



TRIAL & APPELLATE COUNSEL

DON'T BE CHICKEN ABOUT TENDERS: HOW TO PROPERLY TENDER A DEFENSE

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THE IMPORTANCE OF TENDERING


For the Named Insured:

- **Maximize indemnity limits, preventing risk of excess judgment**
- **May avoid having losses impact the insured's loss history**
- **AI policy may have broader coverage than named insured's own policy**
- **Experience and expertise of various carriers in defending/settling the claims**



THE IMPORTANCE OF TENDERING (CONTINUED)

For the Named Insured's Carrier:

- Carriers share in defense costs, such as fees and expenses and, sometimes, primary defense obligation could rest with AI carrier entirely
 - Carriers work together to settle, allocate amongst themselves, and prevent coverage litigation later
 - Claimant cannot effectively Stowerize
 - Carrier shares indemnity obligation with AI Carrier
 - Potential that AI policy is more broad than the Named Insured's policy
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WHAT IS AN ADDITIONAL INSURED?

- **A third person or entity added to a Named Insured's policy by special endorsement (i.e., an "Additional Insured Endorsement")**
- **The obligation to name the third person or entity as an additional insured is typically governed by the contract between the parties (i.e., the Named Insured and the party seeking AI status)**



BENEFITS OF ADDITIONAL INSURED STATUS

- Reinforce the risk transfer accomplished with indemnity agreements
- Provides the Named Insured with the right to an immediate defense by the AI carrier
- May lessen the chance that the AI will be forced to sue the indemnitor directly to be made whole following a claim or suit



TENDERING 101

- 1. Investigate (typically done by defense counsel or the carrier)**
- 2. Analyze Potential Coverage (either by the carrier or coverage counsel)**
- 3. Tender (by the carrier and/or coverage counsel)**
- 4. Re-Tender (by the carrier and/or coverage counsel)**
- 5. Respond to requests for information (by the carrier and/or coverage counsel)**



EFFECTIVE INVESTIGATION

- **Communicate with the insured to identify all subcontractors, suppliers, and third-parties the Named Insured contracted with**
- **Obtain any work contracts or additional insured/indemnity agreements that exist between your insured and third parties**
- **Obtain Certificates of Insurance and/or policy(ies) from third parties**

****LIABILITY DEFENSE COUNSEL IS BEST UTILIZED HERE****



EFFECTIVE INVESTIGATION (CONTINUED)

TIME IS OF THE ESSENCE!

- Be sure to tender to the AI carrier as early as possible to ensure that the carrier is on the hook for defense costs early
- Under Texas law, an insurer is not liable for defense costs incurred before an insured tenders a pleading alleging a potentially covered claim. *LaFarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 400 (5th Cir. 1996); *Members Insurance Co. v. Branscum*, 803 S.W.2d 462, 466–67 (Tex.App.—Dallas 1991, no writ).
 - The voluntary payment provision precludes a carrier's liability for pre-tender defense costs.



REFRESHER ON THE DUTY TO DEFEND

In Texas, the eight-corners rule governs the determination of a Duty to Defend

- Recently, the Texas Supreme Court adopted a narrow exception permitting the consideration of extrinsic evidence. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195 (Tex. 2022).
- Exception for Duty to Defend AI

Essential documents needed to determine Duty to Defend an AI:

- The contract between your insured and the third-party
- The policy(ies) of the third-party
- The pleadings

****Determining the Duty to Defend should be done by the carrier or coverage counsel, NOT defense counsel****



WHAT TO LOOK FOR IN THE CONTRACT BETWEEN THE NAMED INSURED AND THIRD-PARTY

- 1. Language requiring the third-party to name your insured as an additional insured**
- 2. Terms of AI coverage:**
 - Ongoing vs. Completed Operations
 - Time period that AI coverage remains in effect
 - Coverage limits and special policy forms
- 3. Confirm your insured's and the third-party's scope of work**
- 4. Confirm the dates of contract**



ADDITIONAL INSURED ENDORSEMENTS

1. **Scheduled Basis** – the AI is listed on either the endorsement itself or on the declarations page
2. **Blanket Basis** – the AI is determined by whether a “written contract or agreement” requires that such insurance be procured



POLICY NUMBER:

ENDT. #19

COMMERCIAL GENERAL LIABILITY
CG 20 26 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – DESIGNATED
PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)
Where required by written contract, we will consider our policy to be primary under any other insurance maintained by the additional insured for injury or damage covered by this endorsement and that their policy will be non-contributing with this insurance.
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

- A. In the performance of your ongoing operations; or
- B. In connection with your premises owned by or rented to you

EXAMINE THE PLEADINGS

- 1. Is the Named Insured's work implicated by the pleadings?**
- 2. Is the third-party's work implicated by the pleadings?**
- 3. Determine potential coverage for your insured as an AI (i.e., do the pleadings allege "property damage," an "occurrence," and did the damage fall within an operative policy period?)**

****This should be conducted by the carrier or coverage counsel, NOT defense counsel****



TENDER DIRECTLY TO THE THIRD-PARTY'S CARRIER

Royal Insurance Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639, 644 (5th Cir. 2004)

- **Facts:**
 - In the underlying lawsuit, the estate and surviving family of a deceased nursing home resident brought a wrongful death action against the defendant Named Insured.
 - Defendant was the named insured under a CGL/PL policy issued by Hartford and a CGL/PL policy issued by Royal.
 - The CGL and PL policies contained “other insurance” provisions.
 - Defendant Named Insured initially tendered only to Royal as the petition did not obviously trigger the Hartford policy.
 - Later an amended petition triggering the Hartford policy was filed.



TENDER DIRECTLY TO THE THIRD-PARTY'S CARRIER (CONTINUED)

Royal Insurance Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639, 644 (5th Cir. 2004)

- **Facts (Continued):**
 - Royal notified Hartford of the underlying lawsuit and requested Hartford's participation in a mediation. Hartford declined, citing insufficient notice to trigger a defense obligation.
 - Royal settled the case and sought contribution from Hartford of its pro-rata share of the settlement and defense costs.
 - The district court held that Royal's coverage was primary and because policy limits were not exceeded, Hartford had no financial responsibility as an excess insurer.
 - Royal appealed.



TENDER DIRECTLY TO THE THIRD-PARTY'S CARRIER (CONTINUED)

Royal Insurance Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639, 644 (5th Cir. 2004)

- **Analysis:**
 - The court engaged in an examination of whether the CGL or PL policy applied, as liability was indisputably pro rata under the CGL policy, but under the PL policy, liability depended on the interpretation of the “other insurance” provisions.
 - Finding the PL policy applicable, the court applied the *Hardware Dealers* test and found pro rata apportionment of liability.
 - Turning to defense costs, the court evaluated whether Hartford was also responsible for a pro rata share of the defense costs.



TENDER DIRECTLY TO THE THIRD-PARTY'S CARRIER (CONTINUED)

Royal Insurance Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639, 644 (5th Cir. 2004)

- **Holding:**
 - Hartford is apportioned a pro rata share of the settlement
 - Hartford is only responsible for defense cost incurred after the insured tendered the petition, not from the time the underlying lawsuit implicated Hartford's policy.



WHAT TO INCLUDE IN THE TENDER

1. The carrier should be the recipient of the tender letter, and:
 - Identify your Named Insured, any other insured (if applicable), and the third-party (i.e., the carrier's insured)
 - Identify the AI obligation in the contract
 - Identify any AI endorsement you obtained
 - Discuss the allegations triggering the AI obligation in the live pleading
 - Most importantly, it must state that tender is being made for defense/indemnity of your Named Insured

****Coverage counsel or the carrier to draft****



WHAT TO INCLUDE IN THE TENDER

(CONTINUED)

2. Attach copies of the applicable contract, live pleading, and any Certificate of Insurance or AI endorsement obtained during investigation
3. Save a complete copy of the entire tender with all attachments, as well as any green card or other proof of service.

****Remember: the date of the tender is the first date that AI defense is owed****



RE-TENDER EVERY PLEADING

Each Complaint or Petition could affect the existence of coverage:

- **Changes in alleged “property damage”**
- **Changes in parties sued or identified**
- **Changes in causes of action alleged**
- **Additional factual details added, such as resulting “property damage” or dates of damage**



RE-TENDER EVERY PLEADING (CONTINUED)

- If the original Complaint or Petition that was tendered did not trigger coverage, a subsequent pleading may
- The duty to defend is triggered from the carrier's receipt of the first pleading that triggers coverage
- **TIME IS OF THE ESSENCE**
- Always refer to prior tender dates in subsequent tender letters
- Attach the new pleading to the tender letter



RE-ASSESS TENDERS AFTER RECEIPT OF DISCLOSURES AND DISCOVERY

- Disclosures require parties to disclose the existence of any insurance agreement under Rule 194 of the Texas Rules of Civil Procedure
- Additional contracts can be discovered through written discovery
- Depositions and other discovery tools may lead to the discovery of previously unknown third parties

****Defense counsel should serve discovery aimed at uncovering this information****



WHY COVERAGE COUNSEL IS THE BEST CHOICE TO HANDLE TENDER

- Defense counsel rarely are trained in analyzing coverage
- Involving coverage counsel early on allows defense counsel to stay focused on the defense of the insured
- Potential AI carriers often respond to tenders with questions, inquiries, requests for more information, and coverage arguments that coverage counsel has the expertise with which to respond
- Delays are more likely to occur when defense counsel is wearing multiple hats



WHY COVERAGE COUNSEL IS THE BEST CHOICE TO HANDLE TENDER (CONTINUED)

- Settlement negotiations and mediation run much more smoothly when coverage counsel has been involved early on and handles the AI side of mediation
- When AI carriers delay or deny, coverage counsel can initiate a declaratory judgment action early on to assist with settlement of the underlying suit, and force AI carriers to attend mediation
- Defense counsel and coverage counsel can work together during the discovery phase to make sure all relevant information and documents pertaining to AI coverage have been requested.



QUESTIONS?

IF YOU HAVE QUESTIONS, PLEASE FEEL FREE TO CONTACT US FOR MORE INFORMATION.

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