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Defending Mass Tort Claims: Get What You Paid For

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As every risk manager and general counsel in the pharmaceutical industry knows, mass-marketed pharmaceuticals result in significant exposure to product liability loss. As a result, pharmaceutical companies often pay expensive insurance premiums for unlimited defense protection outside of and in addition to insurance policy limits.

Insurance companies are aware that pharmaceutical companies facing mass tort claims often must litigate the claims in a manner that protects the reputation of the company and its product, and discourages additional lawsuits. This defense strategy, however, can be expensive.

Unfortunately, the same awareness that justifies expensive premiums also encourages insurance companies to deny the defense of claims, or, at a minimum, to defend under a "reservation of rights." Courts, however, have developed strict rules regarding the duty to defend that favor the policyholder.

An Insurance Company Must Defend Its Policyholder Whenever There Is A Possibility Of Coverage

It is well-established in nearly every jurisdiction that the duty to defend is far broader than the duty to indemnify. Courts frequently refer to the broad defense promise by an insurance company as "litigation insurance." The duty to defend is independent of, although often tied to, the duty to indemnify.

In Connecticut and New York, an insurance company must defend its policyholder whenever the four corners of the underlying complaint suggest a "possibility" of coverage. Similarly, under New Jersey law, the defense obligation is triggered if the allegations against the policyholder fall "potentially" within coverage.

Generally, the duty to defend is predicated on the allegations of the underlying complaint or an insurance company's knowledge of actual facts which can be considered to establish a reasonable possibility of coverage. If there is any doubt as to whether the allegations of the underlying complaint state a claim covered by the policy, that doubt must be resolved in favor of the policyholder.

Courts recognize the importance of the duty to defend and have established strict rules on its applicability:

> The seriousness with which the courts take this duty [to defend] is exemplified by the fact that the duty to defend must be exercised regardless of whether the original suit is totally groundless or regardless of whether, after full investigation, the insurer got information which categorically demonstrates that the alleged injury is not in fact covered.

Krevolin v. Dimmick, 467 A.2d 948, 951 (Conn. Super. Ct. 1983). In addition, the

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insurance company must defend its policyholder as to *all* claims in a lawsuit, provided that at least one claim is potentially covered.

Denying Coverage Based On A Policy Exclusion

An underlying complaint need not negate each and every exclusion within a policy to trigger a contractual obligation to defend. Likewise, the fact that a complaint alleges a claim that is excluded by the policy does not excuse the insurer from defending the policyholder. All that is required in order to trigger the duty to defend is that *one* of the claims fall within the provisions of the policy, even if others are excluded.

Thus, when an exclusion is relied upon to deny coverage, an insurance company has the burden of demonstrating that *all* of the allegations in the underlying complaint fall *entirely* within the policy's exclusion. While insurance companies typically bear the burden of justifying their reliance upon policy exclusions, courts have noted that the burden is particularly heavy when an insurance company is seeking to avoid its duty to defend. A New York court has summarized the burden as follows:

> To be relieved of its duty to defend on the basis of a policy exclusion, the [insurance company] bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretations, and that there is no possible factual or legal basis upon which the [insurance company] may eventually be held obligated to indemnify the [policyholder] under any policy provision.

Frontier Insulation Contractors v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175 (1997).

A Conflict Of Interest Entitles A Policyholder To Independent Counsel

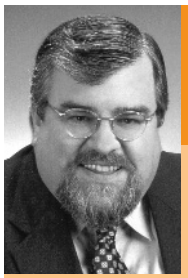
If a conflict of interest arises between a policyholder and its insurance company, the majority of states require that the insurance company give up control of the defense and settlement of the underlying action and pay for *independent* counsel. A conflict of interest most frequently arises where an insurance company defends its policyholder under a reservation of rights, and is rooted in the fear that an insurance company will steer the defense of the underlying action in a manner that will ultimately preclude coverage of the action.

Conclusion

Behind many mass tort claims is the common misperception that all pharmaceutical companies have deep pockets. As is more often the case, however, mass tort product liability litigation will threaten a pharmaceutical company's very existence as a profitable enterprise.

It is important, therefore, to secure an immediate and complete defense commitment under the applicable insurance policies. In the face of mass tort litigation, a policyholder is entitled to an immediate defense unless and until: (1) the insurance company can conclusively prove the absence of any possibility of coverage under the policy; or (2) the indemnity limits of the insurance policy are exhausted. ■

who's who



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