

# Navigating Workers Compensation Insurance Program Disputes

by Robert M. Horkovich, Pamela Hans and Peter A. Halprin

**W**ith increasingly regularity, insurance companies seem to be pursuing policyholders to recover retrospective premiums under old workers compensation programs. In some instances, insurance companies have attempted to open long-closed policy years and adjustment periods in an attempt to obtain payment from a policyholder.

Policyholders facing such situations may find themselves looking through their files to find the many documents that make up the insurance program, and then to untangle the maze of dispute resolution, payment, program, side and other agreements that may govern the relationship between the policyholder and insurance company.

While insurance company attempts to obtain premium retroactively can seem daunting for policyholders, the process for determining whether a request for payment is meritorious, when considered step-by-step, is manageable and can lead to a favorable outcome.

When a policyholder receives an invoice requesting payment of premium, it should request immediately that the insurance company explain the invoice, including the losses and calculations that were used to calculate the premium. Many insurance policies and payment agreements require that the insurance company explain the basis for its calculation of premium and do so within a specified time. Policyholders should scrutinize their insurance policies and payment agreements, demand an explanation and hold the insurance companies to the requirements of the agreement.

Policyholders should also understand the collateral that they may be required to provide as part of the insurance program and closely scrutinize requests to increase collateral. If an insurance company asserts that a particular open claim requires certain reserves and justifies an increase in collateral, policyholders

should request and review the claim file. Insurance companies may err in the factors used to calculate the premium or fail to update reserves after a claim is closed. Policyholders should insist that the insurance company explain the reserves and collateral required.

Policyholders would be wise to pay close attention to the circumstances under which an insurance company may—and may not—draw down on collateral. Insurance policies and payment agreements are typically specific as to the circumstances under which the insurance company may access that collateral through a drawdown on a letter of credit or otherwise. Policyholders should understand the remedies for an improper drawdown of collateral and also understand what legal action is available to prevent an improper drawdown. For example, some agreements enable a policyholder to prevent a drawdown when there is a dispute as to an invoice. In such circumstances, the policyholder should make the record clear that there is a dispute and that this fact precludes a drawdown.

If the dispute cannot be resolved through negotiation, a policyholder may face the specter of arbitration. Many policyholders have concerns about arbitration, particularly in the context of retrospective premium disputes because the arbitration clauses are often one-sided in favor of insurance companies. However, knowledge of the process can help even the playing field. Further, as will be discussed in a forthcoming article there are bases for challenging the enforceability of arbitration provisions in some of these programs.

Whether trying to reach a negotiated resolution of a dispute or pursuing arbitration or litigation, policyholders should insist that the insurance company explain fully the basis for its demand for payment. Policyholders should also scrutinize the merits of the purported basis for the premium sought. This

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will require a detailed examination of the insurance company's claims handling efforts to determine whether claims were appropriately handled. If claims handling efforts were improper, and thus the amounts sought are improper, the policyholder may be able to assert counterclaims for the premium amounts for which they were overcharged.

An insurance company's obligation to explain its premium calculation does not disappear with the filing of suit or demand for arbitration. In fact, an insurance company's failure to explain its premium calculation may constitute a breach of the agreement and thus a defense to a claim for such payment. Even if an explanation is given a policyholder should review carefully the calculations. The insurance company must substantiate its calculations in the course of a litigation or arbitration.

Policyholders facing a dispute regarding retrospective premiums in workers compensation insurance programs may be able to improve the outcome of the dispute by focusing on the points in the process outlined above. Early on, policyholders need

to understand the insurance company's position and should, where necessary, protect their access to capital. If arbitration or litigation ensues, perhaps after challenging the former forum, policyholders should scrutinize claims handling efforts and the amounts claimed, and seek to reduce any amount allegedly owed accordingly. ■

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