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Commentary

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Over decades, insurance companies have repeatedly tried to turn a no-action clause common in insurance policies into a cudgel used to avoid fulfilling their coverage promise. Insurance companies have tried to convince courts – and a few have fallen for the argument – that so-called no-action clauses prevent a policyholder from bringing an action against the insurance company to enforce the right to insurance coverage. That's contrary to common understanding of the clauses' purpose and most judicial precedent.

"No Action" or "Action Against Us" clauses purport to limit lawsuits against an insurance company in certain contexts. Directors and Officers ("D&O") and Errors and Omissions ("E&O") policies typically contain such a clause. A typical no-action clause states:

> "*No action shall be taken against the Insurer unless, as a condition precedent thereto, there has been full compliance with all the terms of this Policy, and until the Insured's obligation to pay has been finally determined by an adjudication against the Insured or by written agreement of the Insured, claimant and the Insurer*."

Insurance companies have wrongfully argued that such clauses bar suits against the insurance company until the underlying claim has been finally adjudicated or settled with the insurance company's consent. Most courts realize, however, that a policyholder may sue for breach of contract when its insurance company has denied its defense obligations – even if the underlying claim remains pending.

Historically, no-action clauses were added to insurance policies to prevent premature claims by injured third-party claimants in a direct action against the insurance company. *See* 7A Couch on Insurance § 105.7. In other words, such clauses prevent the adversary plaintiff

from directly and prematurely pursuing your liability insurance policy prior to a resolution of the adversary plaintiff's case. Nothing in the history of no-action suggests any intent to prevent a policyholder from enforcing its right to insurance under the insurance policy. *See Simon v. Maryland Cas. Co.*, 353 F.2d 608, 612 (5th Cir. 1965) (no action clauses in liability policies are "directed at the injured third party, not the assured"); *De Luxe Motor Stages of Ill., Inc. v. Hartford Acc. & Indem. Co.*, 232 N.E.2d 141, 144 (Ill. App. 1967) ("The purpose of the 'no action' clause is to protect the insurer from collusive or overly generous or unnecessary settlements by the insured at the expense of the insurance carrier. It is, however, unfair to the insured to enforce the clause against him when the insurer has erroneously refused to perform the insurance contract.").

The cases cited here are sixty years old and show the history of no-action clauses. Justice Oliver Wendell Holmes observed that, "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). That history illuminates the meaning and intent of no-action clauses.

Members of the insurance industry are well aware that no-action clauses do not strip a policyholder of the ability to enforce its rights under an insurance policy. In fact, Allan Windt, an insurance industry insider and scholar, acknowledges as much in his treatise, *Insurance Claims and Disputes: Representation of Insurance Companies and Insured*, § 8.06. Windt's rationale turns on the insurance company's breach, which prevents it from enforcing a no-action clause. Windt explains that a no-action clause should not bar a policyholder's declaratory judgment action, since "[h]aving itself allegedly breached the contract, the insurer cannot require the insured to comply with his or her obligations under the contract".

Notably, The New York State Department of Insurance (now the Department of Financial Services) Office of the General Counsel issued an opinion in 1993 confirming that a no-action clause is not intended to prevent a policyholder from establishing its rights under a policy by bringing suit against its insurance company. N.Y. OGC Op. No. 08-11-93.

Policyholders should not accept insurance company assertions that a no-action clause limits their ability to enforce their rights.

No-Action Clauses Prevent Third-Party Suits – Not Policyholder Suits to Enforce the Policy

No-action clauses in insurance policies prevent injured third-party claimants from prematurely bringing direct actions against the insurance company for claims. *See Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252, 254 (10th Cir. 1981) ("The purposes of the no action clause are to prevent nuisance suits against the insurance company and to prevent an injured party or an insured from bringing the insurance company into the underlying litigation with possible resultant prejudice."); *Earth Elements, Inc. v. Nat'l Am. Ins. Co.*, 41 Cal. App. 4th 110, 116 (Cal. Ct. App. 1995) ("A 'no action' clause is intended to preclude actions by the injured third party against the insurer until damages have been fixed by a final judgment or agreed settlement.").

The clause was not meant to apply to claims by a policyholder to enforce its contractual rights against its insurance company. *Paul Holt Drilling*, 664 F.2d at 254; *see also Hawkins, Ash, Baptie & Co., LLP v. Charter Oak Fire Ins. Co.*, 2001 U.S. Dist. LEXIS 27557, 2001 WL 34381113, at *5 (W.D. Wis. June 13, 2001) ("Wisconsin law supports the conclusion that no action clauses apply to third-party suits and not to suits by the insured."). Notably, insurance companies have recognized this critical limitation to the scope of No Action clauses. *See Ottawa Bancshares v. Great Am. Sec. Ins. Co.*, 764 F. Supp. 3d 1079, 1089 (D. Kan. 2025) (insurance company conceded that the No Action clause did not apply to bar policyholder's claim for defense costs); *Paul Holt Drilling*, 664 F.2d at 254 ("Liberty Mutual argues that the no action clause applies only to claims third parties make against the insured[.]").

The public policy rationale for no-action clauses is prevent a third-party claimant from accessing the policyholder's insurance before the third party's claim has been through to settlement or judgment. Indeed, the clause protects an insurance company by avoiding the possibility of collusion involving a third-party claimant. The clause does not strip a policyholder's rights under the insurance contract. *See* 7A Couch on Insurance § 105.7: "[T]he public policy behind prohibiting an injured party from recovering personal injury damages against an insurance carrier on account of the negligence of an insured prior to obtaining a judgment against the insured is designed

to prevent a jury, in a personal injury action, from becoming aware that the tortfeasor is insured and making a larger award under a 'deep pockets' theory[.]" 3 California Ins. Law Dictionary & Desk Ref. § N18 concurs: "[No action] clauses are to prevent collusive settlements between the insured and the claimant before a final judgment. This clause, however, does not bar an action by the insured against the insurer."

Some Courts Adopted the Incorrect Argument that No-Action Clauses Completely Bar Purportedly ''Early'' Policyholder Lawsuits

Despite the historical purpose of the clause, a few courts have accepted the incorrect insurance company argument regarding no-action clauses. Cases in some jurisdictions following those arguments have undermined and ignored the original intent and purpose by incorrectly adopting the view that no-action clauses completely bar policyholders from suing their insurance companies before the underlying claim is resolved. In those cases, the courts adopt an overly broad interpretation of no-action clauses offered by the insurance company, finding that no-action means "no action whatsoever" can be taken against the insurance company until the underlying claim is fully resolved. *See, e.g.*, *Batsakis v. Fed. Deposit Ins. Corp.*, 670 F. Supp. 749, 758-59 (W.D. Mich. 1987) (finding no action clause prevented policyholder from bringing declaratory judgment action against insurance company until liability of policyholder was determined); *Zaborac v. Am. Cas. Co. of Reading, Pa.*, 663 F. Supp. 330, 333 (C.D. Ill. 1987) (finding declaratory judgment action was premature due to no action clause).

This minority approach subverts the purpose of the no-action clause and leaves the policyholder in a precarious position – particularly when its insurance company has denied its defense obligations.

Most Courts Find No-Action Clauses Do Not Bar Claims Based on the Insurance Company's Defense Obligations

In the majority of jurisdictions, no-action clauses do not prevent a policyholder from bringing a lawsuit based on the insurance company's improper denial of its defense obligations under the policy. Under the majority view, a no-action clause allows policyholders to bring breach of contract claims for money damages, while the underlying claim is still pending, based on the insurance company's breach. *See Wilbanks Sec. Inc. v. Scottsdale Ins. Co.*, 215 F.Supp.3d 1196, 1200-01 (W.D. Okla. 2016) (finding policyholder was not barred from bringing breach of contract claim against insurance company based on duty to defend); *Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co.*, 926 F. Supp. 1426, 1435 (D. Colo. 1996) (finding 'no action' clause did not bar suit by policyholder against insurance company to recover defense costs for ongoing underlying dispute); *Patterson v. Allstate Ins. Co.*, 34 A.D.3d 1081, 1081 (3d Dep't 1970) (finding the 'no action' condition did not bar a cause of action based on insurance company's failure to defend liability action).

Even if the policy does not provide formal 'duty to defend' coverage, it may require the insurance company to advance defense costs. A duty to advance defense costs obligates the insurance company to pay those costs as they "come due." Given the duty to defend, no-action clauses should not bar early lawsuits against insurance companies for failure to advance defense costs. Indeed, this appears to be the guidance provided by the Delaware Supreme Court in its decision from *Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 936 (Del. 2025). In *Origis*, the policyholders asserted declaratory-judgment and breach-of-contract claims against their primary and excess D&O insurance companies for reimbursement of defense costs. The policyholders commenced the coverage action while the underlying matter was still pending. The trial court dismissed the coverage suit because of a no-action clause in the policies. The Delaware Supreme Court reversed.

On appeal to the Delaware Supreme Court, the policyholders argued that the policies required the insurance companies to advance defense costs on a current basis and the trial court's application of the no-action clause as a bar to suit essentially nullified the advancement provisions – thereby effectively turning the "duty to advance" policies into indemnity-only policies. *Id.* at 948. The Delaware Supreme Court seemed to agree with the policyholders because it reversed and remanded the case to the trial court to consider the relationship and interplay between the no-action clause and the advancement provisions. *Id.* at 954. *Origis* demonstrates that policyholders must interpret no-action clauses in a manner that does not impair any present obligations owed to them by their insurance company as to its defense obligations.

No Action Clauses Do Not Bar Declaratory Judgment Actions

Reported decisions in several different jurisdictions show that no-action clauses do not prevent "early" policyholder declaratory judgment suits against insurance companies despite the presence of a no-action clause. *See, e.g.*, *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d 229, 233 (9th Cir. 1989) (collecting cases where courts have held 'no action' clauses "do not apply to bar declaratory actions that adjudicate issues of coverage and defense"); *Caldwell Trucking PRP Group v. Spaulding Composites, Co., Inc.*, 890 F. Supp. 1247, 1258 (D.N.J. 1995) (finding "the final judgment or settlement requirement does not preclude an insured from seeking a declaration of the insurer's duty to provide coverage and a defense before a judgment is entered against the insured"); *Ruch v. Morales*, 2023 N.J. Super. Unpub. LEXIS, 15212023 WL 5811673, at *5 n.6 (N.J. Super. Ct. App. Div. 2023) (noting 'no action clause' did not prevent filing a declaratory judgment action regarding coverage); *Mid-Continent Cas. Co. v. Advantage Med. Elecs., LLC*, 196 So.3d 238, 250 (Ala. 2015) (finding 'no action' clause did not apply to bar policyholder from seeking declaration as to insurance company's duty to defend in underlying suit); *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 660 N.E.2d 755, 762 (Ohio C.P. 1993) (finding 'no action' clauses do not bar declaratory actions filed by policyholders concerning coverage issues). Notably, courts allowing "early" policyholder-declaratory judgment suits do not limit such suits to declarations on defense obligations alone but also allow policyholders to seek declarations on coverage for settlements or judgments of the underlying claim, i.e., on the duty to indemnify.

Conclusion

So, whom do we "No"? The 'no' in no-action applies to premature direct actions by adversary plaintiffs and not to policyholders seeking to enforce their rights under their insurance policy. The history and lore of the development of standard-form insurance policy language often illuminate its reasonable meaning. Here, it shows that an insurance company typically cannot avoid coverage by urging an incorrect application of a no-action clause. Where an insurance company improperly breaches the policy and denies its defense obligation, policyholders may bring an action to enforce their right to a defense against the insurance company. Declaratory judgment actions too do not offend the no-action clause. Do not let incorrect arguments regarding the meaning of a no-action clause in your policy permit your insurance company to avoid its coverage obligations. ■

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