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An insurance coverage primer for non-U.S. businesses with U.S. operations that may be subject to long term liabilities.

Stranger in a Strange Land

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If you are general counsel, a risk manager, or any other upper-level executive for a U.S. company with a non-U.S. corporate parent (or sister company), you understand all too well that the tort and liability insurance system in the United States often makes non-U.S. business owners feel like strangers in a strange land. It can leave them at a loss for words or uttering words that we cannot print in this publication. Surprise aside, the tort system in the U.S. giving rise to claims and liability is the twin of the insurance system that is designed to transfer risk and to compensate injury and harm. Simply put, "the purpose of insurance is to insure."[1]

Non-U.S. corporations that have U.S. operations through subsidiaries eventually will face the U.S. tort system. Claims for asbestos, environmental harm, lead exposure, and many other long-term exposure or "toxic tort" situations all should be covered by insurance. In your role as a point-person for your company's U.S.-based operations, you no doubt will have to explain to board members or counsel for the non-U.S. parent or other non-U.S. entities the intricacies of exactly how the U.S. insurance system may be a counterbalance to the U.S. tort system. We provide herein a primer on certain basic insurance concepts for non-U.S. businesses with U.S. operations, including the broad "duty to defend" under general liability insurance policies, certain improper

efforts by insurance companies to limit coverage and settlement obligations, and steps that non-U.S. businesses should take to protect the insurance assets of their U.S. subsidiaries.

General Liability Insurance Provides Full Coverage for Costs of Defense

Because the U.S. tort system gives rise to lawsuits, it should not be surprising that the general liability insurance policy provides litigation insurance. That litigation insurance is in the form of a very broad "duty to defend" that is designed to protect the policyholder from liabilities. There are five general propositions of duty to defend law that are clear and unquestioned in all jurisdictions:

1. An insurance company's duty to defend is *exceedingly broad*.

2. An insurance company has a duty to defend whenever the allegations of the underlying complaint suggest a *reasonable possibility* of coverage or the *potential* for coverage; that's true when *even one interpretation* of the allegations exists that could conceivably or arguably result in coverage.

3. The allegations of the complaint must be *liberally construed* in determining the duty to defend.

4. Any doubts about coverage due to ambiguous, vague, or incomplete allegations in the complaint are resolved in the policyholder's favor.

5. An insurance company cannot avoid its duty to defend unless it meets the *heavy burden* of proving *with certainty* that there is no possible legal or factual basis for coverage under any interpretation of the underlying allegations.

As detailed below, these basic principles and the rationales underlying them have been explained by commentators and confirmed time and again by courts throughout the United States.

Following these principles, well-settled law regarding an insurance company's defense obligation requires that any insurance company with potential liability for underlying long-term liability claims *must* provide a complete defense to its policyholder up front and in full, to the extent necessary to make the policyholder whole. This unfettered defense obligation is one of the two major purposes of general liability insurance policies, which allow the policyholder to obtain full defense coverage from any one of its insurance companies up front, rather than being forced to await the resolution of a defense dispute or a complicated allocation process between its various insurance companies. Thus policyholders are entitled to a complete defense from general liability insurance companies for any potentially covered underlying long-term injury claim.

Not only can a policyholder seek its outstanding defense costs from any of its insurance companies for potentially covered claims, but the policyholder also is entitled to a defense of the entire action where a complaint is potentially covered — even if the complaint includes uncovered allegations. While insurance companies may attempt to reduce their obligations with respect to actions that include some covered and some uncovered claims or parties, the law is clear that the insurance company owes coverage to its policyholder for the entire action.

Finally, where an insurance company reserves its right to deny coverage, even while agreeing to pay for defense costs in the interim, the policyholder has a right to independent counsel. Each of these key concepts described above involving insurance companies' obligations for long-term liabilities is discussed below in greater detail. Non-U.S. businesses with U.S. operations must be familiar with these issues to ensure complete understanding and enforcement of their rights with respect to the liability insurance policies purchased to protect the policyholder companies' interests.

Insurance Companies' Duty to Defend Is Exceedingly Broad

The duty to defend is broader than the duty to indemnify, and a policyholder need establish only that there is a reasonable possibility that the injuries alleged in the underlying actions fall within the policies' coverage.[2] The rationale behind this broad duty is that when a policyholder purchases litigation insurance, there should not be the need to resort to a lengthy court battle over whether the duty to defend applies, which would defeat the whole purpose of having the insurance.

Courts throughout the United States have recog-

nized the breadth of the duty to defend.[3] It is similarly well-settled law that "[a]n insurer must defend whenever the four corners of the complaint suggest — or the insurer has actual knowledge of facts establishing — a reasonable possibility of coverage."[4]

Thus an insurance company cannot decline to defend its policyholder unless there is no possible scenario under which coverage could exist for the claim. For example, the United States District Court for the Southern District of New York held that an insurance company owes a duty to defend under the four corners of the complaint, even when its investigation reveals a likelihood that the underlying action is not covered, because "[t]his duty to defend continues until it is determined *with certainty* that the policy does not provide coverage."[5] An insurance company has a duty to defend if there is even one interpretation of the allegations in the complaint that would result in coverage.[6]

Further, sometimes the face of the complaint may not make clear that a claim is covered, such as where the named defendant is not the party whose products actually are at issue. In some jurisdictions, even if the insurance company knows (or is made aware of) facts establishing the possibility of coverage, the insurance company still must defend its policyholder in such a case.[7]

It is important that non-U.S. companies understand the broad parameters of the duty to defend under general liability insurance policies. Where U.S.-based operations or subsidiaries are insured under such policies, this valuable resource must be tapped when claims for long-term liabilities arise.

Policyholders Are Entitled to a Full Defense, Not a Partial Defense

Two critical effects for policyholders facing long-term liabilities follow from the well-settled duty to defend principles described above. First, once it is clear that at least one potentially covered allegation exists against a policyholder such that the insurance company's duty to defend is implicated, the insurance company has a duty to defend its policyholder *in full* for covered long-term liability claims. Second, the insurance company also must pay such costs in full before seeking any contribution from other insurance companies.[8] Accordingly, an insurance company must *first* provide a complete defense, and then it subsequently may argue for contribution from other insurance companies that also may be liable for the policyholder's loss.[9]

Consequently, policyholders buy liability insurance so that they will be protected — in full — when faced with litigation. Such insurance would not provide sufficient protection if insurance companies could pay for only a partial defense of covered claims by arguing that another insurance company should be responsible for the remainder. As a result, policyholders are entitled to receive full defense costs from any one insurance company that provided insurance for covered claims. Only after an insurance company has provided a complete defense to its policyholder can it argue for contribution *from other insurance companies* that also may be liable for the policyholder's loss.[10]

Where an insurance company has the responsibility of providing a defense, it must pay all defense costs necessary to make the policyholder whole.

Another well-established aspect of duty to defend law is that insurance companies have a duty to pay defense costs *up front* rather than arguing over coverage or allocation issues to the policyholder's detriment. Put another way, where an insurance company has the responsibility of providing a defense, it must pay all defense costs necessary to make the policyholder whole.[11]

A policyholder's right to payment up front of its defense costs for potentially covered long-term liability claims is well settled. Accordingly, a policyholder is entitled to payment of its defense costs up front for potentially covered claims and to a complete defense from any such claims triggered prior to any subsequent contribution action or allocation among insurance companies.[12]

It is not uncommon for U.S. subsidiaries of non-U.S. businesses to maintain insurance through several different insurance companies or to have switched insurance companies over time. In such instances, the non-U.S. parent should not accept anything less than a complete defense from any one of its insurance companies, despite likely arguments

that the insurance company should be liable for only a portion of the losses suffered. While there may be a subsequent allocation proceeding between the insurance companies, the policyholder is entitled to a complete defense up front because the time for payment of defense costs is prior to a contribution action among insurance companies.

Insurance Company Must Defend the Entire Action

With respect to insurance companies' defense obligations, courts do not parse the duty to defend. Accordingly, law is clear nationwide that so long as a single allegation or claim within a complaint is potentially covered, an insurance company has a duty to defend the entire action.[13] It is therefore the complaint as a whole in the underlying action that determines an insurance company's duty to defend — *not* the individual claims. So long as one claim contained within an underlying complaint is potentially covered by the policy, the insurance company must defend the entire action even though the remaining allegations may not covered.

Where lawsuits name both a non-U.S. parent corporation and its U.S. subsidiaries, or any combination thereof, insurance companies may seek to limit their obligations based on the inclusion of entities not named as insureds under the relevant policies. However, case law demonstrates that so long as a single named insured is faced with at least one potentially covered claim, the insurance company must pay that entity's defense costs in full for the entire action — a complete defense — as promised under the policies.

Right to Select Independent Counsel Where a Liability Insurance Company Creates a Conflict of Interest

In certain circumstances, a policyholder's insurance company reserves its rights to deny coverage but continues to pay for the defense of an action. Where the insurance company denies coverage, or where the insurance company has less at stake than the policyholder with respect to the underlying action, the policyholder probably is entitled to appoint independent counsel loyal to the policyholder and its interests rather than loyal to the competing interests of the insurance company.[14] Non-U.S. corporations must be aware of this right and take full advantage of it when litigation arises involving U.S. operations and their corresponding insurance coverage.

Improper Attempts to Reduce or Eliminate Insurance Coverage via Allocation

Given how much money is at stake, either in the form of defense costs or in the form of settlements or judgments, it should not be a surprise that insurance companies have developed a number of techniques to attempt to avoid or limit their responsibility under the insurance policies that they sell. One of the more insidious techniques is to use the subterfuge of allocation in an attempt to avoid all or most of their responsibility. Most jurisdictions reject attempts to avoid liability by improper allocation, though the fights continue every day.

The history and lore of insurance shows that long-term injury cases were intended to be covered in full under multiple insurance policies if necessary. Indeed, even in the early years of long-term products liability, the insurance industry itself acknowledged the full responsibility of each involved insurance company. "The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss."[15] Thus the insurance industry intended that the "all-sums" rule of coverage be applied to liabilities for long-term injury. This means that each insurance company over a span of policy periods could be fully responsible for the costs of defense and settlement; that is, responsible for all sums as the policies state. Every insurance company that sold a liability insurance policy for any period during which a continuous loss occurred was liable for "the full extent of the loss up to the policy's limits …"[16] Many U.S. jurisdictions have adopted the all-sums view of liability insurance in long-term injury cases.

Non-U.S. companies must be aware of the allocation arguments and other defenses that insurance companies typically raise when responding to claims. For U.S.-based operations and subsidiaries subject to U.S. law, these defenses play an important role in key issues such as the best method for submitting claims and the choice of jurisdiction if and when litigation becomes necessary.

Insurance Companies Must Pay to Settle Cases Consistent With Defense Counsel's Advice

It is clear that an insurance company must make

settlement decisions in good faith or be in breach of contract.[17] "Any insurance company, whether excess or primary, in conducting settlement negotiations, is subject to an implied duty of good faith and fair dealing that requires it to consider the interests of the insured equally with its own and evaluate settlement proposals as though it alone carried the entire risk of loss."[18]

In *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company*,[19] a bankrupt policyholder brought an action against its primary, excess, and umbrella liability insurance companies for a declaratory judgment on their duties for its asbestos-related liabilities after reorganization. The court held that California cases "have found that an umbrella or excess insurance company has an obligation to participate in settlements when the potential settlement may invade the insurance company's limits of liability, even though the insurance underlying the excess insurance policy is not yet exhausted."[20]

The *Fuller* court continued:

> Having found that it is the liability of the policyholder, and not the conduct of the underlying insurance company, that triggers the umbrella or excess insurance companies' obligations, the Court concludes as follows: … An umbrella or excess insurance company has obligations that pre-exist and are independent of actual exhaustion by payment of the underlying limits. These obligations include, the duty to participate in settlement negotiations, the duty to accept a reasonable settlement, the duty of good faith and fair dealing …[21]

Accordingly, an insurance company that fails to participate in settlement negotiations or refuses to consent to reasonable settlement terms can be liable for punitive damages in excess of policy limits. While the use of such leverage points may seem to be an unusual or unnecessary tactic, they can be useful when dealing with an obstreperous insurance company.

Five Steps for Non-U.S. Businesses to Take to Protect Insurance for Their U.S. Operations

There are several key steps that a non-U.S. company should take when faced with potential long-term liabilities incurred by its U.S. subsidiaries. While the following list is nonexhaustive, the five items detailed below likely will benefit any non-U.S. business attempting to recoup valuable insurance assets related to long-term losses facing its U.S. operations.

Think Insurance After a Loss

Whenever a lawsuit or claim letter arrives in the company law department, or whenever the company suffers a significant financial loss (property damage, business interruption, theft, etc.), someone should ask whether it is covered by insurance. For example, lawsuits by present and former employees frequently are covered by a company's workers compensation and employer liability policies. Almost as frequently, these cases or losses are handled as though they were uninsured.

In addition to the various types of insurance purchased by the company or any of its predecessors, risk managers and counsel should also analyze other sources of insurance that may potentially cover a claim. Such sources may include contractual indemnitor or other companies' insurance policies that may list the company as a named insured under a vendor endorsement or pursuant to a contractual coverage endorsement. With respect to environmental matters, a company alleged to have generated waste at a Superfund site should look to not only its own liability insurance but also the liability insurance of the transporter of the alleged waste and the owner of the site.

Ultimately, whatever type of claim arises or loss occurs, make sure you are exploring whether any insurance covers the loss. There are potential recoveries for every type of loss, ranging from historical policies to additional insureds coverage under parent or subsidiary policies to policies of acquired or merged companies to policies of third parties. Bottom line: You can never recoup insurance coverage that you don't seek.

Give Notice Of Claims

Insurance policies usually contain certain notice provisions regarding claims against the policyholder. Too often, however, policyholders get so caught up in defending underlying claims or dealing with losses that they delay giving notice to their insurance companies about the claims or losses. When you are faced with a claim or loss, notify the insurance company as soon as possible in accordance with the policy's instructions.

Generally, there are two types of notice provisions referenced in insurance policies. Notice of an event or happening (an "occurrence") that may lead to a claim is one. Notice of an actual claim or potential claim is another. Notice should be given to every potentially applicable insurance company. If the claim for insurance coverage is related to a product, the policyholder should give notice to every insurance company that sold the policyholder insurance coverage from at least the date the product was first marketed to the date of the "occurrence" or of the actual or potential claim. A policyholder should have its insurance agent or broker give written notice to all possibly implicated insurance companies. Do not rely on the broker's or agent's word that there is no insurance coverage. To repeat, insist that the insurance broker or agent immediately forward written notice of the claim to *all* potentially applicable insurance companies. Then follow up and verify that the agent or broker has promptly forwarded the notice to each of them.

Old insurance policies are extremely valuable because they tend to provide insurance coverage for any damage or injury that took place during the policy period, no matter when the damage or injury is discovered.

The insurance industry has developed standardized forms for giving notice. "Plain vanilla" type notice is best. When first giving notice of an event or happening that may lead to a claim, all that needs to be provided to the insurance company is a copy of the document that the policyholder received alleging its liability. The first notice of claim should also state that additional insurance policies may be involved and request that the insurance company provide a list of all policies that have been sold to the policyholder. Additionally, the notice should request that the insurance company provide a defense or agree to pay for defense costs, provide indemnification for any past or future liabilities, and advise the policyholder of all possible legal and factual bases that would support a finding of insurance coverage.

Accordingly, notice should be given as soon as a claim is made or threatened against the policyholder or as soon as the policyholder senses that an event or happening may result in a claim against it. Again, make sure that notice is given to all potentially applicable insurance companies.

Preserve and Locate Insurance Policies

Past insurance policies — especially older liability policies that were written on a broad basis with few exclusions and no aggregate limits — are valuable corporate assets and should be searched for, collected, and cataloged. Copies of current insurance policies also should be collected and cataloged. Make certain that copies of insurance policies issued to corporations and other entities that are acquired by your company through purchase, merger, or otherwise are turned over to your company.

Locate all insurance policies, including old ones. Old insurance policies are extremely valuable because they tend to provide insurance coverage for any damage or injury that took place during the policy period, no matter when the damage or injury is discovered. If a particular policy cannot be found, secondary sources may be used to demonstrate that the policy was purchased.

There are several companies, known as "insurance archaeologists," that specialize in locating old insurance policies.[22] These companies may be able to locate missing insurance policies on a cost-effective basis. And never forget, despite repeated insurance company statements to the contrary, that insurance companies should have copies of the insurance policies purchased from them.

Pursue Insolvent Insurance Companies

Unfortunately, many companies are insured by insurance companies that, as a result of poor underwriting and investment decisions in the past, are financially unstable or insolvent today. There are actions a policyholder should take or consider taking if its insurance company files for protection under bankruptcy or insolvency law: (1) File a proof of claim as a creditor in the insurance company's bankruptcy or liquidation case and in the cases of any subsidiaries of the insurance company that also have filed

petitions; (2) file a claim against the state guarantee fund in one or more possible jurisdictions (note that it is important to determine and comply with stated time limits for filing such claims); (3) if the insolvent insurance company was the policyholder's primary insurance company, ask the first layer excess insurance companies to "drop down" and take the place of the primary insurance; and (4) consider whether litigation against other entities (the insurance company's reinsurers, brokers who placed coverage with an unstable insurance company, or managers of the insolvent company) is a viable option. Because of the complexities involved, it is advisable to seek the advice of counsel specializing in insurance insolvencies in these situations.

When You Make a Claim, Don't Accept No for an Answer

Insurance companies routinely deny claims, even if they ultimately have no basis for doing so. If you do not challenge an insurance company's denial of coverage, the matter will end there. There is no downside, however, to challenging a denial of coverage. Make your insurance company spell out the basis for the denial. Read your policy to see if it says what the insurance company says it does; and then read it again to see if any other provisions alter the insurance company's interpretation. The difference between coverage and noncoverage often directly reflects the determination and persistence of the individual policyholder.

Conclusion

When informing your non-U.S. corporate parent or sister companies about the effect of claims brought against them or their U.S. subsidiaries under the U.S. tort system, it is critical to remember the insurance policies sold to cover the U.S. operations. While the tort system may make one feel like a stranger in a strange land, insurance can help protect against serious loss. The insurance system is designed to transfer risk and to compensate injury and harm. The purpose of insurance is to insure.

Endnotes

1 *Dawson v. Dawson*, 841 P.2d 749, 750 (Utah Ct. App. 1992) (citing *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 [Utah 1988]).

2 *See, e.g.*, Couch on Insurance, § 200:19 ("Even if the allegations are groundless, false, or fraudulent the insurer is obligated to defend").

3 *Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 930 N.E.2d 259, 261 (N.Y. 2010) ("[a]n insurer's duty to defend its insured is exceedingly broad"); *State Farm Mut. Auto. Ins. Co. v. Eusufzai*, No. CL-2007-7170, 2008 WL 6744118, at *2 (Va. Cir. Ct. Jan. 17, 2008); *Miller v. Hartford Cas. Ins. Co.*, 160 P.3d 408, 412 (Colo. App. 2007); *Shafe v. American States Ins. Co.*, 653 S.E.2d 870, 873 (Ga. Ct. App. 2007); *General Accident Ins. Co. of America v. Allen*, 692 A.2d 1089, 1095 (Pa. 1997).

4 *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993); *Murray v. Greenwich Ins. Co.*, 533 F.3d 644, 648 (8th Cir. 2008) (quoting *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 [Minn. 1995]); *Insurance Co. of North America v. Travelers Ins. Co.*, 692 N.E.2d 1028, 1034-35 (Ohio Ct. App. 1997) (citing *Sanderson v. Ohio Edison Co.*, 635 N.E.2d 19, 23 [Ohio 1994]); *Montrose Chem. Corp. of California v. Superior Court of Los Angeles Cnty.*, 861 P.2d 1153, 1160 (Cal. 1993) (citing *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 175 [Cal. 1966]); *Erie Ins. Exch. v. Transamerica Ins. Co.*, 533 A.2d 1363, 1368 (Pa. 1987).

5 *United States Underwriters Ins. Co. v. Falcon Constr. Corp.*, No. 02 CV 4179 (BSJ), 2004 WL 1497563, at *5–6 (S.D.N.Y. July 1, 2004) (emphasis in original) (internal citations omitted).

6 *See Napoli, Kaiser & Bern, LLP v. Westport Ins. Corp.*, 295 F. Supp. 2d 335, 338–39 (S.D.N.Y. 2003).

7 *See Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90, 95 (N.Y. 1991).

8 *Rapid-American*, 609 N.E.2d at 514 (holding that asbestos manufacturer policyholder was entitled to a "complete defense" and should not be denied full coverage from one insurance company merely because other insurance companies also may bear some responsibility — "[t]hat is the litigation insurance the insured has purchased"); *see also Fulton Boiler Works Inc. v. Am. Motorists Ins. Co.*, No. 5:06-CV-1117, 2010 WL 1257943, at *8 (N.D.N.Y. Mar. 25, 2010) (citing *Rapid-American*, granting summary judgment for the policyholder, and holding that "[d]efendants are ordered to pay all of Plaintiff's outstanding defense costs in the underlying lawsuits.… [W]ith regard to future defense costs in the underlying lawsuits, again, so long as the allegations in a case could conceivably result in liability covered by a policy at issue, Defendants *must defend*" [emphasis added]).

9 *See Rapid-American*, 609 N.E.2d at 513–14; *Reliance Nat'l Ins. Co. v. Royal Indem. Co.*, 2001 U.S. Dist. LEXIS 12901,

at *61 (S.D.N.Y. Aug. 24, 2001).

10 *See Rapid-American*, 609 N.E.2d at 513–14; *Reliance Nat'l*, 2001 U.S. Dist. LEXIS 12901, at *61.

11 *See Trustees of Princeton Univ. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 650202-06, 2007 WL 1063870, at *5 (N.Y. Sup. Ct. Apr. 10, 2007) (requiring the full payment of defense costs up front because "the insurer is not entitled to apportion claims at the expense of the insureds' defense of the underlying action"), *aff'd*, 859 N.Y.S.2d 174, 175 (App. Div. 2008) (Anderson Kill & Olick represented the Trustees of Princeton University in this matter); *Federal Ins. Co. v. Tyco Int'l Ltd.*, No. 600507-03, 2004 WL 583829, at *6 (N.Y. Sup. Ct. Mar. 5, 2004) (holding that the insurance company was required to pay all defense costs, even those that were potentially not covered, because "the duty to defend or pay defense costs is construed liberally and any doubts about coverage are resolved in the insured's favor") (Anderson Kill & Olick represented an individual policyholder in this matter); *Westpoint Int'l Inc. v. American Int'l South Ins. Co.*, No. 116832-07, 2009 WL 2207520 (N.Y. Sup. Ct. July 13, 2009), *aff'd*, 99 N.Y.S.2d 8, 9–10 (App. Div. 2010); Transcript of Order at 3–4, *Delaware North Companies Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. I2010-3427 (N.Y. Sup. Ct. Aug. 12, 2010) (holding that *Trustees of Princeton* is controlling, and that the insurance company must "pay [the policyholder's] defense costs in the underlying claim … [because t]he parties indeed agree that [the policyholder] is unquestionably entitled to coverage on the policy").

12 *Rapid-American*, 609 N.E.2d at 514.

13 *See, e.g., Carl's Italian Restaurant v. Truck Ins. Exch.*, 183 P.3d 636, 638–39 (Colo. App. 2007) (holding that where the underlying complaint "alleges even one claim that is arguably covered by the policy, the insurer must defend its insured against all claims presented in the complaint") (citing *Bainbridge Inc. v. Travelers Cas. Co.*, 159 P.3d 748, 756 [Colo. App. 2006]); *Reliance Nat'l*, 2001 U.S. Dist. LEXIS 12901, at *61 (holding that, once established, an insurance company's duty to defend is "unlimited"); *Erie Ins. Exch. v. Colony Dev. Corp.*, 736 N.E.2d 941, 946 (Ohio Ct. App. 1999) ("where a complaint states a claim that is partially or arguably within policy coverage, the [insurance company] has an absolute duty to assume the defense of the entire action") (citations omitted); *Foster-Gardner Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 959 P.2d 265, 273 (Cal. 1998); *Frontier Insulation Contractors Inc. v. Merchants Mut. Ins. Co.*, 690 N.E.2d 866, 869 (N.Y. 1997) ("If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action"); *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986) (where claims alleged negligence, which was covered by the policy, and also intentional torts, which were not covered, insurance company had a duty to defend entire action); *Mendes & Mount v. American Home Assurance Co.*, 467 N.Y.S.2d 596, 598 (App. Div. 1983) ("Th[e] duty to defend, once determined as herein, extends to a defense of the entire action").

14 *See* T.R. Smyth, J.D., Note, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R.4th 932 (1986); see also D.E. Wood, D.P. Bender, Jr., and D.A. Shaneyfelt, *Corporate Policyholders 50-State Guide: The Right to Independent Counsel* (Anderson Kill, 2009).

15 AIA Memorandum of Meeting of Discussion Group — Asbestosis 1 (April 21, 1977).

16 *Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 705 (Dist. Ct. App. 1996).

17 *Peckham v. Continental Cas. Ins. Co.*, 997 F. Supp. 73, 79 (D. Mass. 1989).

18 *Diamond Heights Homeowners Ass'n v. National American Ins. Co.*, 277 Cal. Rptr. 906, 914 (Dist. Ct. App. 1991).

19 *Fuller-Austin Insulation Co. v. Fireman's Fund Ins. Co.*, No. BC 116835, 2002 WL 31005090, at *1 (Cal. Super. Ct. Aug. 6, 2002).

20 *Id.* at *14; *see also Kelley v. British Commercial Ins. Co.*, 34 Cal. Rptr. 564 (Dist. Ct. App. 1963); 1 Windt, *Insurance Claims & Disputes* § 5.26 p. 350 (3d ed. 1995) ("The fact that the excess insurer should have no duty to defend, since the primary insurer should still be providing a defense, is irrelevant. The duty [of an excess insurance company] to settle exists independently of the duty to defend").

21 *Fuller-Austin*, *supra* note 19, at *14 (internal citations omitted).

22 *See* W.G. Passannante and C.T. Malone, "Insurance Archeology & Reconstruction," Kansas City RIMS Chapter, Kansas City, Missouri (Feb. 22, 2006).

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