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Is the "Never Pay Policy" Making a Comeback? How to Fight It – Part II

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"In your policy it states quite clearly that no claim that you make will be paid. You unfortunately plucked for our Never-Pay Policy, which if you never claim is very worthwhile - but, uh, you had to claim - and there it is."

-Mr. Devious to Reverend Morrison about the letter from the insurance company refusing to pay the Reverend's claim for damage to his car that was hit by a lorry while standing in a garage. Monty Python and the Flying Circus, *circa* 1971.

In the last article, I focused on the business and societal ills that can result from insurance carriers acting as if they were selling Monty Python's proverbial "Never Pay" policies. I also mused about a Utopian carrier that would write clear and easily understandable policies, and that would actually pay claims instead of paying claims adjusters to write reservation of rights and denial letters and a legion of lawyers to fly around the country litigating with the insurer's own customers.

Now, I do not mean to suggest that carriers never pay claims. In many instances, they act responsibly. Unfortunately, it seems that some carriers (or certain claims adjusters) act as if they sold you a Never Pay Policy, and this attitude, at least based on observations from my little part of the legal world, seems to be increasing. Equally unfortunately, our Utopian carrier, at least to my knowledge, does not exist.

This article will begin to explore how the real world works and some tips for navigating the confusing world of insurance. I must, however, begin with this caveat. There is no way to make sure that claims that arise in the future will be covered, and there is no way to assure that your carrier will be reasonable.

I am often truly astonished at the positions taken and incredibly creative arguments that insurance adjusters make to try to deny claims. There are some tips that may, however, increase your chances of success. This article will cover some of the basics. The next article will discuss when you probably need to consult with coverage counsel.

1. Find a good broker. Most insurance is bought through brokers or agents. Find an experienced broker, preferably one with experience in writing insurance in your industry. The broker should take the time to meet with you and develop an understanding of your business. The broker should know what you do and how you work in considerable detail. You may have particular risks that raise concerns. These risks should be discussed in detail. A good broker will likely raise other issues that may never have occurred to you. If a broker does not want to take the time to understand your business and review the risks, find another broker.

How do you find a good broker? Ask around. Do some research on the broker. Find out how many people the broker employs. It is probably not necessary to use a giant like Aon or Marsh, but be sure that your broker is well established. It is also helpful if the broker has a little size. Why? If a carrier is balking regarding a claim, a broker can sometimes step in and act as your advocate. It does not always work, but sometimes it helps. If the carrier views the broker as an important source of business, it may be more likely to pay the claim.

It may be helpful if you put in writing to the broker the risks that you want to make sure are covered. This will make sure that the broker has focused on the issues. Ask the broker to review any exclusions to coverage or endorsements that the insurer will require. Endorsements can include additional exclusions. Go over all exclusions and endorsements with the broker, and try to make sure that they do not create a hole in the coverage for potential risks of your business. If the broker makes a mistake and advises you improperly regarding coverage, the broker may be liable to you if the carrier fails to cover a claim.

A necessary implication of using a broker is that you will not be purchasing insurance online. Many carriers, particularly personal lines carriers (home and auto) are selling insurance online in an effort to cut out broker or agency fees and commissions. I would not advise buying business insurance online and would advise you to exercise extreme caution in buying even personal lines insurance online. A good broker is well worth having.

2. Check out the carrier. A broker may propose one carrier or several. Check out any proposed carrier’s financial strength. The broker can usually provide financial strength ratings, such as by A.M. Best, and explain them to you.

Any broker or policyholder’s coverage lawyer knows that some carriers are better about paying claims than others. Ask the broker about this issue. Ask the broker whether the broker would be comfortable relying on this carrier for its own insurance. Do some of your own research. “Google” the carrier online. You will probably begin to get a feel for the carrier’s reputation.

3. Do not buy based solely on price. It is tempting, particularly in the current economic environment, to take the cheapest quote that is offered. If your choice, however, is between buying a cheap policy from a carrier with a bad reputation and buying a somewhat more expensive policy from a carrier that has a good reputation, think very carefully before taking the “bargain.”

It is also worth noting that you should make every effort to make sure that you are comparing “apples to apples.” Make sure that your broker outlines any substantive differences between the cheaper policy and the more expensive policy. The cheaper price may be partially explained by higher deductibles or self-insured retentions (the part of the loss you must pay), lower policy limits, or endorsements that eliminate coverage for particular risks that may be important to your business.

4. Get copies of your policies and keep them with other important papers. I am often asked to evaluate insurance coverage issues. Of course, the first thing I need is a copy of the insurance policy. It amazes me how difficult it is in many instances simply to get a copy of the policy even from relatively sophisticated businesses.

It also is clear to me that many business people do not even have a clear understanding of what an insurance policy *is*. Often, when I ask for a copy of the policy, I am provided with a one page copy of what is known as the “dec page.” This provides almost no help in evaluating coverage, other than determining the policy limits.

Just so the issue is clear, an insurance policy typically consists of three components. First, there is the previously mentioned declarations page, or “dec page.” This is usually one page (sometimes two) and it summarizes the types of coverage and the policy limits. The policy limits establish the maximum amount the carrier will pay. Limits are typically stated as “per occurrence,” meaning the maximum the carrier will pay for one event. Sometimes, the limits are stated to be “per claim” or “per accident,” which will establish the maximum amount the carrier will pay for a single claim or accident. There are also “aggregate” limits. Aggregate limits establish the total maximum amount the carrier will pay in a given period (typically a year) regardless of the number of “occurrences” or “claims.”

Note: There are important differences between “occurrence” based coverage and claims made coverage. These differences are beyond the scope of this article, and should be discussed with the broker. Most general liability coverages are

“occurrence” based. Much professional liability coverage (for architects, engineers, attorneys) is written as “claims made” coverage.
The second part of the policy is the “body” or “policy form.” This is the main part of the policy, and includes the insuring agreement (what the policy will cover), exclusions to coverage (types of events that are not covered), conditions to coverage, and definitions. This, in essence, is the insurance contract, and is what a coverage lawyer or insurance professional will need to begin evaluating any coverage question.

The third part of the policy consists of any endorsements. Endorsements are in effect amendments to the policy. Endorsements can be very important and they can substantially alter the rights of the insured. Endorsements can include, for example, additional exclusions to coverage. For example, one now often sees endorsements with “fungus” exclusions. These exclusions were added by many carriers after many claims were reported several years ago for alleged mold-based property damage or bodily injury.

The policy will usually be delivered after it is purchased, sometimes long after it is purchased. The policy should include the declarations, policy form and any endorsements. Typically, it will be stapled together.

It is a good idea to keep a copy of the policy stored away from your place of business. Why? If there is a loss (a fire, for example) at your place of business, the policy will probably be destroyed. Copies can be maintained in a safe deposit box, or a copy could also be stored in an electronic form where it will be remotely backed up.

The important thing is to have ready access to the policy. Yes, your broker should have a copy. Yes, it should be possible to get a copy from the insurer. However, you would be surprised how tedious this process is. If you have a catastrophic claim and need to consult with a coverage attorney, it is vastly preferable to have a copy of the policy readily available.

5. When you get the policy, review it. Take a careful look at the policy. Does it appear to be what you and the broker discussed? Do there appear to be exclusions or endorsements that affect coverage that were not discussed? If so, call your broker and go over these issues immediately.

One of the practical problems with the way insurance is sold in the U.S. is that the policies are not written in a readily understandable way. Unfortunately, even a careful reading of the policy is not likely to identify every possible issue that may arise. However, it does not hurt to go over the policy and to bring any possible issues that jump out to your broker’s attention.

6. Make inventories and take pictures. A big problem that exists for many property claims is documenting the property that was destroyed. It is a good idea to make lists of property (including, if known, the purchase price), and to take photos or videotapes of property. There are many cheap and easy to use video cameras, such as those by Flip video, that will fit in a shirt pocket. Many digital cameras, even ones that are quite inexpensive, now have video capability. Lists and videos can help eliminate disputes in the event of a claim. Electronic copies of lists and videos should be stored remotely or so they are backed up remotely.

7. If there is an event that may lead to a claim, take pictures. If there is an unusual event that may lead to a claim – such as, for example, a large hail storm – take pictures of the event. Take photographs of the hail or the weather event. If you have a video camera, take video.

It is unfortunate, but some insurance claim adjusters will try to deny that a weather event was substantial enough to cause damage. They may argue that generalized weather information, or even damage to surrounding buildings, is not enough. Although I do not think that many courts would agree with this approach, having photos or a video can end the debate.

Note that some policies require that particular types of property be separately scheduled. This can be true for personal and business lines of insurance. Ask your broker whether this should apply to you, particularly if you have unique and highly valuable property (jewelry, artwork, unique business machinery, etc.).

Conclusion. If you follow these basic steps, you will be more ready to deal with a claim than the average insured. In the next article, I will get into some of the details that may arise if there is a claim and if you need to consult with an insurance coverage attorney.