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*6-1 INSURANCE COVERAGE IN AN ENVIRONMENTAL CASE: FOCUS ON CLAIMS HANDLING

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This paper provides an overview of claims under standard insurance policies in the context of energy, natural resources, and environmental litigation. It will first examine a common exclusion often applicable to such claims, the pollution exclusion, and particularly its exception that provides "time element" pollution coverage.

The paper also will address key issues in handling underlying claims and coordinating with insurance companies in the defense and settlement of claims. These issues include when to notify and tender a claim to the insurance company, how to handle an insurance company's reservation of rights, the difference between the duty to defend and the duty to indemnify, and who controls the defense and settlement of the underlying claim.

I. Scope of Pollution Coverage Under Current Policies

Time Element Pollution Coverage

For many years at the end of the last century and the beginning of this one, environmental insurance coverage litigation, including litigation involving mining and energy companies, was dominated by actions involving coverage under decades worth of historic liability policies, for allegations of long-term pollution taking place in those years. This focus on historic insurance coverage resulted in part from the nature of "occurrence" based general liability insurance, which is triggered to respond by damage taking place during the policy period, even if it is not discovered until years later. It was also the result of the fact that policies in past decades either had no pollutions exclusions, or more limited pollution exclusions than those found in current policies, and so are a valuable source of recovery for those facing allegations of long-term pollution.

***6-2** Such "classic" environmental coverage actions are still being litigated to this day. [FN2] Increasingly, however, even

those companies with historic general liability coverage have settled those policies in prior insurance coverage actions, and other companies were not in existence at a time when the standard policies were more favorable to pollution coverage. As a result, an increasing portion of environmental insurance coverage litigation involves the pollution coverage available under current policy forms.

One type of pollution coverage available under current forms, including those purchased by participants in the mining and energy industries, is so-called "time element" pollution coverage. Policies providing such coverage generally contain a broad pollution exclusion, but that exclusion is subject to an exception for identifiable releases of pollution that are promptly detected by the policyholder, and notified to the insurance company. For example, one version of such an exclusion restores coverage when:

> (i) the underlying incident was "abrupt and neither expected nor intended;" (ii) the incident occurred during the policy period; (iii) the insured became aware of the incident within seven days of its occurrence; (iv) the incident was reported in writing to Commerce within twenty-one (21) days of becoming known to the insured; and (v) the insured made reasonable efforts to address the situation.

Berkley National Insurance Co. v. XTO Energy, Inc., 556 F.Supp.3d 981, 1008 (D.N.D. 2021).

This paper will address some of the issues and potential areas of dispute that have arisen in the application of this type of time-element pollution coverage.

The Notice and Timing Requirement of Time Element Pollution Coverage

Courts taken different approaches to how strictly they will apply the short notice time period in time element pollution coverage. In *Berkley National Insurance Co. v. XTO Energy, Inc.*, 556 F.Supp.3d 981, 1008-09 (D.N.D. 2021), a well owner was an additional insured under a subcontractor's umbrella liability policy, which contained the time-element exception to its pollution exclusion, as quoted in the previous section. The well owner, however, did not obtain a copy of the subcontractor's umbrella policy until nearly two years after the oil well explosion for which it sought coverage, and was previously unaware of its existence. *Id*. The insurance company argued that this precluded coverage, because it meant that the insured had not reported the incident to the insurance company within 21 days of the polluting incident. *Id*.

The court rejected the insurance company's argument, and found the exception to apply. The court first held that the insurance company had waived the 21-day notice requirement by not raising it in its initial denial letter -- under North Dakota law (like some other jurisdictions) an insurance company that fails to raise late notice in an original denial cannot assert that defense ***6-3** later. *Id*. at 1009. In addition, the court held that South Dakota law requiring an insurance company to prove prejudice to succeed on a late notice argument applied to the 21-day requirement in the time-element exception, and the insurance company had not shown prejudice. *Id*.

The court in *Topp's Mechanical, Inc. v. Kinsale Insurance Co*., 968 F.3d 854 (8th Cir. 2020), however, applied a stricter view of the notice requirement in a time-element exception to a pollution exclusion. There, the policyholder had contacted the insurance company by phone within the 45-day notice period required by the exception, but was advised by the insurance company's representative not to submit a claim until the worker injured in the incident filed a formal claim or lawsuit, and so the policyholder did not submit a written notice to the insurance company at that time. *Id*. at 855. When the worker later brought a formal claim, well outside the 45-day period, the insurance company denied coverage on the grounds that the policyholder's written notice was too late to meet the requirements of the time-element exception. *Id*. The court held that the policyholder could not rely on the exception. *Id*. at 856. Despite the fact that the insurance company itself specifically directed the policyholder not to provide timely notice, the court held that the 45-day written notice requirement defined the basic scope of coverage for pollution, and waiver or estoppel could not be used to expand that scope. *Id*.

The court in *QES Pressure Control, LLC v. Zurich American Insurance Co*., 2022 WL 956178, at *3-*5 (S.D. Tex. March 29, 2022), used similar reasoning to hold that Texas's requirement that an insurance company must demonstrate prejudice in order to succeed on a late notice defense did not apply to the 90-day written notice requirement in a time-element exception to a pollution exclusion.

Thus, while there is some authority to the contrary, a policyholder with an exception to a pollution exclusion that requires

notice to the insurance company within a limited window of time should make sure it has procedures in place to ensure that pollution incidents are promptly reported to the insurance company.

Was There a Release of Pollutants?

Before a coverage analysis even reaches the question whether a time element exception to a pollution exclusion applies, it must be determined whether the exclusion applies in the first place. Some policyholders have had success arguing that underlying actions do not involve (or do not exclusively involve) the release of pollutants, and therefore the exclusion does not apply in the first place to bar all coverage.

For example, in *Atkins v. Massey Energy Co.*, C.A. No. 9-C-59, Order (W. Va. Cir. Ct. Dec. 6, 2011), the court held that allegations against a mining company did not clearly and entirely fall within a pollution exclusion, and so the company was entitled to a duty defend from its liability insurance company:

> If portions of the extracted coal, rock, minerals and water are returned to the underground mine voids or above-ground impoundments, it is reasonable for Massey not to consider these ***6-4** materials to be thereby transformed into pollutants, because this material is a natural part of the environment where Massey routinely conducts its business.

Massey, Order at 5-6. The Massey court also relied on cases from other jurisdictions holding that an insurance company had a heavy burden to prove the applicability of a pollution exclusion to the policyholder's core products or operations. *Id*. at 4-5.

Similarly, the court in *Hanover Insurance Company v. Superior Labor Services, Inc.*, 179 F.Supp.3d 656, 685 (E.D. La. 2016), the court found a duty to defend when the underlying complaint alleged injury from "silica dust and other harmful products." The Court held that these allegations did not establish that the alleged injuries fell entirely within the pollution exclusion, and so there was a duty to defend. *Id*. Other courts have applied the definition of "pollutants" more broadly. *See, e.g.*, *Doe Run Resources Corporation v. American Guarantee & Liability Insurance Co.*, 531 S.W.3d 508 (Mo. 2017) (holding that lead released by smelting facility into the atmosphere was a "pollutant" for purposes of a pollution exclusion).

Other courts have limited the scope of releases to which the pollution exclusion applies in other ways. For example, in *National Indemnity Co. v. State*, 499 P.3d 516, 539 - 40 (Mont. 2021), the court held that a version of the pollution exclusion applies only to those directly responsible for the pollution, and not a defendant alleged to have failed to warn of the pollution caused by others.

Additional Exclusion For Clean Up Costs

The pollution exclusions subject to time-element pollution coverage exceptions frequently have additional exclusionary provisions that may not be subject to the time-element exception. For example, one version of such a provision purports to exclude:

> "[a]ny loss, cost or expense arising out of any request, demand, order or statutory or regulatory requirement that the Insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of Pollutants," or any loss or cost arising out of a suit of claim by a governmental authority for damages because of such costs.

Coffeyville Resources Refining & Marketing, LLC v. Liberty Surplus Insurance Corp., 714 F.Supp.2d 1119, 1155 & n.12 (D. Kan. 2010).

An insurance company likely would argue that this type of provision excludes coverage for liability under such statutes as CERCLA, or other types of governmental claims, regardless of whether the time-element exception applies. Such provisions, however, often contain additional language stating that they do not apply when the pollution has caused property damage otherwise covered by the policy. The provision in *Coffeyville*, for example, continued to state that:

> ***6-5** However, nothing contained in this endorsement will operate to provide any coverage with respect to: ...

(iii) Any clean up loss cost or expense arising out of any governmental request, demand, order or statutory or regulatory requirement. However, this provision iii will not apply to third party clean up loss, cost or expense otherwise covered by this endorsement that are also the subject of a governmental request, demand, order or statutory or regulatory requirement; ...

Id. at 1155. The *Coffeyville* court held that this language meant that "when a pollution release covered by the policy results in a claim for damage to a third party's property, the policy will provide coverage to plaintiff for its cost of cleaning up that property even if plaintiff's legal obligation to clean the property is based on a governmental order or statutory requirement." *Id*. at 1157.

There are multiple versions of this type of provisions, purporting to exclude coverage for certain types of clean-up costs, but then adding it back when there is otherwise covered third party property damage. Policyholders should review their policies to make sure the language sufficiently limits the effect of the provisions to situations where there is only a government mandate to clean up, and no third-party property damage.

II. Insurance Issues in the Handling, Defense, and Settlement of Covered Claims

In addition to the scope of the coverage under the policy, issues related to claims handling are also significant for policyholders facing underlying claims. These issues may be governed by the policy language or the applicable law, and include: when to notify an insurance company and tender a claim to them, how to handle the reservation of rights letter the policyholder will likely receive in response, the difference between a policy's duty to defend and the duty to indemnify and when it matters, and whether the policyholder or the insurance company has a right to controls the defense.

Notice

All insurance policies have some form of provision requiring notice to the insurance company of a loss. The notice obligations are different under different types of policies, however, and those differences can have a significant impact on the coverage available.

Traditional occurrence-based general liability policies covering liability for claims of bodily injury or property damage typically require notice as soon as practicable of both the occurrence causing the harm, and any suit that is brought as the result of that occurrence. Most jurisdictions, however, hold that untimely notice of occurrence or suit cannot bar coverage under a general ***6-6** liability policy unless the insurance company can show it was prejudiced by the delay. [FN3] In addition, notice to excess occurrence-based general liability policies is often required only when the liability at issue appears likely to reach that excess layer of coverage. [FN4]

These rules tempering the notice obligation under general liability policies, however, do not apply to all types of insurance coverage. As discussed above, the prejudice requirement may not apply to time-element pollution coverage for identifiable releases that take place over a short period of time during the policy period, and which are reported to the insurance company within a short window of time, such as 21 days. [FN5]

"Claims-made" insurance policies also are subject to stricter notice requirements. Mining and energy companies sometimes have claims-made general liability policies, and claim-made coverage is frequently found in pollution liability policies, as well as other types of coverage (such as directors' and officers' liability coverage, errors and omissions coverage, and employment practices liability coverage). Under claims-made coverage, the policy is triggered to respond by a claim being made against the policyholder during the policy period (as opposed to occurrence-based policies, where a policy responds if the property damage or bodily injury took place within their policy period, even if a claim is not made until later). Most claims-made policies are actually claims-made-and-reported policies. That is, the policies respond only to claims that are both made against the policyholder and reported to the insurance company within the policy period.

The reporting requirements of claims-made policies generally are applied more strictly than in occurrence-based policies. Courts usually do not apply a prejudice standard to determine whether violation of the reporting requirement bars coverage, and there generally is no special rule that notice to the excess layers can be excused if the loss did not appear likely to reach those layers. As one commentator described it, "it is a near unanimous rule that an insurer can deny coverage based upon late

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notice, regardless of whether it was prejudiced by the late notice." [FN6]

This aspect of claims-made-and-reported policies can serve as a trap for unwary policyholders, if the policyholders do not understand to scope of covered claims for which notice is required. Claims-made policies often define "claim" broadly, to include not only traditional lawsuits, but also any demand for monetary or non-monetary relief, requests to toll a statute of limitations, or ***6-7** various types of government investigations. These broad definitions of "claims" assist the policyholder, by expanding the types of disputes that fall within the coverage of the policy. That is, the policyholders does not need to wait until a formal lawsuit before its insurance coverage kicks in; the legal fees it incurs in responding to pre-litigation demand letters and similar demands also fall within coverage. Such breadth has a downside, however, in that it expands the items for which a policyholder is required to provide notice to its insurance company of such a "claim," and so increases the risk that late notice will lead to forfeiture of coverage.

Moreover, claims-made policies often have language stating that all claims arising out of the same facts or circumstances are deemed to be a single claim, which was made (and therefore should have been reported) at the time of the earliest such claims. As a result of this language, a failure to report the first claim in a series of related claims can result in loss of coverage for all of the claims. For example, if a single claimant sends a demand letter to the policyholder in year one, and the policyholder does not report this demand within the same policy period, the insurance company would argue that there is no coverage for this claim, due to late reporting. If in year two, a class action is filed, in which numerous claimants seek recovery based on the same alleged facts and circumstances as the prior year's demand letter, the class action will be held to be part of the same claim as the original letter, and the failure to report the original letter within the policy period in which it was received will also bar coverage for the entire related class action. [FN7]

Companies should be aware of the notice requirements and the breadth of the definition of claims in their liability policies, and make sure that those personnel likely to receive demands are aware of what is considered a claim under the company's insurance policies, and when notice is required.

Tender

Insurance policies almost invariably contain a notice or reporting provision of some sort. It is much less common for a liability insurance policy to contain an express "tender" requirement, in which a policyholder's notice to the insurance company must contain an express request that the insurance company to honor its coverage obligations, particular with regards to coverage for the policyholder's defense. Nevertheless, some jurisdictions have grafted onto the policies requirement that the policyholder expressly "tender" the claim to the insurance company before the insurance company is obligated to respond. [FN8] In light of that, a policyholder providing notice should expressly communicate to the insurance company that it is tendering a claim for defense and any other coverage available under the policy.

***6-8 Responses to Policyholder's Notice**

There are three main ways an insurance company may respond to a policyholder's notice.

1. The insurance company may deny coverage entirely.

2. The insurance company may acknowledge coverage.

3. The insurance company may reserve its right to deny or limit coverage, as it further investigates and, if required by the policy language, defends the underlying action.

Of the three, a simple acknowledgment of coverage is the least likely in the context of a complex environmental claim. In any such claim, there will almost certainly be some basis for an insurance company to want to reserve its right to deny or limit coverage. If nothing else, the insurance company will want to reserve its rights to deny coverage for amounts above the policy's limits of liability. As a result, it is rare to see a straightforward acknowledgment of coverage.

The respective implications for the other two types of responses, denials and reservation of rights, are discussed below.

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Claims Handling Implications of a Denial of Coverage

When the insurance company has denied coverage for a claim entirely, the insurance company generally cannot rely on clauses in the policy granting it control over the defense or settlement, or requiring cooperation from the policyholder. As one frequently quoted formulation of this rule states, the policyholder "should not be required to approach his insurer, hat in hand, and request consent to settle with another when he has already been told, in essence, that the insurer is not concerned, and he is to go away." [FN9] Some courts may reach this same result through other theories, such as waiver of conditions. [FN10]

The policyholder in this situation is free to take reasonable steps on its own to defend and settle the underlying action. If the policyholder disputes the insurance company's denial, it can sue the insurance company for breach of contract. Of course, if the policyholder believes its arguments in favor of coverage are strong, or that the insurance company misapprehended key facts in its decision to deny coverage, it may engage in negotiations with the insurance company seeking to reverse the denial of coverage prior to resorting to coverage litigation.

Duty to Defend and the Duty to Reimburse Defense Costs

If the insurance company reserves its rights, rather than denies coverage, it will generally have to provide the defense coverage found in its policy. A key distinction exists between policies that contain a duty to defend, compared to a duty to reimburse or advance covered defense costs.

***6-9** A policy with a duty to defend provides broad coverage for the policyholder's defense of even potentially covered underlying claims. An insurance company's duty to defend is broader than its duty to indemnify judgments or settlements. If any of the allegations in an underlying action even potentially fall within the coverage provided by the policy at issue, the insurer must defend and pay defense costs. [FN11] The duty to defend is evaluated based on the factual allegations in the underlying action, regardless of their truth. [FN12] The allegations in the underlying litigation must be construed liberally in favor of a duty to defend, and any doubt as to coverage for the duty to defend is resolved in favor of the insured. [FN13] If any allegation in an underlying action is covered, the insurer must defend the entire action. [FN14]

Under a duty to defend policy, the insurance company also has the "right to defend" -- that is, it is given control of the defense and any settlement efforts, including the selection of underlying defense counsel. [FN15] This control is tempered in many jurisdictions, which have held that when an insurance company reserves its rights on a coverage defense that creates a conflict of interest with the policyholder as to how the underlying claim is defended, the insurance company still has the duty to defend its policyholder, but loses the right to defend. Instead, the insurance company must pay the reasonable costs of a defense handled by independent counsel selected by the policyholder, rather than the insurance company. [FN16]

By contrast, a policy that simply advances or reimburses defense costs, without a duty to defend, generally will respond under narrower standards. Under some policies, defense costs are reimbursed only for losses where coverage is established, rather than for claims that even potentially fall within coverage. In others, there may be a duty to advance defenses costs, but this may be limited to the fraction of defense costs related to the covered portions of an underlying action that includes both covered and non-covered claims, and the advancement obligation is often coupled with an obligation to reimburse the insurance company if it is later determined that the claim ultimately was not covered.

***6-10** In policies that contain an obligation to reimburse or advance defense costs, rather than a full duty to defend, the control of the defense usually is granted to the policyholder in the first instance. The insurance company is likely to have a right to associate with the defense, and to have consent rights, such as over the selection of counsel and the acceptance of any settlement.

Liability policies general contain either a duty to defend, or a duty to advance or reimburse defense costs. Some liability policies, however, offer an option to the policyholder: the policyholder is given a short window of time at the beginning of a claim to decide whether it wants the policy to respond as a duty to defend policy, or as a policy that reimburses defense costs. Policyholders with such coverage need to evaluate promptly which of those duties is more favorable to it in a particular case, so that it can select the most beneficial option during that time window.

Reservation of Rights Letters

As discussed above, when there is any complexity to the underlying claim, an insurance company will likely send a reservation of rights letter before providing defense coverage. The purpose of a reservation of rights letter is to identify for the policyholder the defenses the insurance company may rely on the deny coverage in whole or party for any judgment or settlement, so that the policyholder is aware of any potential conflicts of interest between it and the insurance company in the handling of the defense of the underlying claim. [FN17] A policyholder that defends without reserving its rights as to a particular defense to coverage may be found to be estopped from raising that defense against to policyholder. [FN18]

It is in the insurance company's interest, then, to reserve its rights as to every conceivable coverage defense that may become relevant to an underlying action, however the underlying action may develop in the future. Thus, reservation of rights letters frequently contain a laundry list of coverage defenses, many of which may never actually become relevant. Policyholders often wonder the extent to which they must respond to this laundry list of defenses. Generally, a policyholder need not respond specifically to every issue reserved by the insurance company at the time it receives a reservation of rights letter. The policyholder will certainly need to engage with the insurance company on the relevant defenses it raises, for example when the parties are discussing the possibility of an underlying settlement and the extent to which it is covered, but need not do that immediately upon receiving a reservation of rights letter.

Some parts of a reservation of rights letter, however, do call for a prompt response from the policyholder. In addition to the reservations, insurance companies often include items on which they are seeking the policyholder's agreement or acquiescence. These can include the choice of underlying defense counsel, rates caps on counsel, and litigation guidelines the insurance company seeks to impose on counsel, and the insurance company may seek to grant itself the right to reimbursement of defense costs if the claim is later determined not to be covered (even in jurisdictions where such reimbursement is not a right given to insurance companies). If the ***6-11** policyholder disagrees with the insurance company on any of these points, it should respond, to avoid any argument that it acquiesced to these conditions by accepting the defense coverage.

Duty to Indemnify

Unlike the duty to defend, the duty to indemnify covered settlements or judgments is not determined solely from the allegations in the underlying action, but from the facts that are established in that action. [FN19]

Liability insurance policies almost invariably contain clauses providing the insurance company with the right to consent to settlements. There are at least two sources of potential tension this can create that could be impediments to settlement of underlying claims: when the insurance company and the policyholder disagree about the reasonable amount of a settlement, and when they disagree about the portion of the settlement attributable to covered claims.

One protection policyholders have in situations where there is a dispute about the reasonable amount of a settlement is that most jurisdictions recognize that an insurance company with control over the decision to settle must exercise that control in good faith. If an insurance company receives a settlement demand at or just below its policy limits, it may have an incentive to decline the demand, because paying its entire limits is already the worst case outcome for the insurance company, and so even a small chance of avoiding liability by continuing to defend may be rational, even if it exposes the policyholder to the risk of a much higher judgment. To mitigate this perverse incentive, most jurisdictions recognize that an insurance company has a good faith obligation to accept a reasonable settlement within limits, or risk being liable for a later judgment that is in excess of its policy limits. While jurisdictions differ on the precise standards they use in addressing this obligation, the existence of this good faith duty generally helps a policyholder that wants to take advantage of what it views as a reasonable underlying settlement opportunity. [FN20]

A dispute over what portion of an underlying settlement falls within coverage is another area of dispute that can stand in the way of an insurance company and a policyholder settling an underlying action, when it involves both covered and noncovered claims. A policyholder and an insurance company may be faced with the need to resolve their coverage dispute in order to avoid losing a favorable opportunity to settle an underlying action. In some cases, a policyholder ***6-12** can obtain the insurance company's agreement to waive its consent to settle clause (and possibly also any objection to the reasonableness of the settlement) to allow the policyholder to take advantage of an underlying settlement opportunity, leaving the question of the portion that is covered for later determination. In other situations, the policyholder and insurance company may negotiate interim contributions, which similarly could be adjusted to final figures in later dispute resolution procedures.

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As discussed above, in situations where the insurance company has denied covered, the policyholder is generally allowed to make reasonable settlements of the underlying claim, regardless of any clause giving the insurance company the right to consent to settlement. In a substantial minority of jurisdictions, an insurance company that breaches its duty to defend by such a denial also loses the right to raise coverage defenses to an underlying settlement in that action. [FN21] In these jurisdictions the burden on the policyholder to prove coverage for an underlying settlement effectively is much lighter, because the breach is judged by the broad standards of the duty to defend.

In jurisdictions that do not follow that rule, a settlement in the underlying action is likely to take place before the underlying action has determined all the relevant facts that impact coverage. This raises the question of whether a policyholder is required to prove its own liability in the underlying claim in order to access its insurance coverage. [FN22] This issue arises frequently in the context of mass tort actions, where the policyholder defendant disputes that its products or operations have caused the harm that is being alleged by the claimants, but after settling, it needs to establish the facts of such harm to establish insurance coverage for the settlement. Courts addressing this situation have held that a settling policyholder is not required to prove its own liability in order to establish insurance coverage. Rather, it need only prove it settled as a result of the reasonable anticipation of liability for a covered claim, and that the settlement was reasonable in light of the amount of exposure and probability of being held liable. [FN23]

In some situations, a policyholder with a coverage dispute with its insurance company about an underlying claims can extricate itself from the situation by settling with the underlying claimant, and assigning to the claimant as a part of that settlement its rights to the insurance proceeds. Under this approach, the policyholder lets the claimant and the insurance company fight the coverage dispute between them, rather than pursuing its claim itself. [FN24]

***6-13 Conclusion**

Policyholders faced with underlying claims must pay attention both to the scope of coverage of any applicable insurance policy, and also to a number of claims handling issues, in order to maximize their insurance recovery for defense and indemnity costs.

The views expressed in this paper are solely those of the author (or authors).

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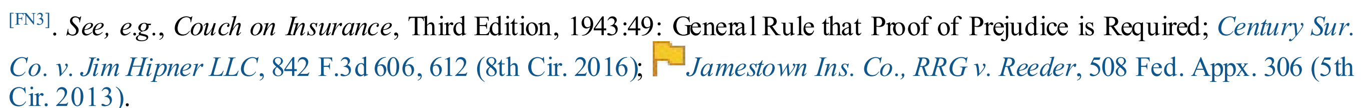
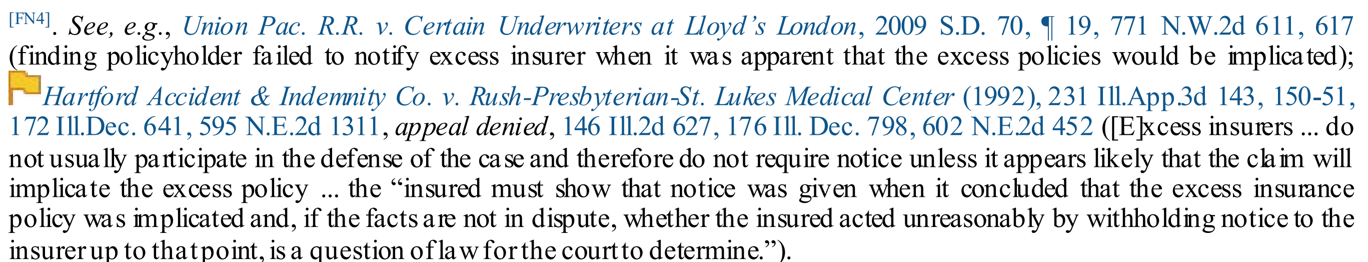
[FN1]. The author would like to thank Kelly Soldatiof Perkins Coie, for her assistance with this paper. The views expressed in this paper are solely those of the author.

[FN2]. *See, e.g.*, Shawn Rice, Coal Ash Liabilities Set Off Search for Historical Insurance, Law360 (Feb, 25, 2022) (Reporting on recent settlements by Duke Energy with its historic insurers for coverage of its coalash liabilities); *Nat'l Indem. Co. v. State*, 499 P.3d 516, 536 (Mont. 2021) (upholding insurance claims by the State of Montana for underlying actions alleging failure of warn of the dangers of asbestos from mining activities in Libby, Montana).



[FN3]. *See, e.g.*, *Couch on Insurance*, Third Edition, 1943:49: General Rule that Proof of Prejudice is Required; *Century Sur. Co. v. Jim Hipner LLC*, 842 F.3d 606, 612 (8th Cir. 2016); *Jamestown Ins. Co., RRG v. Reeder*, 508 Fed. Appx. 306 (5th Cir. 2013).



[FN4]. *See, e.g.*, *Union Pac. R.R. v. Certain Underwriters at Lloyd's London*, 2009 S.D. 70, ¶ 19, 771 N.W.2d 611, 617 (finding policyholder failed to notify excess insurer when it was apparent that the excess policies would be implicated); *Hartford Accident & Indemnity Co. v. Rush-Presbyterian-St. Lukes Medical Center* (1992), 231 Ill.App.3d 143, 150-51, 172 Ill.Dec. 641, 595 N.E.2d 1311, *appeal denied*, 146 Ill.2d 627, 176 Ill. Dec. 798, 602 N.E.2d 452 ([E]xcess insurers ... do not usually participate in the defense of the case and therefore do not require notice unless it appears likely that the claim will implicate the excess policy ... the "insured must show that notice was given when it concluded that the excess insurance policy was implicated and, if the facts are not in dispute, whether the insured acted unreasonably by withholding notice to the insurer up to that point, is a question of law for the court to determine.").

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[FN5]. *See, e.g.*, *QES Pressure Control*, 2022 WL 956178, at *3-*5.

[FN6]. Allan D. Windt, Insurance Claims & Disputes § 1:7 (2013).

[FN7]. *See, e.g.,* Michael T. Sharkey, Government Investigations Can Constitute Covered Claims - And Require Notice - Under Liability Insurance Policies, LexisNexis 2014 Emerging Issues 7145 (Feb. 2014) (discussing the advantages and potential risks of broad "claims" definitions in claims-made liability policies).

[FN8]. *See, e.g.*, *Cas. Indem. Exch. Ins. Co. v. Liberty Nat. Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995) (denying contribution from excess insured where insured failed to tender defense of the action to its insurer); *Hartford Accident & Indemnity Co. v. Gulf Ins. Co.*, 776 F.2d at 1383. ("[M]ere knowledge that an insured is sued does not constitute tender of a claim. What is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired. An insurance company is not required to intermeddle officiously where its services have not been requested.")

[FN9]. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 241 P.3d 429, 434 (Wash. Ct. App. 2010) (quoting *Stephens v. State Farm Mut. Auto. Ins. Co.*, 508 F.2d 1363, 1366 (5th Cir. 1975)).

[FN10]. *See, e.g.*, *U.S. Guar. Co. v. Liberty Mut. Ins. Co.*, 12 N.W.2d 59, 61 (Wis. 1944).

[FN11]. *See, e.g.* *Frontier Insulation Contractors, Inc. v. Merchs. Mut. Ins. Co.*, 690 N.E.2d 866, 868-69 (N.Y. 1997); *See, e.g.,* *SM Brickell Ltd. Partnership v. St. Paul Fire & Marine Ins. Co.*, 786 So.2d 1204, 1206 (Fla. App. 2001) ("If the complaint alleges facts that create potential coverage under the policy, an insurer must defend the lawsuit."); *St. Paul Ins. Co. v. Tex. Dep't of Transp.*, 999 S.W.2d 881, 884-85 (Tex. App.-Austin 1999).

[FN12]. *See, e.g.,* *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 422 N.E.2d 518, 521 (N.Y. 1981); *See, e.g.,* *SM Brickell*, 786 So.2d at 1206 ("A liability insurer's duty to defend is controlled by the allegations in the complaint against the insured, even if they may be factually incorrect or without merit."); *Tex. Dep't of Transp.*, 999 S.W.2d at 884-85

[FN13]. *See* *Ruder & Finn*, 422 N.E.2d at 521; *Brook Shopping Center, Inc. v. Liberty Mut. Ins. Co.*, 439 N.Y.S.2d 10, 12 (N.Y. App. Div. 1981); *See, e.g.,* *Flamingo Self Storage, LLC v. Travelers Indem. Co.*, 43 So.3d 168, 170 (Fla. App. 2010); *Nat'l Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)

[FN14]. *See* *McGroarty v. Great Am. Ins. Co.*, 329 N.E.2d 172, 176 (N.Y. 1975); *Advanced Systems, Inc. v. Gotham Insurance Co.*, 272 So.3d 523, 527 (Fla. App. 2019) ("Even where the complaint alleges facts partially within and partially outside the coverage of a policy, the insurer is nonetheless obligated to defend the entire suit"); *Stumph v. Dallas Fire Ins. Co.*, 34 S.W.2d 722, 728 (Tex. App.-Austin 2000)

[FN15]. "Normally, an insurer's duty to defend is coupled with the right to control the defense of the litigation." *Parker v. Agricultural Ins. Co.*, 440 N.Y.S2d 964, 967 (N.Y. Supr. Ctr. 1981).

[FN16]. *Id*. ("[I]n situations where conflict of interest and loyalties are apparent, 'The insurer's desire to control the defense must yield to its obligation to defend the insured. In such cases, the insured has the right to obtain counsel of its own choice to be paid for by the insurance company."') (quoting *Penn Aluminum, Inc. v. Aetna Cas. & Sur. Co.*, 402 N.Y.S.2d 877, 879 (N.Y. App. Div. 1978)).

[FN17]. *W. Heritage Ins. Co. v. Love*, 24 F. Supp. 3d 866, 877 (W.D. Mo. 2014), *aff'd subnom.* *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832 (8th Cir. 2015).

[FN18]. *Facility Invs., LP v. Homeland Ins. Co. of New York*, 321 Ga. App. 103, 108, 741 S.E.2d 228, 233 (2013)

[FN19]. *Servidone Const. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 424, 477 N.E.2d 441 (1985) ("The duty to

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indemnify is, however, distinctly different. The dutyto defendis measured against the allegations of pleadings but the duty to pay is determined bythe actual basis for the insured's liability to a third person.")

[FN20]. *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 401, 2 P.3d 1, 9 (2000), as modified (July 26, 2000) ("Consistent with these principles, a liability insurance policy's express promise to defend and indemnify the insured against injury claims implies a dutyto settle third party claims in an appropriate case. More specifically, the insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits. The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble--on which only the insured might lose. An insurer that breaches its implied duty of good faith and fair dealingby unreasonably refusing to accept a settlement offer within policy limits maybe held liable for the full amount of the judgment against the insured in excess of its policy limits); *Archdale v. Am. Internat. Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 465-66, 64 Cal. Rptr. 3d 632, 646 (2007) ("An insurer's liability for failing to accept a reasonable settlement offer "is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of goodfaith and fair dealing.")

[FN21]. *Missionaries of Co. of Mary v. Aetna Cas. & Sur. Co.*, 155 Conn. 104, 114, 230 A.2d 21, 26 (1967) ("The defendant, after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions. Nor should the defendant be permitted, by its breach of the contract, to cast upon the plaintiff the difficult burden of proving a causal relation between the defendant's breachof the dutyto defend and the results which are claimed to have flowed from it."); *Nat'l Indem. Co. v. State*, 499 P.3d 516, 536 (Mont. 2021).

[FN22]. *Uniroyal, Inc. v. The Home Ins. Co.*, 707 F.Supp. 1368

[FN23]. *Id., see also* *Luria Bros. & Co. v. Alliance Assurance Co., Ltd.*, 780 F.2d 1082, 1091

[FN24]. *Damron v. Sledge*, 460 P.2d 997, 999 (Ariz. 1969) ("It is well established that a claim by an insured against his insurer for failure of the insurer to defend may be assigned to the injured party."); *Kagele v. Aetna Life & Cas. Co.*, 40 Wash. App. 194, 197 (1985)
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