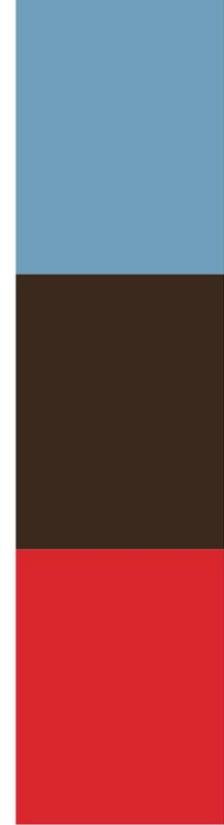


# Minding Your P's and Q's: Primer on Conditions

Jodi Spencer Johnson



*A Legal Professional Association*

- What's the big deal about conditions?

## Claim Initiation

- Notice
- Panel counsel provisions
- Other insurance provisions

# Notice

- Typically primary policies require notice that is “as soon as practicable,” “prompt” or “immediate”
- Generally, notice is required within a reasonable time
- Occurrence v. claims-made policies
- Umbrella/Excess policies
  - May require notice when it appears “reasonably likely” that the claim will reach attachment point

# Insurance Etiquette Lesson 1: Be Timely

The Smiths held a wedding reception for their daughter at their home and was sued by a guest who tripped over a ceramic sculpture of love birds in their yard and injured her neck. The Smiths assumed they had no coverage since their policy contained a Wedding Exclusion (which precludes coverage for expected and intended injuries incurred in connection with weddings), and did not bother notifying their insurer. After attending a seminar on insurance by the Akron Bar Association, the Smiths notified their insurer. Notice was given to an insurer 9 months after the lawsuit was filed. The claim most likely will be:

- A. Fully covered
- B. Denied
- C. Covered, except, perhaps, for costs incurred prior to notice
- D. All of the above

## Notice

- Late notice
  - What is late notice?
  - Consequences
- Practice pointers
  - Provide notice early
  - Notify all insurers with potentially applicable policies
  - Review closely defenses based on notice issues; consult a coverage attorney if necessary

## Selection of Defense Counsel and Panel Counsel Provisions

- Who has the right to choose defense counsel?
  - Policies with no express provision
  - Policies with an express provision

# Selection of Defense Counsel and Panel Counsel Provisions

Pre-authorized defense attorneys for securities claims

Affixed as Appendix A hereto and made part of this D&O Coverage Section is a list of Panel Counsel law firms from which a selection of legal counsel shall be made to conduct the defense of any Securities Claim against an Insured pursuant to the terms set forth in this Clause.

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The list of Panel Counsel firms may be amended from time to time by the Insurer. However, no change shall be made during the Policy Period to the Panel Counsel Firms listed in Appendix A without the consent of the Insured's Representative.

# Other Insurance Provisions

This policy shall apply only as excess over any other valid and collectible insurance which actually pays Loss otherwise covered by this Policy, unless such other valid and collectible insurance is expressly written to be excess over the limit of liability in this policy.

- Has been construed to apply only in actions between or among insurers
- Generally applies among co-insurers during the same period

# Claim Adjustment

- Cooperation
- Examination Under Oath
- No Voluntary Payment/Consent
- Consent to Settle/Hammer Clauses
- Loss Payable/Attachment

# Cooperation

You must cooperate with us in the investigation or settlement of the claim or defense against the suit.

The Insured must cooperate with the Insurer in all matters pertaining to this Coverage Section as stated in its terms and conditions.

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials, and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.

## Cooperation

- Insurers may try to use a violation of this duty as a coverage defense
  - The insurer cannot rely on a violation of a policy condition to deny coverage if it breached the duty to defend or otherwise denied coverage
  - The insurer must prove prejudice

## Examination Under Oath

The insured is required to submit to the examination under oath as a condition to recovering for any loss or damage covered by the policy.

- Looks like a deposition, but the rules of civil procedure and evidence do not apply
- The insured must comply within reason or coverage can be denied
- Multiple EUOs of the insured may be conducted

## Insurance Etiquette Lesson 2: Take the high road

The Smiths' insurer acknowledged the notice letter, but it requested a significant amount of information. The Smiths provided what they could, but the insurer did not defend so the Smiths continued to defend themselves. The Smiths eventually settled the case for \$50,000. The Smiths' primary policy had a \$25,000 limit. The insurer denied coverage based on the Wedding Exclusion and also because the settlement was a voluntary payment to which the insurer didn't consent.

The Smiths:

- A. Should cancel the honeymoon – the romance is over.
- B. Should still recover – who volunteers to give someone \$50,000???
- C. Should still recover – the insurer would have said no anyway.

## No Voluntary Payment/Consent Provisions

The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense...without our consent.

The insured shall not assume or admit liability, make any payment, consent to any judgment, settle any claim...

The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident.

# No Voluntary Payment/Consent Provisions

- How does issue this arise?
  - Pre-tender defense costs
  - Settlements
  - Administrative Consent Agreements
- Key take-aways
  - Are payments in every sense truly voluntary?
  - Prejudice standard applies
  - Cannot be relied upon if the duty to defend has been breached
  - Best practices - keep the insurer notified as to the status and key developments of the case or proceeding, even if the insurer is not defending

## Consent to Settle + “Hammer” Clauses

- “The insurer may make such investigation and negotiation and, with written consent of the insured, such settlement of any claim or suit as the company deems expedient.”
- Some policies add a “hammer” clause that states that if the insured withholds consent, “then the company’s liability for that claim shall not exceed the amount for which the claim would have been settled plus the cost and expenses incurred with the Company’s consent up to the date of such refusal to settle.”
- Other hammer clauses allow the insurer to withdraw its defense if the insured refuses to settle. “The Company shall have no liability for claim expenses accruing thereafter and the Company shall have the right to withdraw from the further defense thereof by tendering control of said defense to the insured.”

## Insurance Etiquette Lesson 3: Be inclusive

The Smiths had an excess policy that provided \$100,000 in limits over the primary policy's \$25,000 limits. After the settlement with the wedding guest for \$50,000 was reached, the Smiths settled with their primary insurer for \$15,000. The Smiths asserted coverage for the remaining portion of the settlement from the excess insurer. The excess insurer denied coverage, arguing that since the underlying primary limits had not been paid, its policy never attached. The Smiths:

- A. Will recover nothing from the excess insurer.
- B. Should be able to recover all but \$15,000 of the settlement with the wedding guest.
- C. Should be able to recover \$25,000 from the excess insurer.
- D. Should get a new coverage attorney.

## Loss Payable/Attachment

Liability under this policy with respect to any occurrence shall not attach unless and until the insured, or the insured's underlying insurers, shall have paid the amount of underlying limits on account of such occurrence.

Liability of the company with respect to any one occurrence shall not attach unless and until the insured, the company on behalf of the insured, or the insured's underlying insurer, has paid the amount of retained limit.

## Loss Payable/Attachment

- Does the policy attach only after the primary limits are actually paid v. liability incurred?
- Does it matter who pays?
- What if there's a gap?

## Claim Dispute Stage

- Contractual Limitations for Filing Suit
- Arbitration and Dispute Resolution
- Action Against the Company

## Insurance Etiquette Lesson 4: Be informed

After the underlying case resolved, the Smiths filed suit against their primary insurer to recover the cost of defense and settlement. The insurer asserted that the suit was barred because it was not filed within 2 years of the loss as required by the policy.

The Smiths' coverage suit will be:

- A. Allowed. The statute of limitations is 8 years for breach of contract.
- B. Allowed. The Smiths weren't told about any limitation on their time to sue, so any such requirement isn't enforceable.
- C. Not Allowed.

## Contractual Limitations for Filing Suit

### Legal Action Against Us

The Insured may not bring any legal action against the Insurer involving loss unless the Insured has complied with all terms of this Coverage Section and unless brought within two (2) years from the date of the loss.

If any limitation in this Condition is prohibited by law, such limitation is amended so as to equal the minimum period of limitation provided by such law.

# Arbitration and Dispute Resolution Provisions

It is hereby understood and agreed that all disputes or differences which may arise under or in connection with this Policy, whether arising before or after termination of this Policy, including any determination of the amount of Loss, must first be submitted to the non-binding mediation process as set forth in this Clause.

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The mediator shall give due consideration to the general principles of the law of the state where the particular Named Entity is incorporated in the construction or interpretation of the provisions of this Policy.

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In the event that such non-binding mediation does not result in a settlement of the subject dispute or difference: (a) either party shall have the right to commence a judicial proceeding; or (b) either party shall have the right, with all other parties' consent, to commence an arbitration proceeding with the AAA that will be submitted to an arbitration panel of three (3) arbitrators...

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The non-binding mediation and arbitration proceeding may be commenced in either New York or the state indicated in Item 1 as the Named Entity's mailing address.

## Action Against the Company

No action shall lie against the Insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy by the Insured, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Insurer.

- This applies to third parties, not the policyholder

Thank you!

