



The Art of Tendering: How to Properly Tender to Maximize Additional Insured Coverage

By:

Julie A. Shehane & Benjamin Passey

© 2022 This paper and/or presentation provides information on general legal issues. It is not intended to give advice on any specific legal matter or factual situation, and should not be construed as defining Cooper & Scully, P.C.'s position in a particular situation. Each case must be evaluated on its own facts. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act on this information without receiving professional legal counsel tailored to their particular situation.

Why Is Tendering So Important?

For 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

Why Is Tendering So Important? (Continued)

For 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 named insured's policy

What Is An Additional Insured?

1. A third person or entity added to a named insured's policy by special endorsement ("Additional Insured Endorsement")
2. The obligation to name the third person or entity as an additional insured is typically governed by the contract between the parties.

Reasons for Additional Insured Status

- Reinforce the risk transfer accomplished with indemnity agreements
- Provides your named insured with the right to an immediate defense by the AI carrier
- It may lessen the chance that the additional insured will be forced to sue the indemnitor directly to be made whole following a claim or suit

Steps to Tendering

1. Investigate (by defense counsel/carrier)
2. Analyze Potential Coverage (by carrier/coverage counsel)
3. Tender (by carrier/coverage counsel)
4. Re-Tender (by carrier/coverage counsel)
5. Respond to information requests (by carrier/coverage counsel)

Necessary Investigation

1. Communicate with your insured to identify all subcontractors, suppliers, and third parties the named insured contracted with
2. Obtain any work contracts or additional insured/indemnity agreements that exist between your insured and the third parties
3. Obtain certificates of insurance and/or policies from those third parties

Liability defense counsel should assist here

Necessary Investigation (Continued)

TIME IS OF THE ESSENCE!

LaFarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d
389 (5th Cir. 1996)

LaFarge Corp. v. Hartford Cas. Ins. Co., 61
F.3d 389 (5th Cir. 1996)

- Facts:
 - Hartford Casualty Insurance Company (“Hartford”) was LaFarge Corporation’s (“LaFarge”) CGL insurer
 - LaFarge was sued for damage caused to a pipeline one of its subsidiaries helped construct
 - LaFarge tendered the petition to Hartford for a defense
 - Hartford originally denied coverage but ultimately extended a defense after the petition was amended
 - The district court found that Hartford was required to provide a defense beginning from the the original tender and was responsible for all pre-tender expenses
 - Hartford appealed

LaFarge Corp. v. Hartford Cas. Ins. Co., 61
F.3d 389 (5th Cir. 1996)

- Arguments
 - Hartford argued that the initial tender was properly denied because the policy only afforded coverage “with respect to liability assumed under an incidental contract”
 - LaFarge argued that a contract implicating one of its subsidiaries was “incidental” to its business and therefore should be covered
 - Hartford further argued that it should not be liable for any defense costs incurred prior to the date that LaFarge tendered the amended petition

LaFarge Corp. v. Hartford Cas. Ins. Co., 61
F.3d 389 (5th Cir. 1996)

- Analysis
 - The court agreed that LaFarge’s proposed interpretation was improper as it would render the “incidental” limitation meaningless and would, as a practical matter, extend coverage to all contracts of LaFarge subsidiaries
 - Further, the court found that the reasoning relied on by the district court for awarding pre-tender expenses was improper and went against the established principle that an insurer is not responsible for any pre-tender defense expenses

LaFarge Corp. v. Hartford Cas. Ins. Co., 61
F.3d 389, 399 (5th Cir. 1996)

- Holding
 - Hartford owed no duty to defend until LaFarge tendered the amended petition
 - Reversed the district court's award of defense costs from the original tender, limiting defense costs only to those incurred after the tender of the amended petition

Refresher On Duty To Defend

In Texas, we follow the Complaint Allegation Rule or 8 Corners Doctrine

- Recent exception for extrinsic evidence
- Exception for duty to defend AI

Essential documents needed to determine duty to defend an AI are:

1. The contract between the your insured and the third party
2. The policy(ies) of the third party
3. The pleadings

****Determining the Duty to Defend should be done by Carrier or Coverage Counsel, NOT Defense Counsel****

What to Look for in Contract Between Named Insured and Third Party

1. Language requiring the third party to name your insured as an additional insured
2. Terms of additional insured coverage:
 - Ongoing vs. Completed Operations
 - Time period that AI coverage remains in effect
 - Coverage limits and special policy forms

What to Look for in Contract (Continued)

3. Confirm Scope of Work of your insured and third party
4. Confirm dates of contract

Additional Insured Endorsements

1. Scheduled Basis – the additional insured is listed on either the endorsement itself or on the declarations page
2. Blanket Basis – the additional insured is determined by whether a “written contract” 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 named insured's work implicated by pleadings?
2. Is third party's work implicated by pleadings?
3. Determine potential coverage for your insured as an additional insured (i.e., do the pleadings allege "property damage," an "occurrence," and did the damage fall within effective 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)

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

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

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

- Facts (Continued)
 - Royal notified Hartford of the underlying suit and requested 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

*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 undisputedly pro rata under the CGL but under the PL policy it 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

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

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

What to Include in Tender

1. Tender letter should be drafted to carrier:

- identify your insured and the third party

- identify the additional insured obligation in contract

- identify any AI endorsement you obtained

- discuss allegations in live pleading

- Must state that tender is being made for defense/indemnity of your named insured

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

What to Include in Tender (Continued)

2. Attach copies of work contract, live pleading, and any certificate of insurance or AI endorsement you were able to obtain
3. Save a complete copy of the entire tender with 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****

Respond to Coverage Correspondence

Oftentimes, the AI carrier will request additional information, like

- dates of construction
- certificates of substantial completion
- payment requests
- change orders

Always respond to requests for additional information timely and thoroughly

Re-Tender Every Petition

Each Petition could affect 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 Petition (Continued)

- If the original Petition that was tendered did not trigger coverage, a subsequent Petition can
- Duty to defend triggers from the carrier's receipt of the first Petition that triggered coverage
- Again, Time is of the Essence
- Always refer to prior tender dates in subsequent tender letters
- Attach the new Petition to 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 be serving discovery aimed at this information****

Why Coverage Counsel Is the Best Choice to Handle the Tender

1. Defense counsel rarely are trained in analyzing coverage
2. Involving coverage counsel early on allows defense counsel to stay focused on the defense of the insured
3. 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
4. Delays are more likely where defense counsel is wearing multiple hats

Why Coverage Counsel Is the Best Choice to Handle the Tender (Continued)

4. Settlement negotiations and mediation run much more smoothly when coverage counsel has been involved early on and handles the AI side of the mediation
5. Where AI carriers delay or deny, coverage counsel can institute a declaratory judgment action early on to assist with settlement of the underlying suit, and force AI carriers to attend mediation
6. 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?

Julie A. Shehane

- (214) 712-9546
- Julie.Shehane@cooperscully.com

Benjamin Passey

- (214) 712-9536
- Ben.Passey@cooperscully.com