

Is A Claimant's Misnomer The Be-All, End-All In An Insurance Coverage Dispute?

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Does your company have subsidiaries, a parent corporation, or a sister company? If so, one scenario you should consider is when a claimant that should have sued your company instead sues one of those other entities. Because you know the claimant's grievance is ultimately with your company, your company defends and pays the claim despite not technically being named in the litigation. To make matters worse, you then realize the entity named as a defendant is not listed as a named insured under your insurance policy. If you find yourself in this situation, are you out of luck when it comes to getting insurance coverage for that claim? Not always. Your insurance carrier will surely pounce on this technicality and try to convince you that the claim – which is technically not against your company or a named insured – will not be covered, but courts do not always agree. Courts in various jurisdictions have been faced with this issue and, while some jurisdictions have found against the named policyholder under these circumstances, others have held that the named policyholder is entitled to coverage. The decisions from these policyholder-friendly jurisdictions depended upon the policyholder being able to establish it was the real party in interest, despite not being named in the actual suit. Facts lending themselves to that conclusion might be that the policyholder was the entity whose actions actually gave rise to the dispute; the policyholder, rather than the named entity, assumed the defense of the action; or the policyholder ultimately paid the judgment that was technically awarded against the other entity. The carrier's spin on this issue will be that you are trying to get coverage for an uncovered entity, but, depending on the jurisdiction, your circumstances might warrant a finding that the claimant merely named the wrong entity, perhaps by mistake or because it did not have a full grasp of the business structure. Here are a few questions to consider if you find your company in this situation:

1. *Did the carrier in any way acknowledge that the claimant named the wrong entity?* Does a review of the claim file or emails between your broker and the carrier, for example, reveal that the carrier recognized the claimant intended to file suit against your company? Or, perhaps something in the file shows the carrier itself used your company's name and the other entity's name interchangeably, or at least acknowledged that the claimant did so.
2. *Did the carrier raise premiums as a result of the claim?* Another thing that might help to refute the carrier's position is if it raised your company's premium at the time of policy renewal or otherwise (assuming that occurred while the coverage dispute was still pending). There are, of course, multiple reasons the carrier might raise your premium, but you should be sure to look for anything that might signify part or all of the increase was the result of the claim made against the other entity. That might be an indicator the carrier expects to pay the

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claim or indemnify your company for the defense in the future.

3. *Did the carrier issue a reservation of rights?* Depending on what jurisdiction you're in, a failure to reserve any rights might support an argument that the claims handler initially did not view the misnomer as a bar to coverage.

4. *Is there anything in the underlying litigation that supports a finding of coverage?* For example, did the pleadings refer to alleged wrongdoing by your company specifically, even though your company is not a named defendant? Did the arbitrator repeatedly refer to your company or (although less likely) name your company in its judgment or order? Do documents produced during discovery show that the claimant primarily communicated with representatives having your company's domain name in their email addresses (as opposed to the other entity's domain name), or that your company fulfilled all of the other entity's obligations under the contract at issue? Did a deponent say anything indicating they knew they were, in reality, doing business with your company rather than the named entity?

5. *Did your company defend the suit and pay the judgment?* As mentioned above, this may help to refute the carrier's argument that your company is trying to get coverage for an uncovered entity. This might be especially helpful if, for example, the subsidiary sued by the claimant merely serves as an operating unit for, or extension of, your company rather than functioning as an independent business.

In sum, even if a claimant sues a related entity that is not a named insured under your policy, it is worth examining the issue carefully.