

NAVIGATING INSURANCE COVERAGE DISPUTES

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Navigating Insurance Coverage Disputes: Strategies Promoting a Successful Voyage for Policyholders

David E. Suchar and Peter K. Doely

Policyholders buy insurance to protect themselves. Yet, when the time comes for reliance on their insurance, policyholders are faced with the challenges of understanding what exactly is covered, the process for getting coverage, and what to do if an insurance company refuses to honor its obligations. While this article cannot address all strategies for dealing with insurance coverage issues and disputes, there are several important steps policyholders can take to ensure they are afforded the full coverage provided by their policies.

Understanding Your Policies

In order to understand how to enforce a policyholder's rights under its insurance policies, it is necessary to understand the applicable coverage in its insurance program. When faced with a potential claim, it is crucial to discover which relevant policies may apply despite the fact that each may be voluminous and technical in describing coverage grants and requirements.

The first step is to gather the operative insurance policies, including any endorsements. This information will be key for making a determination as to whether the loss is covered and, if so, the amount of coverage. In particular, a policyholder should understand the following:

 Initial Grant of Coverage. An insurance policy will initially provide the basic scope of what is a covered loss.

- Definitions. A policy will then more specifically define terms within the policy. The definitions can have a significant impact on the scope of coverage.
- Exclusions. From the initial grant of coverage, a policy will then carve out specific types of losses which would generally be covered but for the exclusions.
- Defense. As a component of the protection afforded under liability policies, the insurer is often obligated to defend its insured. The insurer's defense obligations may be in addition to the insurer's other obligations. In some policies, the costs of defense may also reduce the amount of coverage otherwise available.
- Limits. The insurance policy will only provide coverage up to a specified amount.
- Deductibles and Self-Insurance Retentions. The insurance policy may require the insured to pay for, or otherwise be responsible for, certain amounts before the insurer is obligated to pay for a loss.

Courts across the country have developed vastly different and often opposing interpretations of the same language in standard form insurance policies, and those interpretations can be critical in assessing coverage and will vary depending on the jurisdiction. For example, whether construction defects are considered an "occurrence" under a standard Commercial General Liability policy, and are thus potentially a covered loss, is a hotly contested issue, with courts across the 50 states taking a myriad of different approaches in response to the same policy language. Experienced coverage counsel will be attuned to choice of law issues because the state substantive law will often be a question of fact in interpreting liability policies. Counsel can help explain these issues from a policy specific and state specific standpoint, but reviewing the plain language of the policy

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is always the best starting point.

Notice and Sharing Information with Insurer

Sharing information with an insurer promptly is essential for a policyholder to preserve and enforce its rights under its policy (or policies). In order to do this effectively, an insured needs to recognize potentially covered losses and develop processes to make sure information is provided to the insurer.

What constitutes a covered loss is not always intuitive. For instance, the term "claim" is often defined in liability policies as a "demand for monetary or non-monetary relief." While a lawsuit would certainly fit within this definition, a variety of other types of actions may also fit within the "claim" ambit. Depending the particular policy, these circumstances may include an investigative demand, subpoena, or other third-party assertions that a policyholder may be liable. Employees likely to receive such claims should be trained to recognize them and consider potential insurance coverage. One potential systematic approach may be to engage in a review process within a reasonable period before policy expiration, so that any potential claims may be properly and timely reported to insurers.

Once a policyholder recognizes there may be coverage, it should provide notice to its insurer immediately. Some types of policies provide coverage on a "claims made" basis, meaning a claim against the insured is made during the policy period and notice of the claim must also be made by the policyholder to the insurer within a specified time (often no later than the end of the policy period). If the policyholder fails to provide notice, this may lead to the insurer rightfully denying all coverage.³

Notice can be handled by a policyholders' insurance broker, risk manager, or outside counsel. If there are directions in the policy about how and where to deliver notice, it is important to follow them. The notice does not have to be complex or cumbersome – simply attach the claim documentation to a letter requesting all available coverage (likely including a defense) under all polices.

It is also important to provide notice to all insurers whose policies may provide coverage, including excess or umbrella policies. A policyholder should not make the mistake of believing at the beginning of a dispute that it knows how the dispute will resolve or what its exposure

may be. It is always preferable to notify insurers of potential losses instead of failing to provide notice and risking loss of the ability to pursue coverage later.

In addition to providing initial information to an insurer, it is important to continue to provide information as the underlying claim facts develop. Not only is this often required by a policy's cooperation clause, but it facilitates the process for the insurer making its coverage determination and the policyholder assessing how to proceed.

The policyholder should also never blindly settle or compromise a relevant underlying claim without the involvement and/or consent of the insurer that has accepted its claim. Doing so may breach the policyholder's obligations under the policy and compromise its ability to recover significant amounts from the insurer.4 Any experienced coverage practitioner can tell horror stories about otherwise pristine claims being compromised because parties too easily settled related obligations without informing the insurer. These actions often inadvertently prejudice good corporate citizens who risk coverage by taking what they believe to be the right steps in settling out related claims, because insurers may assert that their subrogation or other rights have been harmed.

Acceptance, Reservation of Rights, Denials, and the Relationship with Insurer

Once a policyholder provides notice of the claim to a liability insurer, the insurer has three options: accept the claim, accept the claim under a reservation of rights, or deny the claim.

If the insurer accepts the claim, it has agreed that the claim is covered under the policy. Often, however, the insurer will accept the claim under a reservation of rights. A reservation of rights means that the insurer is accepting the claim for now, but is preserving its right to later assert that an element of the claim, or the claim as a whole, is not covered. Such letters are often long and technical because insurers want to preserve as many potential defenses as they can. The insurer also may deny coverage in its entirety.

Particularly if a policyholder receives a reservation of rights letter or a denial of coverage, it may want to involve experienced coverage counsel. Insurance companies often aggressively deny coverage, assert defenses, or otherwise act to preserve their rights in writing, knowing

¹ ACE Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789, 795 (D. Md. 2008).

² Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 40 Misc. 3d 1205(A), 975 N.Y.S.2d 370 (Sup. Ct.), aff'd, 112 A.D.3d 1379, 976 N.Y.S.2d 921 (2013).

³ Nat'l Union Fire Ins. Co. v. Zillow, Inc., No. C16-1461JLR, 2017 WL 1354147, at *5 (W.D. Wash. Apr. 13, 2017).

⁴ Ralex Servs., Inc. v. Sw. Marine & Gen. Ins. Co., 155 A.D.3d 800, 802, 65 N.Y.S.3d 49, 52 (N.Y. App. Div. 2017).

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that a certain number of policyholders will fail to respond. For a relatively small expense, an attorney can analyze the policy and claim which may allow the policyholder potentially to pursue significant amounts of insurance coverage. If, upon analyzing the policy, the policyholder disagrees with the insurer's position, it is important to respond to anything but an unequivocal acceptance from the insurer and assert any contrary position. A policyholder should not acquiesce in a denial of coverage without thoroughly assessing its rights.

If an insurer accepts the claim under a reservation of rights, the relationship between the policyholder and the insured may become complicated. On the one hand, the insurer is agreeing to protect the insured for the time being. On the other hand, the insurer has reserved the right to disclaim coverage, and it has an incentive to view the claim in a manner which minimizes coverage. This common situation may create a dilemma for the defense counsel chosen by an insurer to represent the insured. Often such counsel have longstanding relationships with insurers, and many courts have questioned said counsel's allegiances, which arguably may be divided between the policyholder and the insurer. One practical import of these conflicts is that the policyholder may, in some states, be entitled to defense counsel paid for by the insurance company, but selected by the policyholder.5 Experienced counsel can help navigate these issues and make sure the policyholder's interests are always put first.

Insurance Coverage Litigation

When necessary, coverage litigation can be an effective way to ensure the policyholder receives the protection to which it is entitled to from its insurer. Insurers may be slow to come to the table, but legislatures and courts have provided policyholders with tools to help them combat any dilatory insurers. When a policyholder successfully establishes coverage – depending on which particular state's law applies and the egregiousness of the insurer's conduct – the policyholder may be able to recover, for example: (1) its attorneys' fees incurred in pursuing coverage;⁶ (2) interest on the amounts due;⁷ or (3) damages in excess of the policy limits, including extracontractual penalties or punitive damages.⁸

Litigation also provides an opportunity to get information regarding the insurer's views of the scope of coverage and treatment of the claim in order to develop the policyholder's claims against the insurer. For example, in discovery a policyholder may be able to access the insurer's claim file, underwriting file, and the drafting history of the particular policy at issue. Such discovery can be a useful tool for establishing a policyholder's rights to coverage and extracontractual damages.

Mediation and Settlements

Mediation and other alternative dispute resolution processes have become standard, or even required, practice throughout the country, and most lawsuits are settled instead of tried. Particularly in large, complex cases, insurance money will often control whether those suits are able to be resolved.

In approaching a mediation or developing a settlement strategy, it is very important to engage with attorneys and mediators experienced with insurance coverage issues. This experience allows attorneys and mediators to bridge the gap between complex underlying cases and any insurance coverage issues in order to persuade insurers to help fund the underlying settlement.

Because many plaintiffs view the insurance proceeds as the likely source of recovery, insurance coverage attorneys have a unique role in the resolution process. Coverage counsel can explain to the plaintiff any coverage issues that may exist and, as a practical matter, prevent the plaintiff from having an unrealistic view of recovery. Conversely, such attorneys can explain to the insurers the potential coverage exposure and increase insurer participation in the underlying case settlement.

Insurance coverage counsel can also work together with the attorneys in the underlying case to take seemingly inconsistent positions which may advance their mutual client's interest. The attorney in the underlying case can advocate the client's position against the plaintiff; and, at the same time, the insurance coverage attorney can encourage an insurer to limit its exposure and resolve the matter. Thus, the attorneys can fulfill unique and complementary roles in the resolution process.

Conclusion

For policyholders, there are often numerous hurdles for establishing insurance coverage and convincing insurers to pay out on covered losses. Fortunately, there are steps which can be used to establish the maximum amount of insurance coverage. This overview is a starting place for navigating insurance coverage disputes and understanding basic concepts, but it is always advisable to consult with an experienced insurance coverage

⁵ Alaska Stat. § 21.96.100; Cal. Civil Code §2860; Prahm v. Rupp Const. Co., 277 N.W.2d 389 (Minn. 1979); Maryland Cas. Co. v. Peppers, 355 N.E.2d 24 (III. 1976).

⁶ Nolt v. U.S. Fid. & Guar. Co., 329 Md. 52, 66, 617 A.2d 578, 584 (1993).

⁷ Minn. Stat. § 60A.0811.

⁸ Fla. Stat. § 624.155; 42 Pa. C.S.A. § 8371; MKB Constructors v. Am. Zurich Ins. Co., 711 F. App'x 834, 837 (9th Cir. 2017); Pickett v. Lloyd's, 131 N.J. 457, 474, 621 A.2d 445, 454 (1993).

counsel in assessing any loss and potential claim.

Navigating Insurance Coverage Disputes:

Strategies Promoting a Successful Voyage for Policyholders

Presented by David E. Suchar Maslon LLP

Introduction & Road Map

- 1. Understanding your policies
- 2. Notice and sharing information with insurer
- 3. Acceptance, reservation of rights, denials
- 4. Your relationship with insurer
- 5. Insurance coverage litigation
- 6. Mediation and settlement

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Anatomy of an Insurance Policy

- Declarations
- Grant of Coverage
- Definitions
- Endorsements/Exclusions

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Policy Interpretation and Choice of Law

- Construction/Insurance Coverage:
 - Under a CGL policy, can defective construction constitute an "occurrence?"
- Answer depends on state law.
 - Illinois, Wyoming No
 - Indiana, Washington & North Dakota Yes

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Protection under Liability Policies

- Indemnity
 - Payments for covered losses.
- Defense
 - Duty to defend policyholder.
 - Defense costs may be in addition to the policy limits, or they may reduce the policy limits.

Notice

- Must give notice to all insurers right away.
- Common Mistakes
 - Failure to recognize a "claim."
 - Failure to provide timely notice.
 - Failure to notify excess and umbrella insurers or other potentially applicable policies.

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Failure to Provide Notice



An example: National Union Fire Ins. Co. v. Zillow, 2017 WL 1354147 (W.D. Wash. 2017)

Result: Zillow loses out on coverage for \$8 million verdict based on failure to give notice of demand letter received during first policy period, concluding that Zillow's notice of the follow-on lawsuit during second policy period was too late.

Notice: Suggestions

- Train key employees to recognize claims and consider them as such.
- Have an established process for how to handle potential claims and give notice.
- Resist the instinct to assume you know how a claim will evolve and resolve.

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Continued Cooperation and Communication with Insurer

- Continue providing information.
 - · Obligation to cooperate.
- Compromising claims
 - Never settle a claim without insurer involvement and/or consent.
 - Doing so can prejudice ability to collect from insurer.

Insurer Response to Notice

- Three options:
 - Accept.
 - · Deny.
 - Accept with a reservation of rights.
- If you receive a denial or reservation of rights, may want to involve experience coverage counsel.

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Reservation of Rights Letters

- Respond and don't confess "no coverage."
- Develop a policy-based strategy.
- Request discussion with adjuster or claims counsel.

Independent Counsel

- Defense counsel chosen by the insurer may have a conflict of interest.
 - Example: whether a policyholder's action was intentional (and, therefore, excluded under the policy).
- May entitle the policyholder to counsel of their choosing paid for by the insurer.

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Coverage Litigation

- Can be an effective way to protect the policyholder.
- Additional remedies may be available, including recovery of:
 - Attorneys' fees.
 - Interest.
 - Damages in excess of the policy limits.

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Discovery

- Litigation may allow policyholder insight into the insurer's view of coverage.
 - Claims file.
 - · Underwriting file.
 - Drafting history.

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Role of Mediator & Coverage Counsel

- Mediation is used or required in almost all large, complex insurance-related cases.
- Insurance money often controls resolution.
- Experienced mediators and coverage counsel bridge the gap between the underlying case and the coverage issues to fund settlements
- Perception that role of mediators and role of coverage counsel is increasing in importance for resolution of complex cases

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Coverage Counsel and Mediator Familiar With Coverage Issues Act To Facilitate Settlement

- Explain to plaintiff:
 - · Coverage issues/weaknesses.
- Explain to insurer:
 - Case exposure.
- Coverage issues can drive settlement amount.
- Potential collaboration between coverage counsel and counsel in underlying case.

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Insurers and Settlements

- Necessity of involving insurer
- Insurer may be required to settle
- Partial settlements/strategy
 - Settling just with insurers?
 - Or wait until combined mediation?

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David Suchar, a skilled trial attorney, regularly represents clients in construction and insurance coverage disputes, government and internal investigations, and a variety of commercial litigation. In the 2019 Who's Who Legal worldwide ranking of construction law "Future Leaders," David was the sole ranked practitioner from the United States, described as "an impressive trial lawyer whose practice spans the spectrum of construction matters from insurance to payment claims." The 2019 edition of Chambers USA ranks David as one of the top Minnesota construction lawyers and notes that sources describe him as "an excellent attorney with a superb grasp of construction law."

David has developed a niche national practice representing commercial policyholders in insurance coverage disputes, including on many of the largest construction projects and claims across the United States. His recent successes include multimillion-dollar recoveries for such matters in Minnesota, Florida, Louisiana, Washington, Virginia, Maryland, Massachusetts, and Utah. A frequent presenter on construction and insurance coverage issues, David draws from his experience on the Steering Committee for the ABA Forum on Construction Law's Division 7 (Insurance, Surety & Liens) and as contributing editor of The Construction Lawyer, the flagship ABA construction publication.

As a former federal prosecutor, David has also counseled and represented clients at trial and through all aspects of various government, administrative, and internal investigations. His experience includes criminal prosecutions, inquiries, and subpoenas from state and federal agencies.

David's in-court experience sets him apart from the crowd. He has acted as first-chair trial counsel for a variety of bench and jury trials in courts across the country. In addition to his work in the areas of construction and insurance coverage litigation and government and internal investigations, David has successfully litigated various high-end contract and commercial litigation matters. He serves on the Executive Committee (2019 Officer at Large) of the Network of Trial Law Firms, a network of over 5,000 attorneys in 23 separate and independent trial law firms, including Maslon.

Areas of Practice

- Business Litigation
- Construction & Real Estate Litigation
- Government & Internal Investigations
- Insurance Coverage Litigation
- Intellectual Property Litigation

Recognition

- Notable Practitioner in Minnesota for Construction, Chambers USA, 2018-2019
- Who's Who Legal: Construction 2019 Future Leaders
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2014-2016 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)

Education

- Georgetown University Law Center J.D., cum laude, 2002
- DePaul University B.A., with high honor, 1998