your company (and yourself) a gift by following these four easy steps to avoid forfeiting potentially millions of dollars of insurance coverage—coverage you and your company have already purchased—for covered claims:

1. Copy and paste the notice provisions in all company policies into a single document and share that document with the relevant people in the legal department. Someone unfamiliar with an insurance policy can get lost looking for the notice provisions, given that most policies are at least 40 or 50 pages long. Putting the operative language on a single sheet makes it far more likely that company employees will appreciate and understand it. Please note whether each policy provides coverage on an "occurrence" basis or a "claims made and reported" basis. While it is likely that a company's general liability policy is occurrence based and requires notice of an "occurrence, offense, claim or suit" "as soon as practicable" (which generally means prompt under the circumstances), a company's professional liability, directors and officers liability, employment practices liability, cyber, and errors and omissions policies are very likely "claims made and reported" policies. This means coverage under these policies is only available if the claim—a demand letter, a lawsuit, or sometimes a subpoena—is first received by the company and notice is provided to the insurer *during* the policy period (or shortly thereafter). Many state courts interpret these reporting provisions strictly. A common issue our clients confront is that a demand letter is received in year one, but it does not evolve into a lawsuit until year two. In those situations, a client often provides notice in year two, and the insurer denies coverage because the demand letter from year one arguably qualified as a claim that the insured should have reported in year one. Ouch!
2. Compile a list of all lawsuits, demand letters, and subpoenas served on the company this past year and confirm that notice has been provided to the appropriate insurers. We realize that this list could run into the thousands for our larger clients, and we assume a tracking system is already in place. In our experience, the decision to provide notice is made at the outset and often by junior members of the legal or finance teams. However, lawsuits can evolve over time, and initial determinations regarding potential loss can be inaccurate. Several years ago, a sophisticated financial services client assigned a junior paralegal in the law department to review every incoming suit. The paralegal reviewed a complaint in which the

amount at issue appeared minimal and determined notice under the company's E&O policy was unnecessary because of a sizable retention. Unfortunately, the suit was a class action and while the damages claimed by the named plaintiff were minimal, the size of the potential class made the exposure huge. This error was discovered well after the end of the policy period of the claims-made-and-reported E&O policy in effect when the lawsuit was first received by the company. No fun! It's far better to err on the side of reporting claims and potential claims to your insurer, even if you think the claims are meritless, won't exceed the retention or deductible, or aren't covered under your policy language.

3. Pull the schedule of locations from your company's property policy and confirm that all locations are listed. While larger property programs often include "unintentional errors or omissions" and "newly acquired property" endorsements, which provide coverage for locations accidentally left off a list of covered locations or for buildings purchased after the policy begins, this coverage can be limited. Nothing feels more like finding a lump of coal in your stocking than realizing after a major loss that the damaged building was left off the schedule of locations. This happens more often than expected, but it's easy to avoid with a review of the schedule of locations.
4. Check all of the definitions of "insured" in your company's policies and confirm they include all of the entities in your company's corporate structure. Definitions of "insured" can vary, and some policies include long lists of related entities as "additional named insureds." In our experience, eyes tend to glaze over when looking at these lists, and confirming their accuracy is often not a very high priority during policy renewal. We recommend taking a beat this holiday season, grabbing a slice of fruitcake, and assigning the right person in the finance department to confirm the accuracy and completeness of your policies' definition and/or list of covered insureds.

We've given you a list; be sure to check it twice! Don't let the Grinch rob you of your insurance coverage because of an avoidable clerical error or administrative oversight. Check your policies, provide timely notice to insurers, and enjoy a safe holiday with your loved ones.

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