



THE COVERAGE POSITION LETTER

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The role of the third party claims handler is to investigate and based on the information developed objectively resolve all issues of coverage, liability and damages. Every claim handler loves to argue their theory on who is at fault or responsible for the cause of the loss, but maybe not as much as negotiating the final settlement of the damages issue with the claimant or their legal representative. Very few claim handlers will put explaining or debating a coverage position on their list of favorite tasks. Why? Because few claims have coverage issues and most claim handlers are not as familiar and comfortable with writing a reservation of rights or disclaimer letter or explaining their coverage conclusions to the insured or their legal representative. The number of third party claims involving coverage issues is low. On the other hand, certain types of claims such as environmental claims generate numerous potential coverage issues that must be carefully analyzed. The purpose of this article is to review the technical aspects of handling claims with questions of coverage and to give some practical advice on how to avoid some potentially dangerous situations.

TYPES OF COVERAGE POSITION LETTERS

What is a coverage position letter? Any letter in which the claims handler communicates a coverage position to the insured is a coverage position letter. There are three basic types of letters: (1)those letters that tell the insured there is a question of coverage and it is not resolved, (2)those letters that tell the insured there is no coverage and (3)those letters that tell the insured there is no question of coverage.

The purpose of the “reservation of rights” letter is to advise the insured there is a question of coverage and that the coverage issues are under investigation and the carrier is reserving all their rights to disclaim coverage at a later date once the coverage issue has been fully investigated and analyzed. This is a unilateral act on the part of the insurer. Frequently brokers or agents will respond to a carriers’ reservation of rights letter with a reservation of rights letter reserving all the rights of the insured. It is an affirmative act by the carrier to avoid a waiver of a potential coverage disclaimer at a future date. Sounds easy, but if the claims handler is not accustomed to writing detailed coverage position letters it is not an easy task. In many claims, the factual information needed to resolve the coverage issue is not available or the results of the investigation show the issue requires a subjective determination to be resolved. For example, most third party liability policies contain some form of intentional injury exclusion, and to apply the exclusion you need a direct affirmation from the insured that they intended the injury not just the act that caused the injury. It is unlikely the claims handler can get the information needed in a recorded interview with the insured to resolve the coverage issue. In these coverage cases, a reservation of rights will require periodic review and renewal¹. In some jurisdictions if the issue is not resolved in a specific time period, the claims handler may need to file a declaratory judgment action and ask the court to make the determination. Failure to take such action can waive the right of the carrier to assert the coverage defenses at a later time. Place this scenario on top of a demand from the insured to defend a third party suit arising from the loss and you have several difficult decisions to be addressed. Well written and documented communication between the insurer and the insured make addressing these types of difficult claim scenarios easier to manage. You may never be able to resolve a coverage issue short of litigation and it may be necessary to address the issues in a

¹ Some state laws require a coverage position letter be sent within specific time frames. Further, these laws may require specific follow-up within a specific time period and may even lead to an estoppel if certain actions are not taken. Advise of counsel can clarify the laws applicable to the jurisdictions in which the claims handler works.

declaratory judgment action. Miscommunication or missed communication can cloud the true coverage issues to be resolved by the court.

A “non-waiver letter” or sometimes called a “non-waiver agreement” is another method by which the claims handler can advise the insured there is a question of coverage. The non-waiver is a bilateral act as it requires an affirmative agreement (signature) by the insured. Frequently the non-waiver letter contains a specific question or request for information from the insured necessary to address a final coverage determination. What options are available to the claims handler if the insured refuses to sign the non-waiver? The issue of cooperation clause in the policy can be raised as yet another potential coverage issue. If a non-waiver agreement is properly explained to the insured or their representative, there should be little or no disagreement. Technically the insured is in no worst position if they sign a non-waiver as opposed to having received a reservation of rights letter from their carrier. The key to avoiding disputes is understanding the coverage position taken, the applicable policy language and well written clear and concise communications to the insured.

The “disclaimer letter” is a letter designed to tell the insured there is no coverage for a specific loss or specific item of damages under the terms and conditions of the policy issued by the insurer. Disclaimer letters should only be issued after very careful consideration, and in some situations after seeking the advice of counsel. The reasons behind a disclaimer need to be written so the insured can understand the nature and scope of the disclaimer. Many times there are numerous coverage issues and only one issue is resolved to the point that a disclaimer can be issued to the insured. In the disclaimer letter, the reasons for a disclaimer must be separated from the unresolved issues and a reservation of rights incorporated into the disclaimer for those unresolved issues. The key to avoiding disputes is the understanding the coverage position taken, referring to the applicable policy terms, and ensuring you have provided well written communications to the insured.²

CONTENT OF THE COVERAGE POSITION LETTER

There are several areas that need to be addressed in every coverage position letter. A coverage position letter could be defective and expose the insurer exposed to uncovered claims based on a waiver if all necessary issues are not addressed in the letter. Prior to writing the coverage position letter the claims handler must first thoroughly analyze the applicable coverage in light of the known facts and identify all issues for inclusion in the position letter. Remember, in 3 to 5 years you may be asked to testify in a coverage suit thus take good notes and make sure they become a part of your claims file available to refresh your recollection of actions taken.

First, the coverage position letter should contain a brief but accurate description of the “facts” of the loss as they are understood by the claims handler. The description of facts may in certain circumstances include the source of the information being relied upon. For example, stating you are relying upon the statement of an independent witness or facts found in an official report helps to clarify the analysis. This gives the insured the opportunity to correct any misunderstandings as to how the loss occurred. This is an example of the good communications that helps avoid disputes and misunderstandings. Asking the insured to correct any factual misunderstandings helps to narrow the issues and could lead to a final coverage determination.

Secondly, the coverage position letter must identify the specific “policy (ies)” from which the coverage question(s) arise. Identification of the policies should include the basic information that would allow the insured to identify the policy, such as policy number, policy dates and limits. It should refer to any policy endorsements that may be at issue. If there are multiple lines of coverage³ afforded by the carrier, each line

² It is highly recommended that “form” coverage position letters not be utilized. Each coverage position letter should be tailored and address the facts of the specific claim for which it is issued.

³ General Liability, Personal Injury and/or Auto Liability.

of coverage should be acknowledged and if those lines are not being analyzed based on the nature of the loss, then the position letter should indicate that the line does not apply. For example, if a general liability claim is being presented and there is auto coverage or property coverage, it can be simply stated these policies are not being analyzed as they do not apply to the nature of the loss reported. This clarification can avoid disputes and misunderstandings and a potential waiver. If the carrier provided multiple years of coverage the letter should acknowledge those years and confine the coverage position to only those years at issue. For example, if a carrier provided auto insurance to a risk from the year 2000 to 2006, then only the policy in effect at the time of the accident need to be analyzed. On the other hand if a carrier provided General Liability coverage from 1975 to 1995 and the insured was reporting a claim with an injurious exposure aspect, then the coverage position letter needs to spell out the details of all the policies at issue.⁴

The third category the coverage position letter needs to address is the "specific policy provisions" upon which the coverage issues arise. Citing entire sections of the policy may be confusing and unnecessary. For example it is not necessary to cite all the exclusions if only 1 or 2 exclusions are at issue. Just cite those that apply or may apply. However, it is important to cite the entire definition to describe the nature of the coverage issue. For example, if there is an issue over whether a specific claim is a claim for "property Damage" citing the entire definition of property damage may necessary to effectively communicate the nature of the issue. The letter must clarify why there is a coverage issue or no coverage. The letter needs to be precise and comprehensible by the insured. Remember, in 3 to 5 years from the time you write the letter you may be in court to explain just what you intended in the reservation or disclaimer letter you authored. The disclaim letter can be the claim handlers best documentary evidence of good faith claims handling in a potential bad faith case if the letter clearly spells out the facts upon which the coverage position was based. It will also show that you clearly communicated to the insured the policy provisions that are operable to eliminate or minimize the coverage obligation.

OTHER SUGGESTIONS

The coverage position letter should always be addressed to the insured unless you are specifically required to communicate with an insured's legal representative by law. If the insured's interest in the coverage issues is represented by counsel, send a copy of the coverage position letter to counsel. There is no legal obligation for a primary carrier to send a copy of the letter to an excess carrier.⁵

The conclusion of the coverage position letter should inform the insured of their rights to take concerns, questions and/or complaints to the applicable state insurance department. Many state insurance departments have instituted directives that require the insurer to provide the insured the name, address and phone number of the appropriate department or agency to which the insured can address concerns or questions.

The coverage position letter should require the insured or their legal representative to promptly notify the carrier of any incorrect factual information contained in the coverage position letter. Correcting a misstatement may or may not change the coverage position taken by an insurer but it does bring the parties closer to agreement as to how the coverage applies. The letter should also include the carriers contact information for the insured to ask questions. This should include a phone number, a mailing and email address.

⁴ Policies terms during the time frame referenced in the example change substantially and requires multiple policy analysis. The most understandable analysis takes one policy at a time and does not attempt to analyze all policies at one time.

⁵ There is no contractual relationship between the primary carrier and the excess carrier. The excess carrier can obtain a copy of the coverage position letter from the insured or their legal representative.