

Tips for Defending against Litigation without Jeopardizing Insurance Coverage

1. NOTICE: When Is The Right Time To Notify Insurers Of A Claim?

- **TIP:** Give Notice Early, and Often¹
- **TIP:** Assume Defense Costs Will Be Covered and Demand it Accordingly²

2. COVERED AND UNCOVERED CLAIMS: How to Strike the Balance

- **TIP:** If At Least One Claim Is Potentially Covered, A Defense Should Be Afforded, And for All Claims³
- **TIP:** Do Not Presume an Insurer's Allocation Between Covered/Uncovered Claims is Correct, and Be Mindful of this in Structuring Verdict Forms or Settlement⁴

3. DEFENSE COUNSEL: What to Look Out For in Panel Counsel, How to Maximize Control, When Independent Counsel Should be Provided

- **TIP:** Defense Counsel Selection is Subject to Negotiation⁵
- **TIP:** Trust but Still Vet Insurer-Appointed Counsel
- **TIP:** Look Out for a Reservation of Rights that Previews a Potential Conflict of

¹ *JT Magen v. Hartford Fire Ins. Co.*, 879 N.Y.S.2d 100, 102 (N.Y. App. Div. 2009) (the notice of claim provision "is a condition precedent to coverage, and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy."); *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 414 F. Supp. 2d 508, 519 (M.D. Pa. 2005) ("Under Pennsylvania law, where the insured provides late notice of the potential claim, the insurance company will be relieved of its responsibilities under the policy only if it can prove actual prejudice from the untimely notice.").

² *The Village of Piermont v. American Alternative Ins. Corp.*, 151 F.Supp.3d 438 (S.D.N.Y. 2015) ("In New York, an insurer's duty to defend is exceedingly broad and distinct from the duty to indemnify.") (internal quotations omitted).

³ See, e.g., *National Fire Insurance Company of Hartford v. E. Mishan & Sons, Inc.*, 2016 WL 3079958 (2d Cir. 2016) (applying New York law) (holding once the duty to defend is triggered as to any one claim, it is the insurer's duty to defend the entire action, including those causes of action that would not otherwise fall within the policy's coverage); *People ex rel. Spitzer v. ELRAC, Inc.*, 745 N.Y.S.2d 671 (N.Y. Sup. Ct. 2002) ("If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."); *Graphic Arts Mutual Insurance Company v. Pine Bush Central School District*, 159 A.D.3d 769, 73 N.Y.S.3d 241, 354 Ed. Law Rep. 443 (2d Dep't 2018) (the duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability to a third person). But see *Irma Straus Realty Corp. v. Old Republic Natl. Tit. Ins. Co.*, 184 AD3d 1095, 1097 (4th Dept 2020) (the duty to defend does not include an affirmative duty on the part of the insurer to prosecute its insured's potential actions against another party)

⁴ See, e.g., *Uvino v. Harleysville Worcester Ins. Co.*, 708 Fed. Appx. 16, 20-21 (2d Cir. 2017) (applying New York law) (adopting the majority rule of placing the allocation burden on the insured whether there is a dispute of covered and uncovered claims); *Executive Risk Indem., Inc. v. Cigna Corp.*, 74 A.3d 179, 183 (Pa. Super. Ct. 2013) (insured bears burden of allocating settlement amount between covered and uncovered claims).

⁵ *Cunniff v. Westfield, Inc.*, 829 F. Supp. 55 (E.D. N.Y. 1993) (holding that the insured was not necessarily required to select counsel from a list of law firms proffered by the insurer); *Housing Authority of City of Dallas, Tex. v. Northland Ins. Co.*, 333 F. Supp. 2d 595 (N.D. Tex. 2004) (discussing policies which afford insureds an "opportunity to confer" with the insurer regarding selection of counsel).

Interest and Right to Independent Counsel⁶**4. COOPERATION: What Obligations Do You And Your Defense Counsel Have To Share Information With The Insurer?**

- **TIP:** Do Not Presume a Defending-Insurer Is Entitled to Know Everything⁷
- **TIP:** Do Not Presume That What You Share With Your Insurer is Protected from Disclosure in Discovery⁸
- **TIP:** Do Not Presume that Insurer “Litigation Guidelines” are the “Bible”⁹

5. SETTLEMENT: Who Plays What Role in Negotiations, How to Maximize Control, What to Do When Strategy Diverges

- **TIP:** Do Not Forget to Involve the Insurer in All Communications Regarding Settlement¹⁰
- **TIP:** Do Not Lose Your Leverage in Coverage Negotiations by Settling a Claim “Within Limits” Before the Insurer Has Agreed to Pay

⁶ See generally *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401-02, 425 N.E.2d 810, 815 (NY 1981) (conflict of interest entitles insured to independent counsel of its choosing paid for by the insurer); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 888-89, 860 N.Y.S.2d 229, 232 (3rd Dep't 2008) (holding insurer has an affirmative duty to inform insured of right to direct counsel and ruling failure to do so a deceptive business practice in violation of GBL § 349), compare with *Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 A.D.2d 169, 170, 719 N.Y.S.2d 223, 224 (1st Dep't 2000) (commenting that cases cited by appellant due not impose an affirmative duty on insurer to advise of right to choose counsel). See also *QBE Ins. v. Jinx*, 22 N.Y.3d at 1110 (Pigott J. Dissenting) (stating in dicta that insurer has an obligation to inform insured and citing to *Elacqua*, but failing to discuss *Sumo* or any other supporting authority); *Great American Insurance Company v. Houlihan Lawrence, Inc.*, 449 F. Supp. 3d 354 (S.D. N.Y. 2020) (an insurer's reservation of rights does not automatically give the insured representation of its choice at the insurer's expense); *Vanguard Ins. Co. v. Guagenti*, 157 Misc. 2d 900, 599 N.Y.S.2d 215 (Sup 1993) (insured entitled to independent counsel where the insurer conceded in its reservation of rights that it intended to investigate and if possible avoid coverage on the basis that the insured acted intentionally).

⁷ An insured is only required to provide information to a carrier that is material and relevant to the investigation or settlement of a claim. See *V.M.V. Management Co., Inc. v. Peerless Ins.*, 15 A.D.3d 647 (2d Dep't 2005) (“the [insurer] failed to show that certain documents which were not produced were material and relevant to the investigation or settlement of this claim.”). “[W]hen evaluating an insurer's rights to investigation [sic] of a claim, the insurer's rights tend to be measured by ‘reasonableness,’ with the courts attempting to balance the insurer's legitimate interest in ascertaining the validity and extent of the claim against the insured's ... rights to both privacy and prompt payment of sums due under the terms of the contract.” *Id.* “[T]he duty of an insured under the cooperation clause of [an insurance policy] is satisfied by substantial compliance.” *Avarello v. State Farm and Cas. Co.*, 208 A.D.2d 483 (2d Dep't 1994); *SCW West LLC v. Westport Ins. Co.*, 856 F.Supp.2d 514 (E.D.N.Y. 2012) (cooperation by the insured may be excused as a matter of law if it is improperly demanded); *Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73 (1st Dep't 2001) (rejecting insurer's motion to dismiss bad faith claim when complaint alleged pattern by insurer of avoiding the claim by making multiple requests for additional documentation).

⁸ *Amac. Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 616 (N.Y. 2016) (“We conclude that the policy reasons for keeping the litigation limitation on the common interest doctrine outweigh any purported justification for doing away with it, and therefore maintain the narrow construction that New York courts have traditionally applied.”).

⁹ *SCW West LLC v. Westport Ins. Co.*, 856 F.Supp.2d 514 (E.D.N.Y. 2012) (“Cooperation by the insured may be excused as a matter of law if it is improperly demanded.”); *Ladner v. American Home Assur.*, 201 A.D.2d 302, 304, 607 N.Y.S.2d 296 (1st Dept. 1994) (“When a conflict of interest exists between an insured and the insurer which is obligated to defend, the remedy is to permit the insured to select defense counsel, with the reasonable cost of the defense to be borne by the insurer.”).

¹⁰ See, e.g., *State Farm Auto. Ins. Co. v. Blanco*, 208 A.D.2d 933, 617 N.Y.S.2d 898 (2d Dep't 1994) (holding where a liability policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of a condition of the insurance and disqualifies the insured from availing himself of the pertinent benefits of the policy).

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