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Your Liability Insurer Agreed To Defend? Don't Relax Yet.

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You tendered a lawsuit to your liability insurer. You cooperated with its investigation of the claim, and maybe you had to challenge an initial denial. Now, you have a hard-earned letter from your insurer agreeing to defend the suit. This is a significant milestone in managing your risk for the liability, but the need for vigilance to maximize your insurance benefits and protect your rights is far from over. Whether there are thousands or millions at stake, policyholders must remain vigilant and active, to ensure they are receiving maximum benefit from their coverage. Even after your insurer agrees to defend, numerous disputes may still arise that can affect whether you maintain control over decisionmaking, whether the insurer pays everything it owes under the policies, and whether you otherwise maximize your policy benefits. Below are 10 frequent post-acceptance issues that either your risk manager, general counsel or outside coverage counsel may need to address.[1]

1. Choice of Counsel

Most policies give the insurer the right to select defense counsel. While the insurer's choice may be perfectly adequate, and many firms are, disputes can and do arise. Maybe the insurer chooses a lawyer with little experience in the subject area of the suit. Maybe there is a concern, or at least an appearance, that the lawyer is more loyal to the insurer than to you. Maybe the insurer has

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reserved its rights to later deny coverage, thereby giving rise to a conflict of interest between selected counsel and your interests. In many jurisdictions, the insurer's right to choose counsel may give way, under certain circumstances, to a policyholder's right to use its own counsel at the carrier's expense. Knowing when and how to exercise that right could make a significant difference in the quality of your defense.

2. Billable Rates and "Reasonable and Necessary" Defense Costs

In situations where the policyholder has a right to use its own counsel at the insurer's expense, the insurer may try to foist defense costs back onto the policyholder by claiming that counsel's rates are too high, or that important defense activities are not "reasonable and necessary." If the policyholder is not equipped to adequately protect its rights as to these issues, it may end up stuck with a big chunk of the defense bill, despite the insurer's agreement to defend.

3. Control of Defense and Settlement

This issue is similar to the choice-of-counsel issue. Again, most policies give the insurer the right to control defense and settlement decisions, but again, that right may give way, in certain circumstances, to the policyholder's right to control. Even if an insurer has the right to control, it must still do so within the bounds of good faith, giving adequate regard to the policyholder's interests. Policyholders should vigilantly monitor defense and settlement decisions to ensure that their interests are protected, and be prepared to exercise their rights if the insurer is not adequately protecting those interests.

4. Whether the Policyholder Must Contribute to a Settlement

Even if an insurer is providing a complete defense, it still may turn to the policyholder in certain circumstances to demand that the policyholder make a significant contribution to the settlement amount. For example, the insurer may contend that part of the settlement is excluded from coverage. The policyholder must be prepared to oppose such efforts, and to avoid, or minimize, its settlement contribution in these circumstances.

5. Disputes Over Whether Costs are Defense or Indemnity Costs

This type of dispute typically arises in the environmental liability context. Usually, the dispute is whether expenses incurred to investigate contamination count as defense costs or as indemnity costs. This distinction could make a big difference in the scope of your coverage, in at least two respects. First, defense costs frequently are in addition to the policy limits, and are not subject to those limits. An insurer has an incentive to count those costs as indemnity costs that exhaust the policy limits and extinguish its coverage obligations faster, rather than as "limitless" defense costs. Second, the duty to defend is generally broader than the duty to indemnify. By classifying those costs as indemnity rather than defense, an insurer may be trying to avoid paying those costs altogether. Depending on the wording of the policies and the applicable law, the policyholder may be able to contest these types of insurer decisions.

6. Pre-Notice or Pre-Suit Costs

Most insurers that agree to defend will still deny an obligation to pay defense or mitigation costs the policyholder incurred before the suit was filed or before the insurer was notified. State law varies broadly on whether, and under what circumstances, these costs are covered. Some states have a bright-light rule that pre-notice or pre-suit costs are not recoverable, but other states allow partial or complete recovery of these costs under certain circumstances. Knowing which state's law applies, and knowing your rights under that state's law, is critical to avoid potentially leaving money on the table.

7. Information-Sharing in the Context of the Defense

A policyholder must take great care in responding to an insurer's information requests during the course of a lawsuit. Often, information may be relevant both to the defense of the suit, and to the question of whether the liability is covered. Issues such as whether, when, and how a policyholder must share information that may be damaging to its coverage claim can be subtle, and must be approached deliberately and carefully.

8. National Coordinating Counsel

This issue arises in the context of recurring liability exposure – for example, asbestos or toxic tort suits filed in jurisdictions across the country. It may be essential to the policyholder's overall defense strategy to appoint attorneys from one or more firms to serve as national coordinating counsel to oversee the defense of all such suits, and to prevent taking inconsistent positions. An insurer may contend that its duty to defend does not include a duty to hire and pay national coordinating counsel – a dispute that could make the difference in whether millions of dollars of defense costs are covered or not.

9. Deductibles/Self-Insured Retentions

There are many types of deductibles, self-insured retentions, and other complex mechanisms by which a policyholder may retain a portion of an insured risk. A host of issues may be raised by the presence of these mechanisms in a policyholder's insurance program, including whether and how a particular mechanism affects the carrier's duty to defend or to pay for the defense; whether the mechanism converts a duty to defend or pay into a duty to reimburse the policyholder; and how many deductibles or retentions a policyholder must satisfy. Great care is needed to navigate these issues to ensure that the policyholder's benefits are maximized.

10. Multiple-Carrier Situations

All of these issues become more complex where more than one insurer owes an obligation to defend or indemnify the same suit. A host of issues arise in this context, including the question of how defense and indemnity costs are apportioned or allocated among carriers; and whether and to what extent the policyholder must also contribute a portion of the defense and indemnity. If the policyholder is unaware of its rights on these issues and does not aggressively protect those rights, it may end up saddled with a significantly larger contribution than it is obligated to pay. Having a risk manager, in-house counsel, or outside coverage counsel actively advocate for the policyholder's

interests on these issues is essential in maximizing benefits from the carrier group. In summary, even after you have obtained an insurer's agreement to defend and cover a lawsuit, in many instances your work has only just begun. The issues above can be worth millions of dollars to policyholders, and it is worth protecting your company's rights by taking these tips to heart.

[1] These issues frequently arise in a variety of liability policy contexts (CGL, E&O, D&O, PLL, and other liability coverages). Post-acceptance issues arising in a first-party insurance context are beyond the scope of this article.