

CLIENT ADVISORY

Late Claim Reporting - A Crucial Component in Avoiding a Denial

The AmWINS Claims Practice was formed to help with claim advocacy, claim reporting, locating the proper contacts at the insurer, assistance with TPAs and other activities to help improve your claims experience. One of the issues that led to the establishment of this advocacy group was late claim reporting. While there are many valid reasons why claims are reported late, insurers are often not sympathetic, leaving you, as the broker, potentially accountable and subject to an E&O claim. However, there are steps you and your client can take to preserve the rights to recover the proceeds of an insurance policy.

The Problem

Regardless of the reason for missing the deadline, insurers will often look to avoid accepting the claim. Policies, especially claims made policies, specifically state when a claim must be reported to the insurer. It can be within the policy period itself, or extended to up to 90 days after policy expiration. We've seen policies stipulate that, if you don't renew with the same insurer, you don't get any post-policy reporting grace period. The reporting rules in the policy are just as critical as the policy definitions and exclusions.

Depending on the state, you might be able to report claims even after a post-policy reporting period, given the right circumstances. In some states, the deadline is the deadline and the insurer won't have any obligations to "let this one slide in." The insurer might have some discretion depending on the amount of damages being sought.

Jay Rothman Esq. – Marshall Dennehey – General Counsel:

"Most Commercial General Liability and some Errors and Omissions policies require an insured to give notice of a claim or suit to the insurer 'as soon as practicable.' This language is typical in policies that provide occurrence-based coverage. In order to take the position that notice was late, the majority of courts require the insurer to demonstrate that it has suffered prejudice as a result of the late notice. Generally speaking, it is difficult for an insurer to demonstrate prejudice if the claim or suit has not been, for example, concluded, reduced to a judgment that cannot be reopened, if a finding of liability has not been made, or if witnesses have not disappeared. Most states follow the majority 'no prejudice' rule including California, Delaware, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania and Texas. Some states hold that once late notice has been shown, prejudice is presumed, which means the insured must demonstrate that the late notice did not prejudice the insurer. Rebuttable presumption states include, but may not be limited to, Florida, Indiana and Ohio.

"In a minority of states, however, a showing of prejudice is not required, including but not limited to, Georgia, Nevada and Virginia.

"In addition, a prejudice standard does not apply to late notice under claims-made coverages. This is because such policies typically require that a claim be made or first made, and sometime also requires that it be notified within the policy period or a specified period after the policy expires, which appears in the insuring agreement/clause. Issues involving notice under claims made policies therefore involve the court interpreting the language appearing in the insuring agreement/clause. However, if a claims made policy includes a condition requiring notification of a claim as soon as practicable (in addition to 'claims made' or 'claims first made' language), some courts could require the insurer to show prejudice for a late notice defense."

Whose Fault Is It?

It goes without saying that a claim denial letter is not something your client is pleased to see. Even if you did everything right, your client will still be looking at you and asking how you let that happen to them. When a client is one of the parties in the blame game, we know who is right. If the insured sends a claim to you and the wrong types of policies are noticed, the wrong years are noticed, the wrong insurers are noticed or not all insurers are noticed until after the reporting deadline, it's possible that you could have an E&O claim brought against you. There are unfortunate circumstances like a client sending you a claim on the final day before it's due and you or one of your representatives doesn't turn the claim in until after the deadline. Is the late notice your fault? The answer is probably "partly." The last thing any of us need as brokers is a conflict with our clients. It is hard enough to win new business; losing it is no fun.

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To learn more about how AmWINS can help you place coverage for your clients, reach out to your local AmWINS broker or marketing@amwins.com.

If you do not have a contact at AmWINS to help with your casualty risks, [click here for a list of brokers on our website](#).

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Claims Example: Potential Exposure to Insurance Agent for Failure to Notify Excess Carrier

(Below is a claims example, the names have been changed to protect the party's privacy)

A long-time client of an insurance agency has a \$1 million primary claims made E&O policy and a \$2 million excess policy. The excess policy requires notification of any claim made to the primary carrier. The client receives a pre-suit demand letter for \$6 million and believes the claim is meritless. The client provides information concerning the claim, including a letter from outside counsel, in which the lawyer opines that the claim is meritless. After several telephone conversations between the agency and the client over the claim, and other concerns the claim would have on the client's business plans, a joint decision was made to only notify the primary carrier. Nothing is confirmed in writing.

A lawsuit is filed against the client and the primary carrier appoints an attorney to represent the client in the litigation. Three years later, once the case is ready for trial, the client now wants to settle the claim for \$3 million. The client now asks the insurance agency to notify the excess carrier of the claim, which the agency does. The excess carrier denies the claim due to the late notice. The client now makes a claim against the insurance agency for the \$2 million that would have been available from the excess carrier, but for the denial of the claim for late notice notwithstanding the alleged joint decision to notify only the primary carrier. Eventually the client settles the underlying case for \$3 million and files suit against the insurance agency to recover the \$2 million.

Tips for You and Your Client to Reduce the Likelihood of Missing a Claim Reporting Deadline

Melissia Parscale – AmWINS Brokerage of Texas Claims Department:

"You should keep a list of every possible policy that could be applicable to a claim and keep it where you can find it. You should have a list ready before you have a claim so when you are under duress with the claim, you won't panic and miss a policy. It is very important to remember that each and every excess policy will need to get its own notice. If you miss one, it may lead to a denial that prevents the rest of the excess insurers from responding.

"You don't need to sit and wait to hear from the insurer. If there is an assigned TPA, you can reach out to them as soon as you get a claim number to get the claim moving along. If you send notice to the TPA, don't forget to also send the claim notice to the insurer. The TPA likely has no obligation to report the claim to the insurer."

Natalie Dominguez – AmWINS Brokerage of Georgia Claims Department:

"Make sure that your insured knows that they should always report first party property claims. You can withdraw it if you change your mind or you can just report it as 'Record Purposes Only.' Also, if an adjuster, 'public adjuster' or attorney wants five layers of excess put on notice, despite the claim value being within the primary, it is your responsibility to put them on notice once you've been asked to do so.

"On liability claims, always report any incident that could give rise to a claim, as well as any notice you get that someone has threatened to file a claim or sue you. Your insured's interests need to be protected regardless of the existence, or lack thereof, of negligence or liability.

"I do not agree with the school of thought that says every policy should always be put on notice for every single claim. It can be overkill that also creates the opportunity for a mistake. If you throw everything at every loss, instead of reviewing each loss and all paperwork submitted very carefully, you run the risk of missing a second occurrence or even a completely separate claim that was mentioned and needed to be reported separately. You should study each loss and respond to the requirements of that loss and potential exposures.

"Lastly, state laws can affect policy language. Never assume that your policy language is the final word on coverage. Report the claim to the appropriate carrier(s) so your interests are protected and get an acknowledgement."

Other tips on claims reporting

- Keep your client aware that they have insurance and what coverage types they've purchased
- Be sure your client understands its reporting obligations
- Consider having your client report claims directly to the insurer and copy you in the communication
- Document everything

Conclusion

Nobody likes to see a claim get denied for any reason. It's one thing if the policy isn't designed to cover the loss that was submitted. It's another problem when something avoidable like missing the reporting deadline leads to the denial. As we've shown, the insurers have grounds to stand firm on their denial in many states. The insurance policy is a binding contract for both the insurer and the client. With the proper planning in place, it is pain that can be avoided and possibly ensures that your client stays with you and your agency for many years.

This article was authored by David Lewison, a member of the AmWINS Brokerage Claims Practice.