

INTRODUCTION TO INSURANCE LAW

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What is An Insurance Policy

- “ Insurer agrees that it will defend the Insured.
- “ Insurer agrees that it will indemnify or provide coverage to the Insured
- “ The insurance is for unknown future events only.
- “ An insurance policy can be an “occurrence” policy or a “claims made” policy.
- “ Traditionally, liability policy are occurrence policies, which insure negligent acts or other liability which causes the bodily injury or property damage to occur during the policy period, regardless of when the claim is made. See Section I. b.
- “ Claims made policies provide coverage only when a claim or lawsuit is made during the policy period. A policy may also provide that the claim must be reported by the Insured to the Insurer during the effective dates of the insurance policy. A policy may define a claim as a demand for money, a written demand for money, or a demand for money or services.

Components of An Insurance Policy

- “ Declarations Page.
- “ Endorsements.
- “ Policy Form.
- “ Certificates of Insurances and Additional Insureds.
- “ *Westfield Insurance Company v. FCL Builders, Inc.*, 407 Ill.App.3d 730, 948 N.E.2d 115, 350 Ill.Dec. 46 (1st Dist. 2011).
- “ *Pekin Insurance Company v. American Country Insurance Company*, 213 Ill.App.3d 543, 572 N.E.2d 1112, 157 Ill.Dec, 648 (1st Dist. 1991).

Rules of Construction

- “ Insurance policies are construed like any other contract.
- “ The policy should be construed as a whole.
- “ Ambiguity in a contract is construed against the Insurer.
- “ Exclusionary clauses must be clear and definite and are narrowly construed.
- “ Reasonable expectations doctrine. *El Rincon Supportive Services Organizations Inc., v. First Nonprofit Mut. Ins. Co.*, 281 Ill.Dec. 128, 803 N.E.2d 532, 346 Ill.App.3d 96 (1st Dist. 2004) .

Types of Insurance Policies

- “ Commercial General Liability Policy. Insurer pays damages the Insured becomes legally obligated to pay because of bodily injury, property damages, caused by an occurrence or an advertising injury or personal injury caused by an offense.
- “ Directors and Officers Policy. Provides coverage for wrongful acts for any individual acts of a director or officer. The policy will provide coverage for directors and officers individually when they are not indemnified by the corporation, and also provides coverage for to the corporation if it has paid the director or officer for expenses associated with the suit. Policy will not provide coverage for claims based upon personal profits.
- “ Professional Liability Policy. A professional liability policy or an E&O policy provides coverage to the Insured for errors and omissions arising from the Insured rendering a professional service.
- “ Employment Practices Liability Policy. Provides coverage to an employer for claims such as wrongful termination, discrimination or harassment. Will often exclude coverage for claims concerning violations of Equal Pay Act, OSHA, NLRA.

Insurer's Duty to Defend

- “ Insurer's duty to defend arises if expressly stated in the policy.
- “ Duty to defend is most often seen in a liability policy.
- “ Insurer will have an obligation to pay legal expenses incurred by Insured in defending a lawsuit.
- “ The duty to defend includes defending the Named Insured and any Additional Insured.
- “ If the Insured has multiple insurance policies, it can make a “targeted tender” and select which Insurer shall defend it in a lawsuit.
- “ The Insurer's duty to defend is a separate and distinct duty from its duty to indemnify. Often, the Insurer will provide a defense, but no indemnity under a policy.
- “ *Maryland Cas. Co. v. Vonnahmen*, 102 F.3d 277 (7th Cir. 1996).

Determining Whether The Insurer Has A Duty To Defend

- “ Duty to defend is broader than the duty to indemnify.
- “ The duty to defend arises if any of the facts alleged within an underlying complaint fall potentially within the policy’s coverage.
- “ Courts will liberally construe complaint in order to determine if there is a duty to defend.
- “ If an Insurer relies on an exclusionary provision to deny coverage, the exclusion must be clear and free from doubt.
- “ *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 189 Ill.Dec. 756, 620 N.E.2d 1073, 156 Ill.2d 384 (Ill. 1993).
- “ *Valley Forge Ins. Co. v. Swiderski Electronics*, 307 Ill.Dec. 653, 223 Ill.2d 352 (Ill. 2006)
- “ *Illinois State Bar Ass’n Mut. Ins. Co. v. Mondo*, 331 Ill.Dec. 914, 911 N.E.2d 1144, 392 Ill.App.3d 1032 (1st Dist. 2009).

Determining Whether The Insurer Has A Duty To Defend

- “ Insurer must defend if it has knowledge of true but unpleaded facts which, when taken together with allegations in complaint, indicate that claim is potentially covered by the policy.
- “ An Insurer’s duty to defend arises when the policy is triggered. The policy is triggered when a lawsuit is filed against the Insured.
- “ *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 211 Ill.Dec. 459, 655 N.E.2d 842, 166 Ill.2d 520 (Ill. 1995).,
- “ Insurer must defend if it has actual notice.
- “ *Cincinnati Companies v. West American*, 233 Ill.Dec. 649, 701 N.E.2d 499, 183 Ill.2d 317 (Ill. 1998).
- “ *American Nat. Fire Ins. Co. v. National Union Fire Ins. Co. of Pittsburg, PA*, 277 Ill.Dec. 767, 796 N.E.2d 1133, 343 Ill.App.3d 93 (1st Dist. 2003).

Determining Whether The Insurer Has A Duty To Defend

- “ If the Insured has not made a targeted tender, and both policies contain “other insurance” clauses, the Insurers will share in the costs of defense.
- “ Because the duty to defend and indemnify are separate, the defense costs incurred by the Insurer are in addition to the indemnity costs, unless otherwise stated in the Policy.
- “ The Insurer cannot escape its duty to defend by tendering its policy limits to the courts.
- “ The Insurer has a right to control the defense, unless there is a conflict of interests.
- “ *National Cas. Co. v. Forge Indus. Staffing, Inc.*, 567 F.3d 871 (7th Cir. 2009).
- “ *Maryland Cas. Co., v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976). Reservation of rights letter should clearly explain the conflict.
- “ Insurer may be able to recover its defense costs if there is an express provision in the insurance policy.
- “ *General Agents Ins. Co. of America v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092 (Ill. 2005).

Targeted Tender

- “ Insured who is covered under multiple policies can select which Insurer to defend it.
- “ Targeted tender will often occur when the Insured is insured under its own policy and insured as an Additional Insured under another policy.
- “ Targeted tender will also occur when the Insured selects which of its own Insurers must provide a defense. For example between a employer’s liability policy and a CGL Policy.
- “ Eliminates an Insurer’s ability to seek equitable contribution.
- “ *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill.2d 570, 727 N.E.2d 211, 244 Ill.Dec. 912 (2000).
- “ *Legion Insurance Co. v. Empire Fire & Marine Insurance Co.*, 354 Ill.App.3d 699, 822 N.E.2d 1, 290 Ill.Dec. 719 (1st Dist. 2004).

Excess Insurer's Duty To Defend

- “ Excess or umbrella Insurer will provide coverage only when the primary insurance policy has been exhausted.
- “ Sometimes when an Insured is insured under multiple insurance policies, one Insurer may become an excess insurer by coincidence because of the presence of other insurance clauses present in the policies
- “ The primary Insurer, not the excess carrier or Insurer has the duty to defend.
- “ *Western Cas. & Sur. Co. v. Western World Ins. Co. Inc.*, 769 F.2d 381 (7th Cir. 1985).
- “ *Kajima Construction Services Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill.2d 102, 879 N.E.2d 305, 316 Ill.Dec. 238 (2007).

Insurer's Breach Of Its Duty To Defend

- “ When the Insurer's duty to defend is triggered, the Insurer must: (1) defend; (2) defend under a reservation of rights; or (3) file a declaratory judgment action.
- “ If the Insurer fails to defend, defend under a reservation of rights, or file a declaratory judgment action it has breached its duty to defend.
- “ Breach of the duty to defend, will result in the Insurer waiving its rights to approve a settlement or assert policy defenses.
- “ Insurer will be responsible for Insured's litigation expenses in the underlying action, and for the judgment entered in the underlying action, up to the limits of its insurance policy.
- “ Insurer may become liable for entire judgment recovered against its Insured, in excess of policy limits, if the breach of the duty to defend constitutes fraud, negligence, or bad faith.
- “ *Korte Const. Co. v. American States Ins.*, 255 Ill.Dec. 847, 750 N.E.2d 764, 322 Ill.App.3d 451 (5th Dist. 2001).

Declaratory Judgment Actions

- “ Insurer may bring a declaratory judgment action, if it believes it has no obligation to defend an Insured. The Insured may also bring a declaratory judgment action.
- “ Insurer or Insured must comply with Illinois Compiled Statute, 735 ILCS 5/2-701 (2011), must be an actual controversy, and must be an interested party.
- “ An Insurer’s duty to defend is suspended upon its filing for a declaratory judgment that there is no coverage.
- “ Illinois appellate courts have held that if an Insured brings a declaratory judgment action and is successful, this does not entitle the Insured to attorney fees. The only way that it can recover fees is if it is provided for in the contract or by statute.
- “ *Westchester Fire Ins. Co. v. G. Heileman Brewing Co., Inc.*, 321 Ill. App. 3d 622, 637, 747 N.E.2d 955, 967-68 (1st. Dist. 2001)

Insured's Duty to Indemnify

- “ Court will examine the policy to determine whether is coverage, i.e., whether the Insurer must provide indemnity.
- “ Insurer's duty to indemnify arises when the Insured becomes legally obligated to pay damages in the underlying action, i.e., a settlement agreement is reached or an actual judgment is entered by the court.
- “ Once the Insured determines that a policy provides coverage, the Insurer has the burden to affirmatively demonstrate that coverage is limited or non-existent.
- “ If the Insurer wants to deny coverage based upon an exclusion, the terms must be clear, definite and explicit.
- “ If there is no duty to defend, there is no duty to indemnify. *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 189 Ill.Dec. 756, 620 N.E.2d 1073, 156 Ill.2d 384 (Ill. 1993).
- “ The anti-subrogation rule provides that Insure cannot subrogate against its Insured. *Chubb Insurance Co., v. DeChambre*, 808 N.E.2d 37, (1st Dist. 2004).

Limits and Restrictions on the Insurer's Duty to Indemnify

- “ Illinois courts will not insure against a known loss. *St. Paul Fire & Marine Ins. Co. v. Lefton Iron & Meal Co., Inc.*, 230 Ill. Dec. 771, 694 N.E.2d 1049, 296 Ill.App.3d 475 (5th Dist. 1998).
- “ Illinois law forbids insuring against criminal fines or punitive damages.
- “ An agreement to indemnify one against its voluntary, not accidental misconduct is void against public policy.
- “ There is no duty to indemnify against an Insured's intentional acts. Insured must have the specific intent to injure.
- “ Excess insurer will have a duty to indemnify only when the limits of the primary policy have been exhausted.
- “ The presence of other insurance clauses in two primary insurance policies will cancel each other out, and the loss will be prorated between the policies.
- “ The “voluntary payment provision” provides that Insurer is not responsible for expenses the Insured incurred prior to tendering defense.

Insured's Duty To Provide Notice And Cooperate

- “ An insurance policy will contain a provision that the Insured provide it with immediate, prompt, or provide notice as soon as possible, of a claim or any occurrence that may result in a claim.
- “ Purpose of this provision is to allow the Insurer to make timely and thorough investigations.
- “ Courts will ask whether the notice that was given was reasonable under the facts and circumstances of the case.
- “ If the Insured fails to give reasonable notice, the Insurer will have no duty to defend or indemnify. *Northern Insurance Company of New York v. City of Chicago*, 259 Ill.Dec. 664 (1st Dist. 2001).
- “ Prejudice to the Insurer is only a factor to consider for reasonable notice. *Country Mutual Insurance Co., v. Livorsi Marine, Inc.*, 222 Ill.2d 303 (Ill. 2006).
- “ The Insured will also have a duty to cooperate with the Insurer. *Waste Management, Inc. v. International Surplus Lines, Ins. Co.*, 144 Ill.2d 178 (Ill. 1991).

Bad Faith Actions

- “ An Insured may bring a bad faith action against the Insurer pursuant to 215 ILCS 5/155 and recover attorneys fees, costs, and penalties.
- “ *Richardson v. Illinois Power Company*, 217 Ill.App.3d 708, 577 N.E.2d 823 160 Ill.Dec. 498 (5th Dist. 1991).