Insurance Coverage Claims

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Insurance Coverage
First, Read the Policy

- Forms vary
- Application of policy to facts is not always obvious
- Ambiguity favors coverage

Insurance Coverage
Different States; Different Law

- Fifty States: significant differences in interpretation of policies
- Choice of law can determine outcome

Coverage
Policy Structure

- Declarations
- Insuring Agreement (Coverages)
- Exclusions
- Who is Insured
- Limits of Insurance
- Conditions
- Definitions
- Endorsements

Claims Made Policies

- Claim must come in during the year of policy coverage or any extended notice period
- Accident could have occurred prior to beginning of policy term
- Important to make sure no break in coverage (*e.g.*, changing insurers)
- Typically used for D&O, malpractice and professional liability

Occurrence-Based Policies

- Coverage for bodily injury or property damage that occurred during the policy period
- Claim could be made years later
- Most CGL is occurrence-based

Red Flag – Policy Form or Carrier Changes

- High alert
- Unintended consequences

Case Intake and Informal Investigationcs

1. When a “claim” is made, one of the first steps is to evaluate the possibility of coverage.
2. Obtain copies of policies and evaluate possible coverage.
3. Getting policies can be difficult if the events giving rise to the claim occurred years ago (asbestos, environmental, etc.). *(This is addressed in the next section.)*
4. Do not blindly accept broker’s or carrier’s conclusion of no coverage.

Case Intake and Informal Investigation (continued)

5. Arriving at the correct answer on possible coverage often requires fact investigation concerning the underlying claim. Be careful not to take too long, and be mindful that associated attorneys' fees will not be covered in most instances.
6. Determine if the matter constitutes the sort of "claim" that trigger's the duty to notify the insurer. Some policies define "claim" as a lawsuit or arbitration. When in doubt, be safe and give notice.
7. Insurer's duty to defend is triggered when it receives notice of the claim, not when the claim is filed against the insured. *Kubit v. MAG Mut. Ins. Co*., 708 S.E.2d 138 (N.C. App. 2011).

Finding Sources and Limits of Coverage

1. The perils of "long-tail" risks can engender lawsuits long after the "occurrence" giving rise to insurance coverage.
2. In a coverage action, the insured must prove the terms of the policy and the facts to bring its claim within the policy's coverage. *Rogers v. Unitrim Auto and Home Inc. co.*, 388 F. Supp. 2d 638, 642 (W.D.N.C. 2005); *Duncan v. Cuna Mut. Ins. Society*, 171 N.C. App. 403, 405, 614 S.E. 2d 592, 594 (2005).
3. Rule 1004 of the Federal and North Carolina Rules of Evidence provides that the original of a document is not required, and other evidence ("secondary evidence") to prove its contents is admissible, if the proponent establishes that the document was lost or destroyed without bad faith, and that the proponent made a diligent effort to find the document.
4. Rule 1004 applies in actions where coverage is alleged notwithstanding that the policy has been lost or destroyed. *Vaughan v. Carolina Indus. Insulation*, 183 N.C. App. 25, 32, 643 S.E. 2d 613, 617-18 (2007); *Pecar v. St. Paul Fire & Marine Ins. Co.*, 2003 WL 21912282 at * 2 (4th Cir. 2003).

Finding Sources and Limits of Coverage (continued)

5. Under Evidence Rule 1004, the insured must present evidence that it did not lose or destroy the insurance policy fraudulently or in bad faith. E.g., *Vaughan v. Carolina Indust. Insulation*, 183 N.C. App. 25, 32, 643 S.E. 2d 613, 617-18 (2007); *Sellmayer Packing Co. v. Commissioner*, 146 F. 2d 707, 709 (4th Cir. 1944).

6. The standard of proof regarding the contents of a lost policy is unsettled in North Carolina, although one case suggests that a preponderance of the evidence may suffice. *Vaughan v. Carolina Indust. Insulation*, 183 N.C. App. 25, 34, 643 S.E. 2d 613, 619 (2007).

7. In many jurisdictions, the terms of a lost policy must be established by "clear and convincing" evidence, rather than by the preponderance standard. E.g., *Klopman v. Zurich American Ins., Co.*, 2007 WL 1381599 (4th Cir. 2007) (Maryland law); *In re Wallace & Gale Co.*, 284 B.R. 553, 555-56 (D. Md. 2002).

8. Examples of standard policy forms or contemporaneous policies issued by the insurer provide secondary evidence of the terms of a lost policy, as is testimony by a witness familiar with the terms of a lost policy. *Klopman v. Zurich American Ins. Co. of Illinois*, 233 Fed. App. 256, 260 (4th Cir. 2007).

Finding Sources and Limits of Coverage (continued)

9. The "mere mention of a policy number in another document" is helpful evidence, but standing alone is "insufficient to prove the existence of terms of insurance coverage." *Boyce Thompson Inst. V. Ins. Co. of North America*, 751 F. Supp. 1137, 1140 n. 2 (S.D.N.Y. 1990)

10. Proof of the "actual language" of a lost policy is generally unnecessary. *Dart Ind. v. Commercial Union Fire Ins., Co.*, 52 P.3d 79 (2002).

11. Common sources of information on historical insurance coverage:
    - Excess carriers often have information on primary liability coverage.
    - Insurance brokers often maintain copies of policies, premium registers and other information.
    - State insurance regulatory authorities.
    - Conduct computer searches for old lawsuits involving the insured, some of which may have been covered and, therefore, handled by counsel engaged by the insurer.
    - Check with lawyers who represented the insured historically.
    - Old loan and other transaction documents may include proof of insurance provisions.
    - Beware of mergers, asset acquisitions and name changes.

Finding Sources and Limits of Coverage (continued)

- Old cancelled checks or check registries.
- Contact former employees of the insured who may have dealt with insurance issues.
- Search the “attic.”

12. Try an “Insurance Archaeologist”

    Insurance Archaeology Group

    www.iagltd.com

    R.M. Fields International

    www.rmfields.com

    LECG Corporation

    www.lecg.com

Tendering the Claim for Defense

1. Virtually all liability policies contain provisions requiring the policyholder to provide the insurer with notice of each claim for which coverage is sought.
2. Notice provisions serve the important purpose of allowing the insurer an adequate opportunity to investigate the underlying claim.
3. Policy language varies (“promptly”, “as soon as possible”, “immediately”, etc.). Despite varying notice language, North Carolina Courts generally ask whether the policyholder gave notice "as soon as practicable." *E.g., Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573 S.E.2d 118 (2002).
4. “As soon as practicable” allows delay, as long as the policyholder acted in “good faith” and the insurer was not “materially prejudiced.” *Great Am. Ins. Co. v. C.G. Tate Constr. Co.,* 315 N.C. 714 (1986); *Erie Ins. Exchange v. Szamatowicz*, 164 N.C. App. 748, 597 S.E.2d 136 (2004).

Tendering the Claim for Defense (continued)

5. Policyholders commonly notify their agent of a claim, and rely on the agent to notify the insurer. This is generally an acceptable form of notice in North Carolina. *E.g., Kubit v. MAG Mut. Ins. Co.,* 708 S.E.2d 138 (N.C. App. 2011).
6. Agents make mistakes, so keep a written record. (In fact, always keep a written record.)
7. Generally, forego notifying insurer if it is clear the deductible will not be reached.
8. Insurer has three basic options upon receiving notice/coverage demand, (i) acknowledge coverage; (ii) deny coverage; or (iii) provide a defense under a reservation of rights.

Tendering the Claim for Defense (continued)

9. In some states (probably not North Carolina), a defense under reservations of rights triggers a conflict of interest, and gives the policyholder a right to independent counsel, paid by the insurer. Sometimes referred to as "*Cumis* counsel."

10. Insurer's denial of coverage can be risky, because unjustified coverage denial can open door to bad faith or unfair/deceptive trade practices claim. Certain claim settlement practices, such as misrepresenting policy provisions and failure to adopt reasonable claim investigation standards, are per se "unfair or deceptive acts or practices." N.C. Gen. Stat. Sec. 58-63-15. These automatically entitle the policyholder to relief un the Unfair and Deceptive Trade Practices Act. *E.g., Thorpe v. Ameritas Inv. Corp.*, 2012 U.S. Dist. LEXIS 134049 (E.D.N.C. 2012); *Cobb v. Pa. Life Insurance, Co.*, 715 S.E.2d 541 (N.C. App. 2011); *Noble v. Hooters of Greenville, LLC*, 199 N.C. App. 163, 681 S.E.2d 448 (2009).

11. Timely notice is especially important in relation to claims-made policies, because these policies are structured specifically to provide coverage for claims made against the insured during the policy period. Courts consider the notice provision to be part of the insuring agreement in a claims-made policy, and view notice to the insurer during the policy period as a condition precedent to coverage. In other words, in the vast majority of states, actual prejudice to the insurer is immaterial if notice is not provided during the period of coverage under a claims-made policy.

Tendering the Claim for Defense (continued)

12. Timely notice can also impact a policyholder's right to defense costs. In North Carolina, an insurer's duty to defend is not triggered by the filing of a lawsuit against the insured, but only by the insurer's receipt of notice of the claim. *Kubit v. MAG Mut. Ins. Co*., 708 S.E.2d 138 (2011).

13. If insurer defends a lawsuit, policyholder must cooperate in the defense, including providing information, documents and testimony, Failure to cooperate can void coverage. However, policyholder must be careful if insurer is defending under reservation of rights

North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA")

1. The UDTPA outlaws "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a).

2. The UDTPA provides for mandatory treble damages, and discretionary award of attorneys' fees. N.C. Gen. Stat. §§ 75-16 and 75-16.1.

3. To prevail on a UDTPA claim, a plaintiff must prove (1) the defendant committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) the plaintiff was injured thereby. *Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

4. An act is "unfair" if it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") (continued)

5. An act is "deceptive" if it has the tendency or capacity to deceive; proof of intent to deceive or actual deception is unnecessary. *Jones v. Capitol Broadcasting Co., Inc.*, 128 N.C. App. 271, 276, 495 S.E.2d 172, 175 (1998); *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301-02, 435 S.E.2d 537, 542 (1993); *Gilbane Building Co. v. Federal Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 902-03 (4th Cir. 1996).

6. UDTPA claims have replaced many common law fraud and bad faith claims because they are easier to prove and treble damages are mandatory, rather than being left to the finder of fact's discretion.

7. An arbitration agreement or other provision in an insurance policy probably can't deprive a claimant of the right to treble damages under the UDTPA. *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 288 (4th Cir. 2007).

North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") (continued)

8. The UDTPA applies to the business and acts of insurers. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 70-71, 529 S.E.2d 676, 682-83 (2000); *Kron Medical Corp. v. Collier Cobb & Assoc.*, 107 N.C. App. 331, 335, 420 S.E.2d 192, 194 (1992).
9. N.C. Gen. Stat. § 58-63-15 sets forth several acts and practices that are deemed "unfair and deceptive" in the "business of insurance."
10. Although § 58-63-15 does not provide for a direct private right of action, the acts and practices set forth in § 58-63-15 are examples of conduct that support a claim under the UDTPA. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 682-83 (2000); *Carter v. West American Ins. Co.*, 661 S.E.2d 264, 271 (2008); *ABT Building Products Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 472 F.3d 99, 125 (4th Cir. 2006).

North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") (continued)

11. A mere breach of contract (i.e., an insurance policy), even if intentional, cannot sustain a UDTPA claim. There must be "aggravating factors – like fraudulent or deceptive conduct, or conduct that amounts to an inequitable assertion of power." *Strategic Outsourcing, Inc. v. Continental Casualty Co.,* 2008 WL 1751789 at *6 (4th Cir. 2008), citing, *Oestreicher v. Am. Nat. Stores, Inc.,* 290 N.C. 118, 225 S.E.2d 797, 809 (1976).

12. An insurer is not subject to a UDTPA claim by a plaintiff that is not a direct insured or in contractual privity with the insurer. *Wilson v. Wilson*, 121 N.C. App. 662, 666, 468 S.E.2d 495, 498 (1996); *Woods v. Sentry Ins. Mut. Co.*, 2008 WL 4471407 at *2-3 (N.C. App., Oct. 7, 2008) (unpublished).

The Tripartite Attorney-Client Relationship

1. Insurance defense attorneys often face conflicts of interest, on account of the "tripartite relationship between an attorney, an insurer and an insured." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005).

   - The North Carolina State Bar has declared that its ethics opinions have "firmly established that a lawyer defending an insured at the request of an insurer represents ***both clients***." 2003 Formal Ethics Opinion 12 (October 21, 2004) (emphasis supplied).
   - This tripartite relationship poses difficult conflict issues where a lawsuit against the insured asserts both covered and non-covered claims, and the insurer reserves its coverage rights.
   - Counsel must explain the joint representation and potential conflict to the insured, in particular, and must withdraw if the insured refuses to accept the joint representation.

The Tripartite Attorney-Client Relationship (continued)

- In some states, including South Carolina, the insured is entitled to its own independent "*Cumis* counsel", paid for by the insurer, if this conflict exists and the insured refuses to consent to the joint representation. See *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365 (2005).
- Under Ethics Opinion RPC 92 (January 17, 1991), where an attorney represents both an insurer and insured, "the attorney'' ***primary allegiance*** is to the insured, whose best interest must be served at all times." (Emphasis supplied.)
- 98 Formal Ethics Opinion 17 (January 15, 1999) and Ethics Opinions RPC 118 (October 18, 1991) and RPC 56 (April 14, 1989) all specify that the insured is the lawyer's "primary client."
- Ethics Opinion RPC 92 (January 17, 1991) obligates the attorney to offer "appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent [the insured's] interest."

The Tripartite Attorney-Client Relationship (continued)

- 98 Formal Ethics Opinion 17 (January 15, 1999) requires an attorney to disclose to the insured any billing guidelines and restrictions imposed by the insurer which may "restrain the lawyer's exercise of independent professional judgment when determining the tasks and services necessary to represent the insured competently." If the insured does not consent to such billing guidelines and restrictions after full disclosure, the lawyer is "ethically prohibited from complying with the guidelines and restrictions."
- 2003 Formal Ethics Opinion 12 (October 21, 2004) allows an attorney to provide both the insured and insurer with the attorney's evaluation of the case, including settlement value, but the attorney "may not recommend that the carrier decline to settle and go to trial if this recommendation is contrary to the wishes of the insured."

The Tripartite Attorney-Client Relationship (continued)

2. The "common interest" or "joint client" doctrine applies to protect communications among the policyholder, insurer and counsel from disclosure to third parties, although the communications are subject to discovery in a coverage action between the policyholder and insurer. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005), *aff'd* 360 N.C. 356, 625 S.E.2d 779 (2006). *See also Raymond V. North Carolina Benevolent Ass'n, Inc.,* 365 N.C. 94, 721 S.E.2d 923 (2011).

Venue Selection Can Control Outcome

- First to file selects venue, jurisdiction, and possibly governing law.
- Insurers frequently file preemptively in pro-insurer venue.
- Do not inform insurer of intention to file coverage action.

Filing Options

- Personal Jurisdiction
  - Familiar analysis: Long-arm statutes + minimum contacts.
  - Often, insurance companies are subject to personal jurisdiction in all 50 states.
- State or Federal Court
  - Federal - Diversity Jurisdiction - Insurer preference
  - Benefits of State Court for Insured
    - Venue transfers limited
    - Hometown advantage
- Ask for a Jury Trial

Filing Options

- Venue Options (e.g., N.C. Gen. Stat. §1-82, 28 U.S.C. §1391)
  - Where defendant "resides." Usually, where insurer is subject to personal jurisdiction.
  - State venue statutes may limit state court filing options.
- Choice of Law Provisions or Forum Selection Clauses are Rare.

Narrowing it Down

- What is most favorable law? *E.g.*:
  - Availability of Unfair and Deceptive Trade Practices Act claim (treble damages plus possible attorney fees) (*E.g. Lee v. Allstate Ins. Co.,* 2010 N.C. App. LEXIS 1420).
  - Punitive Damages Caps (*e.g.,* N.C. Gen Stat. 1D-25)
  - Favorable interpretations of policy terms
  - Favorable contribution rules

Narrowing it Down

- Where is favorable law most likely to be applied?
  - Not enough to consider substantive law in each potential venue – law of forum state does not always control.
  - Consider choice-of-law rules first.
  - Several states – *Restatement (Second) of Laws – Conflict of Law.*
  - Some states diverge from Restatement.

North Carolina, for example

- "With insurance contracts, the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract. *Fortune Ins. Co. v. Owens,* 351 N.C 424 (2000)
- Exception: NCGS § 58-3-1: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof."
- Sufficiency of contact with NC is fact-specific inquiry.

Forum Matters: A Case Study

- National manufacturer of building material sued in multiple class actions in various states.
- Allegations: Sulfur and other compounds emanating from product cause “health consequences” to homeowners.
- Insurance policy provided general liability protection.
- “Pollution exclusion” excludes from coverage damage from “any substance” that has “the effect of making the environment impure, harmful or dangerous.”

Forum Matters: A Case Study

- Insurance company refused coverage for millions in defense costs.
- Litigation was inevitable.
- The goal: File a declaratory judgment action (1) in the right forum (2) before the insurance company.
- The approach: fast, accurate research and analysis of options prior to filing.

Forum Matters: A Case Study

- Diversity of citizenship = likely removal to federal court, so important to begin in logical venue to avoid transfer to unfavorable venue.
- Underlying lawsuits filed in Florida and other states.
- G/L policy delivered to client's headquarters in NC.
- Which law?
  - Florida and other states applied pollution exclusion broadly.
  - Some NC Courts refused to expand pollution exclusions beyond "traditional" or "prototypical" environmental pollution. *NGM Ins. V. Kuras,* 2011 U.S. App. LEXIS 512 (4th Cir. Jan 11, 2011)(unpub.)

Forum Matters: A Case Study

- Conclusion: file in state that will apply NC law.
- North Carolina Choice of Law: "Last act" rule meant NC Courts would apply NC law.
- Current Status:
  - Lawsuit filed in NC.
  - Plaintiff's summary judgment motion pending.
  - Florida and other states have since applied pollution exclusion to analogous situation.

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