



INSURANCE AND INDEMNITY 101

The Insurer's Duty to Defend

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Most policies that provide insurance coverage for liability claims that are asserted against the insured impose two main duties on the insurer: 1) to defend the claim (pay for legal counsel and litigation costs); and 2) to indemnify the insured (pay for damages on the insured's behalf) against the loss if the plaintiff who sued the insured is successful. There are "indemnity only" policies, as opposed to policies paying "on behalf of the insured," but they tend to be written in special circumstances. Generally, standard liability policies will create both duties.

Because the policy creates both duties, they are obviously linked. "[I]f the policy does not apply then the insurer does not have a duty to indemnify or defend the insured."¹ "The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively" from the language of the contract.²

The two duties also share the characteristic that the insured must take the first step and request that the insurer defend and indemnify the insured by formally and timely notifying the insurer of the claim made against the insured and complying with other duties under the applicable policy. "[O]rdinarily, an insurer has no duty to defend an insured absent a request to defend."³

The differences between the duty to defend and the duty to indemnify begin to emerge when the analysis in each specific case starts, though they begin in the same way. An insurer's duty to defend its insured against a claim or a lawsuit is separate and distinct from the insurer's duty to indemnify.⁴

The analysis of both duties begins with the underlying complaint that asserts that the insured defendant is liable to the plaintiff, and it is the factual allegations in that complaint, and not the labels the underlying plaintiff gives them, that drive the analysis.⁵

The "characterization of [defendant's] conduct as being mere negligence does not control the applicability of the exclusionary clause, because the duty to defend is not limited to the precise language of the pleadings. Rather, it is the substance of the allegations, not their mere form, that must be examined."⁶

The allegations contained in the underlying complaint generally determine an insurer's duty to defend. However, mere allegations of negligence in a transparent attempt to trigger insurance coverage by characterizing intentionally tortious conduct as negligent will not persuade the court to impose a duty to defend.⁷

The injuries resulting from the car accident are excluded from coverage regardless of the label the allegations were given in the complaint. We must look to the underlying cause of the injury to determine coverage and not the theory of liability.⁸

1. The Duty to Defend extends to claims arguably within coverage

The analyses diverge here, though, because the analysis of the duty to defend must go further. Although "[t]he insurer is not required to defend against claims expressly excluded from policy coverage," "[t]he duty to defend is not limited by the precise language of the pleadings."⁹

The duty of an insurance company to provide a defense in an underlying tort action depends on the allegations in the complaint and extends to allegations which "even arguably come within the policy coverage." The duty to defend is broader than, and not necessarily conclusive of, an insurer's duty to indemnify. The court must resolve any doubt pertaining to the duty to defend in favor of the insured.¹⁰

This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage.... The duty to defend

cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible ... In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor.¹¹

2. An Insurer must investigate the allegations beyond the complaint

The Michigan Supreme Court has held that the insurer cannot get summary disposition in its favor where the facts are not yet fully developed.¹²

A consequence of this principle is that the insurer cannot limit its analysis to the allegations of the complaint where the duty to defend is at issue. The insurer must look behind those allegations.

An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor.¹³

The insurer cannot limit its analysis to the underlying complaint but must conduct its own investigation to determine whether the claim should be covered.

“[T]he duty to defend is broader than the duty to indemnify,” and an insurer who wrongfully refuses to defend its insured becomes liable on any judgment against the insured “despite theories of liability asserted against any insured which are not covered under the policy.” An insurer's duty to defend, then, includes the duty to investigate and analyze whether the third party's claim against the insured should be covered.¹⁴

The fact that the duty to defend extends to claims that may or may not be covered as long as they are “arguably” covered is one important characteristic of the insurer's duty to defend, and the insurer's affirmative duty to investigate and look “behind” the complaint is another. The third major difference is that if any claim in the underlying complaint is sufficient to trigger a duty to defend, that duty extends to all of the claims made in the underlying complaint, even those that are not covered.

An insurer must defend its insured even if theories of liability asserted are not covered under the policy, if any asserted theories of recovery fall within the policy coverage.¹⁵

In a situation like this, the insurer will often issue a reservation of rights letter explaining that it will defend against all claims, but that if liability is ultimately found to exist on a claim that is not within the policy's coverage, then the insurer will not indemnify the insured for the loss.¹⁶ This situation can sometimes lead to a quandary for the retained defense counsel. Defense counsel's obligation is to the insured client, not to the insurer. What should defense counsel do if one of two claims is covered and the other is not? Defense counsel may, for example, file a compelling motion for summary disposition on the covered claim and have it dismissed. In theory, dismissing this claim would be a victory for the client-defendant-insured, but the result is that the insurer will then withdraw the defense of the remaining (not covered) claim.

About the Author

Rabih Hamawi is a past chairperson of the Insurance and Indemnity Law Section. He is a principal at the Law Office of Rabih Hamawi, P.C. and focuses on representing policyholders in fire, property damage, and insurance-coverage disputes with insurers and in errors-and-omissions cases against insurance agents. He has extensive expertise in insurance coverage and is a licensed property and casualty, life, accident, and health insurance producer and counselor (LIC). He earned the Chartered Property and Casualty Underwriter (CPCU), Certified Insurance Counselor (CIC), and Certified Risk Manager (CRM) designations. He is a frequent author on insurance and indemnity topics. His email address is rh@hamawilaw.com

Endnotes

- 1 *Protective National Ins Co v City of Woodhaven*, 438 Mich 145, 159; 476 NW2d 374 (1991). See also *Farmers & Merchants Mut Fire Ins Co v Le Mire*, 173 Mich App 819; 434 NW2d 253 (1988).
- 2 *Stockdale v Jamison*, 416 Mich 217; 330 NW2d 389 (1982). In interpreting an insurance contract, “the policy application, declarations page, and the policy itself construed together constitute the contract.” *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708; 706 NW2d 426 (2005).
- 3 *Celina Mutual Ins Co v Citizens Ins Co*, 133 Mich App 655, 662; 349 NW2d 547 (1984).
- 4 *Allstate Ins Co v Maloney*, 174 Mich App 263, 268; 435 NW2d 448, 450 (1988).
- 5 *Gorzen v Westfield Ins Co*, 207 Mich App 575, 578; 526 NW2d 23 (1994).
- 6 *State Farm v Johnson*, 187 Mich App 264, 268; 466 NW2d 287 (1991) (citations omitted).
- 7 *Iowa Kemper Ins Co v Ryan*, 172 Mich App 134, 137; 431 NW2d 434 (1988).
- 8 *Gorzen, supra*, 207 Mich App at 578.
- 9 *Tobin v Aetna Cas & Surety Co*, 174 Mich App 516, 519; 436 NW2d 402 (1988).
- 10 *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989).
- 11 *State Farm Fire & Cas Co v Huyghe*, 144 Mich App 341, 345; 375 NW2d 442, 443–44 (1985) (quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141–42; 301 NW2d 832, 835 (1980) (citations omitted)).
- 12 *St. Paul Fire & Marine Ins Co v Michigan Mutual Ins Co*, 469 Mich 905; 668 NW2d 903 (2003), citing *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450–452; 550 NW2d 475 (1996).
- 13 *American Bumper, supra*, note 10, internal citations deleted.
- 14 *Koski v Allstate Ins Co*, 456 Mich 439, 445 note 5; 572 NW2d 636 (1998), citing *American Bumper, supra*.
- 15 *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 100; 730 NW2d 682 (2007).
- 16 <https://www.hamawilaw.com/post/the-reservation-of-rights-and-denial-letters> (*The Journal of Insurance and Indemnity Law*, Volume 16 Number 3, July 2023).