

Workshop M3

Monday, October 29, 9:00 a.m.–noon and 1:30–4:30 p.m.

PROTECTING YOUR COVERAGE RIGHTS AFTER A CLAIM

Presented by



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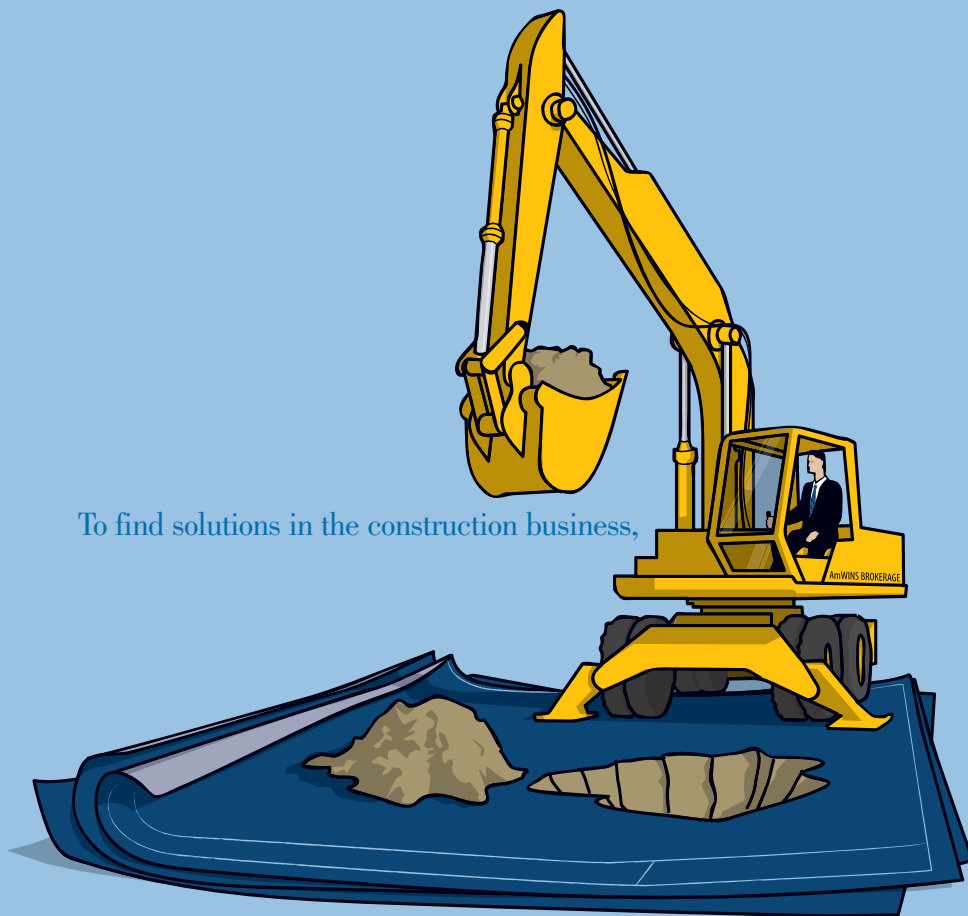


Teresa A. Martin
Vice President,
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Lockton Companies

Most contractors expect to be on the same “team” as their insurance company in responding to a liability claim. In reality, insurance companies sometimes have to balance competing interests, and policyholders are often confused by the results. In this session, learn more about reservation of rights letters and the defense of claims, two issues that most policyholders do not consider until they are in the middle of a complicated and stressful claim.

- Examines the purpose of a reservation of rights letter and outlines an effective, factual approach for responding and even using it to your advantage.
- Identifies potential conflicts of interest in construction claims, when independent counsel is appropriate, and how such a defense is coordinated.
- Outlines the role of the insurance agent or broker in responding to these issues.

To find solutions in the construction business,



we dig
a little
deeper.

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Jill B. Berkeley
Partner
Howrey LLP

Ms. Berkeley is one of the presenters for Workshop M3, "Protecting Your Coverage Rights after a Claim" on Monday. Ms. Berkeley is a partner in the Chicago office of the law firm Howrey LLP, where she co-chairs Howrey's national Insurance Recovery practice. She has concentrated in insurance law and coverage litigation for over 25 years, including the supervision of tort and coverage litigation on the primary and excess levels. Ms. Berkeley has extensive experience in the representation of insurers and insureds in coverage litigation involving declaratory judgments, bad faith, toxic tort and hazardous wastes, and excess liability matters.

Ms. Berkeley is an active member of TIPS and has held various committee and leadership positions, currently serving as chair of the ICLC. She is also a frequent speaker and has been widely published on insurance, self-insurance, and risk management issues. Ms. Berkeley is active in the American Bar Association, the Illinois State Bar Association, and the Association of Professional Insurance Women.

Since 1986, Ms. Berkeley has served as author and executive editor of the *CGL Reporter*.

Ms. Berkeley graduated Phi Beta Kappa, *magna cum laude*, with a bachelor of arts degree from the University of Michigan in 1972 and received her juris doctor degree from Northwestern University School of Law in 1975.

Teresa A. Martin
Vice President Producer
Lockton Companies

Ms. Martin is one of the presenters for Workshop M3, "Protecting Your Coverage Rights after a Claim" on Monday. At Lockton, Ms. Martin is vice president, producer; member of Lockton Construction Services (LCS) and cochair LCS—Kansas City. She is an experienced producer who is committed to providing the best service in the industry to her clients. She is the internal Lockton client advocate, to ensure delivery of the highest level of customer service and that the company meets or exceeds the clients' expectations.

Ms. Martin has been at Lockton since 1993. Previously, she was account executive, producer, and unit manager at Hass & Wilkerson Insurance for 6 years, and group sales representative and client representative at UNUM for 6 years.

Ms. Martin is a member of the Associated General Contractors of Kansas Board of Directors; the Associated Builders & Contractors National Membership Growth Committee, Heart of America Chapter Board (past member); the Construction Financial Management Association; and the National Association of Women in Construction.

Ms. Martin was named among 2003 Women Who Mean Business by the *Kansas City Business Journal*; was the Associated Builders & Contractors Heart of America Chapter 2005 Associate Member of the Year; and received the Surety Association of Kansas City 2002 SIO Award for Excellence in Surety Bond Promotion.

Her recent presentations and articles include "Controlling Your Cost of Risk," Craig Safety Webinar, April 2007; "How Uncommon Service Drives Unprecedented Growth," *Kansas City Business Journal* (October 27, 2006); and "Insurance & Surety Issues Panel Presentation," Associated General Contractors of Kansas Annual Convention, February 2006.

She holds a B.S.B. in Business Administration and a B.S. in Public Affairs from Emporia State University, Emporia, Kansas. She holds the Construction Risk and Insurance Specialist (CRIS) designation.




Protecting Your Coverage Rights After A Claim

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Part 1: Purpose of Reservation of Rights Letter, Role of the Parties, and Insurance Broker Advocacy

Presented by: Jill B. Berkeley, Partner, Howrey, LLP
 Teresa A. Martin, Producer, Lockton Companies, LLC





Policyholders Buy Policies To:

- ❖ Protect against defense costs
- ❖ Purchase insurance company buying power and litigation expertise
- ❖ Protect against liability costs

3



Brokers Sell Policies To Policyholders

- ❖ Premium protection
- ❖ Underwriting protection
- ❖ Claims protection

4



When the Claim Occurs

- ❖ Moment of truth for the policyholder
- ❖ Broker performance on the line
- ❖ Insurer has greatest opportunity to negatively impact policyholder and broker relationship

5



Initial Claims and Coverage Decision

- ❖ When things go right:
 - Notice acknowledged promptly
 - Defense counsel immediately retained
 - Investigation undertaken
 - Positive contact with policyholder
- ❖ When things begin to go wrong:
 - Insurer slow to acknowledge notice
 - General reservation of rights
 - ❖ "Nothing herein, nor any action taken by insurer, including but not limited to, investigation, defense, settlement, or adjustment, shall be construed as a waiver of any right to deny coverage, and is subject to a full reservation of rights."
 - Insurer investigates claim with eye toward coverage, not liability and damages

6



Why Insurers Have to Write Reservation of Rights Letters

- ❖ Avoid Waiver and Estoppel of Policy Defenses
 - If believe coverage defenses exist, must reserve or will be deemed waived
 - ❖ Cannot investigate
 - ❖ Cannot defend
 - ❖ Cannot interview policyholder
 - ❖ Cannot request documents

- ❖ Statutory-Regulatory Compliance
 - Within 30 days put policyholder on notice of all issues

7



Common Insurer Practices

- ❖ Notify policyholder of potential risk that coverage does not exist
- ❖ Disclose to policyholder potential excess liability
- ❖ Notify policyholder to give notice to other insurers

8



Types of Typical Provisions

- ❖ Repeat allegations of complaint
- ❖ Set out provisions of policy
- ❖ Advise there are no suggestions, at this point, that Insured is liable
- ❖ Retain right to supplement

9



Sample Provisions

Existing law requires us to send this letter, which is known as a "Reservation of Rights" letter. This reservation-of-rights letter is not an attempt on our part to avoid our responsibilities to Insured under the Policy, but to apprise Insured of our obligations and rights. For the reasons set forth below, the Company will provide a defense for this matter, subject to the terms and conditions of the Policy and our reservation of rights, as set forth herein.

We recognize that the allegations of wrongdoing set forth in the Complaint/Amended Complaint are unsubstantiated contentions at this time. Nothing in this letter is intended to suggest or imply that these allegations have any legal or factual merit. Nevertheless, we must reserve our right to decline coverage should any of the exclusions set forth in the Policy, the endorsements to the policy, or any other provision of the Policy prove to be applicable.

10



Sample Provisions

❖ Other Insurance

Section IV Other Insurance of the Policy as amended by Endorsement No. 4 (4) provides that if any **Loss** under this Policy is insured under any other valid and collectible insurance subject to the same terms, conditions and provisions as the insurance provided by this Policy, then this Policy shall cover its share of such **Loss**, subject to its limitations, conditions, provisions and other terms, in an amount equal to the proportion that the then available Limit of Liability under this Policy bears to the aggregate of all limits of liability of all insurance covering such **Loss**, whether such other policy(ies) stated to be primary, contributory, excess, contingent or otherwise, under such other policy(ies) is written only as specific excess insurance over the Limits of Liability provided in this Policy. If any **Loss** under this Policy is insured under any valid and collectible insurance other than as described above, then this Policy shall be specifically excess over, and shall not contribute with, any such other insurance, whether such other insurance is stated to be primary, contributing, excess (except insurance specifically in excess of this Policy), contingent or otherwise.

You are requested to notify all insurers whose policies may have been triggered and to provide the Company with a copy of the notice, the applicable policy, and the insurer's response regarding coverage under such policy.

11



Sample Provisions

❖ Cooperation

The **Insured** agrees to provide the Company with all information, assistance and cooperation which the Company reasonably requests. The Company shall have the right to make investigations, conduct negotiations and, with the written consent of the **Insured**, enter into such settlement of any **Claim** that the Company deems appropriate. The **Insureds** agree not to settle any **Claim**, incur any **Defense Costs**, or otherwise assume any contractual obligation or admit any liability with respect to any **Claim** without the Company's written consent. The Company shall not be liable for any settlement, **Defense Costs**, assumed obligation or admission to which it has not given its prior written consent.

❖ Reservation to Supplement or Update

Our position with respect to this matter is based upon the information provided to date, and is subject to further evaluation as additional information becomes available. Insurer reserves its right to assert additional terms and provisions under the policy and at law, which may become applicable as new information is learned.

12



Create or Identify Conflict of Interest

- ❖ Whose side is my defense lawyer on?
- ❖ Are there facts that will be discovered in the claim which can be used to exclude coverage?
- ❖ Examples:
 - When the damage occurred.
 - When operations were completed.
 - When notice was received.
- ❖ See *American Family Mut. Ins. Co. v. W. H. McNaughton Builders, Inc.*, 843 N.E.2d 492 (Ill. App. 2006)

13



Are There Issues or Defenses That Will Be Litigated Which Will Resolve Coverage Issue?

- ❖ Is there an occurrence
 - Expected or intended.
- ❖ Within the scope of the work
- ❖ Arising out of the liability of
- ❖ Was the damage to named insured's product or subcontractor's work

14



Create Right to Independent Counsel

- ❖ More to be said later
- ❖ Policyholder interest only; no loyalty to insurer
- ❖ Interest in maximizing coverage in addition to defending a claim

15



What Broker Should Do When Insurer Reserves Rights

- ❖ All Reservation of Rights (ROR) letters must be carefully reviewed
- ❖ Review intent of coverage and promise by underwriter
- ❖ Review policy wording and all endorsements
- ❖ Promptly address any noted errors or misstatements in ROR
- ❖ Recommend policyholder not routinely sign ROR and return to carrier

16



Assist Policyholder in Developing Response

- ❖ Do not ignore ROR
- ❖ Consult with insured to understand the claim and develop an effective strategy/response to ROR
- ❖ Things to consider:
 - Having a conversation with the adjuster to understand underlying reasons for letter
 - ❖ No substitute for face-to-face communication
 - Involve underwriter to ensure claims side understands original underwriting intent
- ❖ Assist insured in securing needed documentation to provide to carrier so full evaluation of coverage can be completed
- ❖ Recommend legal counsel when appropriate

17



What Policyholder Should Do

- ❖ Use Mutual Reservation of Rights.
 - Anything they say, policyholder gets equal protection (argue coverage exists).
 - This letter is subject to a full and complete reservation of rights by the policyholder to assert its rights to coverage for any claim that it may have under any insurance policy or the law and nothing herein shall be construed as a waiver of any right, privilege, and/or defense that the insured may have under any policy or the law. Similarly, nothing contained herein shall be construed as an acknowledgement, either express or implied, that any valid defense to coverage has been raised.
- ❖ Use Mutual Non-Waiver Agreement

18



Discuss With Defense Counsel and Confirm Loyalty

- ❖ One client or two
- ❖ Regularly retained by insurer (what percent revenue)
- ❖ Limitation on engagement to those issues where no conflict
- ❖ Will not take adverse position against either
- ❖ No secrets
- ❖ Cannot "maximize" coverage
- ❖ May not advise on issues of excess liability

19



Be Aware of Rights

- ❖ Settlement
 - Usually "no consent" provision
 - ❖ Cannot settle and get reimbursement
 - ❖ Cannot prevent insurer from settling
 - ❖ Can influence decision; raise policyholder interests
 - Business relationship
 - Timing
 - Target in other litigation
 - ❖ Make demands; facilitate settlement
- ❖ Prohibition against two-front battle

20



Reimbursement of Independent Counsel Attorney Fees

- ❖ Rates
 - Not limited to regular panel counsel rates
 - Reasonableness is fact basis
- ❖ As incurred
 - Insurer should pay within 30–60 days of submission
 - Failure to pay as incurred is breach
- ❖ No recoupment
 - Jurisdictions differ on rules
 - No policy provision

21



Case Studies of Actual Reservation of Rights Letters Involving Construction Claims

- ❖ Analyzing the ROR letter and corresponding policy terms and conditions
- ❖ Evaluating the insurer's positions are correct based on the policy provisions
- ❖ Developing effective strategy for achieving favorable outcome for insured/client
 - Broker/agent role
 - Insured's role
 - Coverage counsel's role

22



Defective Construction Case

- ❖ Developer puts general contractor on notice of water intrusion through roof, windows, mortar, and flashings. General contractor tenders to roofing subcontractor, window installer, architect, and bricklayer, as warranty issue. General contractor performs investigation to determine causation of the problem. After almost four weeks of investigation, general contractor's project manager notices property damage and staining of walls, inside finishes, wallboard, floors, and ceilings. Project manager notifies risk manager immediately. Risk manager puts its current CGL insurer on notice. Insurer issues reservation of rights.
- ❖ Coverage defenses include:
 1. "Your work" exclusion; "impaired property" exclusion.
 2. No occurrence; intended or expected damage.
 3. No property damage.
 4. No property damage during policy period.
 5. Property damage occurred prior to policy period.
 6. Professional services exclusion.
 7. Late notice.
 8. Investigation costs were voluntarily incurred without consent.
 9. Give notice to other insurers.

23



Conclusion/Best Practices

For insured

- ❖ Be proactive:
 - Consult your broker to understand/anticipate what the carrier wants
 - Advise the carrier early of your strategy and why
- ❖ Cooperate/provide the information carrier requests
- ❖ Own the problem
- ❖ Get to know the claims person—communicate directly; do not assume an adversary
- ❖ Keep the broker informed/involved so they can correct a problem

For broker

- ❖ Recognize and respect the delicate balance between insured/insurer relationship
- ❖ Negotiate claims handling in advance:
 - Dedicated construction industry specific adjusters
 - Special protocols
- ❖ Partner with the carrier to bring the right resources to bear
- ❖ Leverage underwriting relationship when needed—usually most effective with claims department

24