



Practice Development

Glenn A. Klinger

SmithAmundsen LLC, Chicago

Intersection of Litigation and Insurance: the Basics

Shortly after I started to practice I was asked to review and appeal deductions to the billing invoices issued in the cases I was assigned to handle, which seemed easy enough, but I kept seeing one issue that I didn't understand: the clients we defended were aerospace companies, but the invoices were issued to and written down by insurance carriers. Back then I did not understand the hugely significant role of insurance in defense litigation and, having no real experience with the practical application of legal concepts like the duty to defend and the duty to indemnify, I felt a bit lost. This column is the first in a series that will talk about the intersection of litigation and insurance and starts with some of the basic concepts.

Named Insured v. Insured v. Additional Insured: The *named insured* is the individual or entity who (generally) purchases the policy and is identified on the declarations page as the named insured or a named insured. A person or entity can be an *insured* without being the named insured because policies typically cover certain people or entities that have a relationship with the named insured, *e.g.*, employee or executive officer of a named insured-corporation may qualify as insureds under the corporation's policy to the extent that their acts were within the scope of employment or while performing duties related to the corporation's business. *Additional insureds* are individuals or entities that are not named in the declarations page and do not otherwise qualify as an insured under the coverage form, but are generally afforded coverage if certain circumstances arise. This typically occurs by way of a policy endorsement and the scope of coverage for the additional insured depends on the language of the endorsement.

First-Party Insurance: First-party insurance is purchased by the insured and insures against loss of or damage to the insured's property or to the insured themselves. First-party claims are submitted to the insured's own insurance carrier and a key distinction from third-party insurance is that in the case of first-party insurance, the claimant is the policyholder, *i.e.*, the first-party to the insurance contract. Uninsured and underinsured motorist and medical payments coverages in auto policies provide first-party coverage. Commercial property policies and business interruption insurance is also first-party coverage.

Third-Party Insurance: Third-party insurance insures against loss or damage the insured causes or allegedly causes to another individual or entity or their property. The policy is purchased by the insured (the first-party) from the insurance carrier (the second-party) for protection against the claims of another (the third-party). Third-party claims are generally made against the insured party by a party alleging injury, prompting the insured party to submit the claim to its insurance carrier; however, in many instances the third-party files a claim directly with the insured party's insurance carrier. Examples of third-party policies that insure against loss the insured causes or allegedly causes to a third-party include personal or commercial auto liability coverage, general commercial liability coverage, and directors' and officers' liability coverage. Policies insuring against liability to third-parties often include a duty of the carrier to defend the insured and to indemnify the insured.



Duty to Defend: The insuring agreement of most standard form liability policies grants the carrier the right and duty to defend its insured (or additional insured) in any suit against the insured seeking damages or losses allegedly within the scope of coverage (*i.e.*, third-party claims). In Illinois, a carrier's duty to defend is broad and it is separate from the carrier's duty to indemnify its insured. The duty to defend is determined by comparing the allegations of a complaint to the relevant terms of a policy to see whether there is potentially coverage available under the policy based on those allegations. When a complaint alleges facts within or potentially within the coverage of the policy, the duty to defend is generally triggered even though actual liability may never be found.

Reservation of Rights: Many times, you will see an insurer agree to defend an insured subject to a reservation of rights to withdraw the defense or deny indemnity coverage—depending on the facts of the case. An insurer's coverage defenses and reservations are generally laid out in a “reservation of rights” letter.

Duty to Indemnify: The duty to indemnify means that the carrier agrees to pay damages sought in a settlement or upon a judgment. A carrier's duty to indemnify its insured will not be determined until the litigation against it is resolved and there is a finding of liability. The question of whether the insurer has a duty to indemnify for a particular liability is only ripe for consideration if the insured has incurred liability in connection with the claim against it. The duty to indemnify generally arises if the insured's activity and the resulting loss or damage actually fall within the policy's coverage.

Tripartite Relationship and Conflicts of Interest: Where the insurance carrier has a duty to defend and there are no conflicts of interest between the insurance carrier and insured, the insurance carrier typically appoints panel counsel to represent the insured. The question is: does defense counsel retained on behalf of the insured also represent the insurance carrier? In Illinois, the answer is that counsel represents both the insurer and the insured. Under this relationship, the insurance carrier generally has the obligation and right to control the defense, but the attorney owes the same professional obligations to the insured as if the attorney was personally retained by the insured.

About the Author

Glenn A. Klinger is an attorney in the Chicago office of *SmithAmundsen LLC*, where he concentrates his practice on insurance coverage disputes involving commercial and professional policies. He also litigates commercial and bad faith cases, and advises clients on issues related to risk management and transfer. Mr. Klinger serves as the Vice-Chair of the IDC Educate Pillar.

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