THE RESERVATION OF RIGHTS LETTER FROM YOUR COMMERCIAL GENERAL LIABILITY INSURANCE CARRIER

This is yet another short, article revisiting the always important topic of your insurance coverage. In the past, I have discussed the love/hate relationship between the contractor and its carrier. But with the economy seemingly back at full flood and with more work that means we are seeing more claims against contractors.

I am first revisiting the general procedures of how to make a claim. I then address the topic of reservation of rights.

IN GENERAL

Claim to your insurance carrier. Commercial general liability insurance policies create two basic obligations for the carrier. First, to defend claims within the policy (providing it's insured with legal counsel), and second, to pay damages if warranted and covered.

If you receive a notice of claim, notify your commercial general liability insurance carrier of the claim as soon as possible; immediately forward every demand, notice, summons or other documents received. When making this "tender" - conveying a claim to the insurer - it is always best to do so in writing and it is often required; be brief but provide the relevant information. Create a paper trail.

Your insurance carrier's response. Once the tender has been made, you must now allow your carrier to investigate and retain counsel on your behalf. The assigned counsel is paid for by the insurance.

Reimbursement of your Legal Fees. One final point about insurance claims and tender. Generally, from the date of making the tender to your carrier until the tender is accepted, your carrier must pay a part of your private legal bills incurred while you waited for acceptance.

RESERVATION OF RIGHTS LETTER

Once the claim is tendered, you are likely to receive a letter from your carrier saying that it has accepted the tender of the case "under reservation of rights".

What "reservation of rights" means is that you will be provided legal representation at no cost to you, but the insurance company reserves its right up to the end of the case to determine whether the claim is actually covered by your policy or not. Making a reservation of rights and sending the letter so stating is now standard insurance practice. The reservation of rights letter is usually sent out soon after a claim is tendered.

The typical language is, "We are investigating this claim but preserve our right to later deny coverage if investigation shows that it is not a covered loss." (This is then usually followed by many pages of the text of your insurance policy).

The insurance carrier is trying to protect itself. The letter does not mean the claim isn't covered. But it signals that the insurer thinks there **might** be grounds to deny coverage for at least part of the claim.

A claim against a contractor may include both covered and excluded matters. It may allege some counts that the policy may or may not cover, such as intentional torts, financial loss with no property damage or bodily injury, or a matter clearly outside the policy scope. Frequently the insurer will include a section at the end of the reservation of rights letter explaining the specific facts of the claim and the specific reasons why they have coverage concerns.

Some time may pass before an insurer knows enough to make its determination as to whether coverage exists. In the meantime, they are responsible for protecting their insured. By law, insurers must enter an appearance, hire a defense lawyer, and file an answer to the lawsuit unless they are almost certain there is no coverage.

This procedure is as protective of carrier as it is of the insured. Insureds thus cannot later claim that the insurer, by its actions, led the policyholder to believe that coverage existed when it did not. If that occurred, the insurance company could be accused of "bad faith" and itself subject to a claim by its insured for breach of contract.

Please note that your panel counsel (the attorney appointed by the insurers to handle this) generally will not get involved with any coverage issues, including reservations of rights questions. It would probably put him or her in a position of conflict of interest. Even though your panel counsel is paid for by your insurance, he/she has a duty to protect the insured's interests. However, your insurance company has its own interests so it is advisable to consult with your own attorney to be sure you are adequately represented by panel counsel.

This can be complicated – so talk to your own attorney. So, keep calm and carry on. But it is always prudent to talk to an attorney about the dispute and the claim. Such a discussion is particularly important to have at the beginning of the process. That allows one to be vigilant about one's rights from the get go.

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For Bryant's previous articles, please visit SFBA NARI's website and click on the link "In the News/Newsletter" under "For the Trade." They are also available on his website under "Articles," and on Brian's website under "Publications."

As always, these articles are summary discussions only - to simply give you a heads up on various construction topics. The information contained herein is not legal advice. Each scenario is different and if you need legal advice, you should contact an attorney immediately.