Notice for Occurrence and Claims-Made Policies:
Navigating Notice of Claim vs. Circumstance,
Pre-Tender Costs and More

Resolving Disputes Over Multifaceted and Complex Notice Issues From Insurer and Policyholder Perspectives

WEDNESDAY, JUNE 25, 2014

1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

David Borovsky, Partner, Meckler Bulger Tilson Marick & Pearson, San Francisco
Jeffrey L. Schulman, Partner, Dickstein Shapiro, New York
Erica Villanueva, Partner, Farella Braun + Martel, San Francisco

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
**Tips for Optimal Quality**

*Sound Quality*
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-927-5568** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

*Viewing Quality*
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

• In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**

• Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you'd like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
Program Materials

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.
Notice for Occurrence and Claims-Made Policies: Navigating Notice of Claim vs. Circumstance, Pre-Tender Costs and More

Resolving Disputes Over Multifaceted and Complex Notice Issues From Insurer and Policyholder Perspectives

David Borovsky, Partner, Meckler Bulger Tilson Marick & Pearson
Jeffrey L. Schulman, Partner, Dickstein Shapiro
Erica Villanueva, Partner, Farella Braun + Martel

June 25, 2014
Types of Notice Provisions

- Occurrence-Based Policies
- Claims-Made Policies
- Claims-Made- and-Reported Policies
“Conditions” or “Your Duties After Loss”

• You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:

  1) How, when and where the “occurrence” or offense took place;
  2) The names and addresses of any injured persons and witnesses; and
  3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
“Conditions” or “Your Duties After Loss”

• If a claim is made or “suit” is brought against any insured, you must:
  – Immediately record the specifics of the claim or “suit” and the date received; and
  – Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or “suit” as soon as practicable.

[Commercial General Liability Policy]
“Warning” Language

THIS POLICY IS WRITTEN ON A “CLAIMS-MADE” BASIS. THIS POLICY APPLIES ONLY TO CLAIM FIRST MADE AGAINST YOU DURING THE POLICY PERIOD. PLEASE READ THE ENTIRE POLICY CAREFULLY.
Insuring Agreement

• This insurance applies to “bodily injury” and “property damage” only if:
  – The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
  – The “bodily injury” or “property damage” did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and
  – A claim for damages because of the “bodily injury” or “property damage” is first made against any insured . . . during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.
Claims-Made-and-Reported Policies: Sample Policy Language

**Insuring Agreement**

This insurance applies when a **Claim** is first made against any of **You** during the **Policy Period**. To be covered:

1) The **Claim** must arise from a **Wrongful Act** committed during the **Policy Period**; and

2) The **Claim** must be reported in writing to **Us** during the **Policy Period** or within 60 days after the end of the **Policy Period**.

We will consider a Claim to be first made against You when a Claim is first received by any of You.

[Accountant’s Professional Liability Insurance Policy]
Why the Different Notice Requirements?

Underwriting Rationale

• Occurrence-based policies

• Claims-made policies

• Claims-made-and-reported policies

Pros and Cons of Each
Overview of Occurrence-Based Notice Requirements

- The “notice-prejudice rule”
- Rule varies from state to state
Late Notice Defense Under “Occurrence” Policies

<table>
<thead>
<tr>
<th>STATES</th>
<th>PREJUDICE REQUIRED?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama (AL)</td>
<td>Primary: NO  Excess: YES</td>
</tr>
<tr>
<td>Alaska (AK)</td>
<td>YES</td>
</tr>
<tr>
<td>Arizona (AZ)</td>
<td>YES</td>
</tr>
<tr>
<td>Arkansas (AR)</td>
<td>NO: *if notice provision is sufficiently demarcated in the policy as “Condition Precedent”</td>
</tr>
<tr>
<td>California (CA)</td>
<td>YES</td>
</tr>
<tr>
<td>Colorado (CO)</td>
<td>YES</td>
</tr>
<tr>
<td>Connecticut (CT)</td>
<td>YES</td>
</tr>
<tr>
<td>Delaware (DE)</td>
<td>YES</td>
</tr>
<tr>
<td>Florida (FL)</td>
<td>YES (but No, if notice provision is sufficiently demarcated in the policy as “Condition Precedent.”)</td>
</tr>
<tr>
<td>Georgia (GA)</td>
<td>NO</td>
</tr>
<tr>
<td>Hawaii (HI)</td>
<td>YES</td>
</tr>
<tr>
<td>Idaho (ID)</td>
<td>NO</td>
</tr>
<tr>
<td>Illinois (IL)</td>
<td>HYBRID RULE: Depends on circumstances—did late notice prejudice insurer—sliding scale</td>
</tr>
<tr>
<td>Indiana (IN)</td>
<td>YES: but prejudice presumed from late notice</td>
</tr>
<tr>
<td>Iowa (IA)</td>
<td>YES</td>
</tr>
<tr>
<td>Kansas (KS)</td>
<td>YES</td>
</tr>
<tr>
<td>Kentucky (KY)</td>
<td>YES</td>
</tr>
</tbody>
</table>
## Late Notice Defense Under “Occurrence” Policies

<table>
<thead>
<tr>
<th>STATES</th>
<th>PREJUDICE REQUIRED?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana (LA)</td>
<td>YES</td>
</tr>
<tr>
<td>Maine (ME)</td>
<td>YES</td>
</tr>
<tr>
<td>Maryland (MD)</td>
<td>YES</td>
</tr>
<tr>
<td>Massachusetts (MA)</td>
<td>YES</td>
</tr>
<tr>
<td>Michigan (MI)</td>
<td>YES</td>
</tr>
<tr>
<td>Minnesota (MN)</td>
<td>YES</td>
</tr>
<tr>
<td>Mississippi (MS)</td>
<td>YES</td>
</tr>
<tr>
<td>Missouri (MO)</td>
<td>YES</td>
</tr>
<tr>
<td>Montana (MT)</td>
<td>Uncertain: Predicted YES</td>
</tr>
<tr>
<td>Nebraska (NE)</td>
<td>YES</td>
</tr>
<tr>
<td>Nevada (NV)</td>
<td>Uncertain: Under old case law, NO. Under Nevada Administrative Code, YES. *there is no recent State Supreme Court case law on the issue</td>
</tr>
<tr>
<td>New Hampshire (NH)</td>
<td>YES</td>
</tr>
<tr>
<td>New Jersey (NJ)</td>
<td>YES</td>
</tr>
<tr>
<td>New Mexico (NM)</td>
<td>YES</td>
</tr>
<tr>
<td>New York (NY)</td>
<td>YES *law changed in 2009</td>
</tr>
<tr>
<td>North Carolina (NC)</td>
<td>YES</td>
</tr>
<tr>
<td>North Dakota (ND)</td>
<td>YES</td>
</tr>
</tbody>
</table>
## Late Notice Defense Under “Occurrence” Policies

<table>
<thead>
<tr>
<th>STATES</th>
<th>PREJUDICE REQUIRED?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio (OH)</td>
<td>YES: but, prejudice presumed from late notice</td>
</tr>
<tr>
<td>Oklahoma (OK)</td>
<td>YES</td>
</tr>
<tr>
<td>Oregon (OR)</td>
<td>YES</td>
</tr>
<tr>
<td>Pennsylvania (PA)</td>
<td>YES</td>
</tr>
<tr>
<td>Rhode Island (RI)</td>
<td>YES</td>
</tr>
<tr>
<td>South Carolina (SC)</td>
<td>YES</td>
</tr>
<tr>
<td>South Dakota (SD)</td>
<td>YES</td>
</tr>
<tr>
<td>Tennessee (TN)</td>
<td>YES</td>
</tr>
<tr>
<td>Texas (TX)</td>
<td>YES</td>
</tr>
<tr>
<td>Utah (UT)</td>
<td>YES</td>
</tr>
<tr>
<td>Vermont (VT)</td>
<td>YES</td>
</tr>
<tr>
<td>Virginia (VA)</td>
<td>NO</td>
</tr>
<tr>
<td>Washington (WA)</td>
<td>YES</td>
</tr>
<tr>
<td>West Virginia (WV)</td>
<td>YES</td>
</tr>
<tr>
<td>Wisconsin (WI)</td>
<td>YES</td>
</tr>
<tr>
<td>Wyoming (WY)</td>
<td><strong>Uncertain</strong>: Predicted NO, but no recent case law.</td>
</tr>
</tbody>
</table>
Overview of Occurrence-Based Notice Requirements

Rationale and Impact

• Notice-prejudice rule states

• States rejecting notice-prejudice rule
Providing Sufficient Notice Under Occurrence-Based Policies

• Contents of sufficient notice
• Placing all potentially liable insurers on notice
• Potential consequences of failing to provide timely notice
Coverage for Pre-Tender Defense Fees and Costs

• Costs incurred by the insured before notice is given the insurer

• Sample “voluntary payments” condition:
  No insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.
  [Commercial General Liability Policy]

• Notice-prejudice rule does not apply

• What is a “voluntary” payment?

• Exceptions
Notice Requirements Under Claims-Made Policies

- Usually requires notice “as soon as practicable,” or similar wording (i.e., similar to the notice requirements in occurrence-based policies)

- Does the notice-prejudice rule apply? Generally yes, but answer may vary by state
Notice Requirements Under Claims-Made-and-Reported Policies

• Claims-made policies are now relatively rare—the vast majority of claims-made policies are claims-made-and-reported

• “Claims-made-and-reported” = the policy covers Claims that are (1) first asserted during the policy period; and (2) first reported to the insurer during the policy period
Most Commercial Policies Are Actually Claims-Made-and-Reported!

- Directors’ & Officers’ Liability
- Employment Practices Liability
- ERISA/Employee Benefits Liability
- Professional/Errors & Omissions Liability
- Tech Errors & Omissions Liability
When Must the Claim Be Reported?

• During the policy period, or within a short period thereafter (usually 60-90 days)

• Exceptions/Variations, principally in D&O policies:
  – Run-off Period
  – Discovery Period
“Run-off”

• Policy automatically converts to run-off when there is a “change in control” (i.e., the company is merging or being acquired)

• Policy continues in force through the rest of the policy period, but only affords coverage for claims arising out of conduct that occurred before the “change in control”
Discovery Period

• Also may be called “Extended Reporting Period”

• Can be purchased when the policy is cancelled (e.g., due to merger or acquisition), or when insurer refuses to renew

• Additional period of time during which claims can be both made and reported

• The claim(s) must arise out of conduct that occurred before the policy cancellation/end of policy period

• Duration of period is usually six years
When Must the Claim Be Reported?

- Late notice = No coverage
- Notice-prejudice rule does not apply
- Under policies issued to *private* companies, it is sometimes possible to purchase an endorsement imposing a requirement that the insurer establish prejudice
What Must Be Reported as a Claim?

- Policy definition of a Claim is far broader than just a lawsuit
- For insurance reporting purposes, a dispute may constitute a “Claim” long before it develops into a lawsuit
What Is a “Claim”?

Typical D&O policy definition of “Claim”:

(a) a **written demand for monetary or non-monetary relief** against an Insured Person or, with respect to Insuring Agreement C, against the Insured Organization; including a request to toll the statute of limitations;

(b) a **civil or criminal judicial proceeding or arbitration** against an Insured Person or, with respect to Insuring Agreement C, against the Insured Organization;

(c) a **formal administrative or regulatory proceeding** against an Insured Person; or

(d) a **formal criminal, administrative, or regulatory investigation** against an Insured Person, including the receipt of a Wells Notice to an Insured Person;

including any appeal therefrom. A Claim will be deemed first made on the earliest date any Insured receives a **written demand, request to toll the statute of limitation, complaint, indictment, notice of charges, or formal order of investigation** in such Claim.
Sufficiency of Notice

• Must include all material necessary for insurer to recognize that there is a “Claim”

• Example:
  – Formal order of investigation vs. individual subpoenas
Pre-Tender Defense Costs

• Claims-made and claims-made-and-reported policies usually contain the same Policy Condition regarding “Voluntary Payments” as in occurrence-based policies.

• Thus, pre-notice payments are not covered; the insurer is not required to prove prejudice.

• But, the policyholder can make the same arguments regarding exceptional circumstances.
Interrelated Claims/Wrongful Acts

• Many policies contain limitations on coverage for “related” or “interrelated” acts when multiple claims arise out of similar circumstances
  – May impact the application of a self-insured retention or deductible
  – May implicate an earlier insurance policy
• Some policies exclude Loss based upon a Wrongful Act when the Wrongful Act occurs together with an Interrelated Wrongful Act

• Excluding all “Loss arising from any Claim . . . based upon, arising out of, directly or indirectly resulting from, in consequence of or in any way involving:
(a) any fact, circumstance, transaction, event or **Wrongful Act** that, before [the policy’s inception date], was the subject of any notice of **Claim** or **Loss**, or notice of potential **Claim** or potential **Loss**, given under any other policy of insurance;

(b) any fact, circumstance, transaction, event or **Wrongful Act** of which, as of [the policy’s inception date], any **Insured** had knowledge and that was reasonably likely to give rise to a **Claim** that would fall within the scope of the insurance afforded by this Policy; . . . , or

(c) any other **Wrongful Act** whenever occurring, which together with a **Wrongful Act** described in (a) or (b) above, constitute **Interrelated Wrongful Acts**.

Media Pro Policy
Other policies provide that **Interrelated Claims** will be treated as a single **Claim**:

“More than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be considered as one Claim which shall be deemed made on the earlier of: a. the date on which the earliest such Claim was first made, or b. the first date valid notice was given by the Insureds . . . of any wrongful Act . . . or any fact, circumstance, situation, event or transaction which underlies such Claim.”
Prior Notice Exclusion

Purports to exclude coverage for a **Claim** alleging, arising out of based upon or attributable to the facts alleged, or to the same or related **Wrongful Acts** alleged or contained in any Claim which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which it may succeed in time.
Notice of Circumstances

If during the Policy Period . . . the Assureds first become aware of circumstances that might give rise to a Claim, and if the Assureds during the Policy Period . . . give written notice to Underwriters of . . . the specific circumstances and the anticipated Wrongful Act allegations . . . the consequences which have resulted or may result therefrom; and . . . the circumstances by which the Assureds first became aware thereof, then any Claim made subsequently arising out of such circumstances or Wrongful Act shall be deemed for the purposes of this Policy to have been made at the time such notice was first given. A notice of such a circumstance must describe as precisely as possible all facts and details including the reasons for anticipating a Claim with full particulars as to dates and persons involved and an estimate of quantum.
The “notice of circumstances” provisions:

- allow the insureds to provide written notice of circumstances and anticipated **Wrongful Act** allegations that may give rise to a future **Claim**

- Upon receipt of such notice, coverage extends beyond Claims first made during that policy’s Policy Period, to subsequent Claims based on those circumstances by deeming them to have been first made during the Policy Period

- Insured may need to provide particulars
Presenters

**David Borovsky**  
Partner, Meckler Bulger Tilson Marick & Pearson  
david.borovsky@mbtlaw.com  
(415) 644-0914

**Jeffrey L. Schulman**  
Partner, Dickstein Shapiro  
schulmanj@dicksteinshapiro.com  
(212) 277-6500  
@JLSchulman

**Erica Villanueva**  
Partner, Farella Braun + Martel  
evillanueva@fbm.com  
415.954.4400