Insurer's Duties to Defend and Indemnify: New York

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A Q&A guide to an insurer's duties to defend and indemnify claims and losses in New York under commercial general liability (CGL) policies. This Q&A addresses state laws, court cases, and customs that impact the duties to defend and indemnify, when the duties are triggered and what they encompass, the scope of the duties, notice requirements, policy interpretation, defense and attorneys' fees, and duration.

GENERAL

1. How does an insurer's duty to defend differ from the duty to indemnify in your jurisdiction? Specifically, please discuss:

- What the duties to defend and indemnify generally encompass.
- Whether the duty to defend is broader than the duty to indemnify.
- What the basis is for the duties to defend and indemnify. Is it contract law, common law, or statute?
- When each duty is triggered and when it arises.
- Whether the insured must tender the defense to the insurer and whether the insurer has the right to control the defense.

Under New York law, the obligation to indemnify for damages and the obligation to defend against third-party suits are separate and distinct (see *Int'l Paper Co. v. Continental Cas. Co.*, 361 N.Y.S.2d 873, 876 (1974); see also *Freedman, Inc. v. Glens Falls Ins. Co.*, 27 N.Y.2d 364 (1971)). Specifically:

- The duty to defend arises if the claims fall within policy coverage, even if the claims are based on debatable or untenable theories (*Schwamb v. Fireman's Ins. Co. of Newark, New Jersey*, 394 N.Y.S.2d 632, 633 (1977); see also *Gramercy Advisors, LLC v. Coe*, 2015 WL 13780603, at *2 (S.D.N.Y. Apr. 17, 2015), order clarified, 2015 WL 13780602 (S.D.N.Y. June 10, 2015)).
- The duty to indemnify arises only if liability actually exists under the indemnification language (see *Am. Home Assur. Co. v. Port Auth. of New York & New Jersey*, 412 N.Y.S.2d 605, 607-08 (1979); see also *Turner Const. Co. v. Am. Mfrs. Mut. Ins. Co.*, 485 F. Supp. 2d 480, 491 (S.D.N.Y. 2007), aff'd sub nom. Turner Const. Co. v. Kemper Ins. Co., 341 F. App'x 684 (2d Cir. 2009)).

WHAT THE DUTIES ENCOMPASS

In New York:

- The **duty to defend** encompasses the obligation of the insurer to defend any lawsuit brought against the insured that alleges and seeks damages for a claim that is even potentially covered by the policy.
- The **duty to indemnify** encompasses the obligation of the insurer to pay all covered claims and judgments against the insured that are actually covered by the policy.

Under New York law, the insurer can draft the policy, setting the scope of coverage and the exclusions as they see fit, so long as the policies are not contrary to the law (*Cincotta v. Nat'l Flood Insurers Ass'n*, 452 F. Supp. 928, 930 (E.D.N.Y. 1977); *Bersani v. Gen. Acc. Fire & Life Assur. Corp.*, 354 N.Y.S.2d 197, 199-200 (1975) (discussing policy provisions contrary to law)).

WHICH DUTY IS BROADER

In New York, the obligation to defend is usually broader than the obligation to indemnify because it may apply whether or not the third-party claim has merit or is covered under the policy (see *Century 21, Inc. v. Diamond State Ins. Co.*, 442 F.3d 79, 82 (2d Cir. 2006); see also *City of New York v. Evanston Ins. Co.*, 830 N.Y.S.2d 299, 303 (2007)). Therefore, if there is no duty to defend there is no duty to indemnify.

BASIS FOR THE DUTIES

In New York, the basis for the duties to defend and indemnify is the insurance contract (see *Atlantic Cas. Ins. Co. v. Value Waterproofing,*

Inc., 918 F. Supp. 2d 243, 252 (S.D.N.Y., 2013) (stating that an insurer's duty to defend is a contractual obligation); see also *Cont'l Ins. Co. v. Atl. Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir. 2010) (stating that New York law treats insurance policies as contracts)).

WHEN THE DUTIES ARE TRIGGERED AND WHEN THEY ARISE

Duty to Defend

In New York, to determine if the duty to defend is triggered, compare the allegations of the complaint against the insured to the policy terms. If the allegations in the complaint fall within the scope of policy's coverage, even if the allegations are false or groundless, the insurer has a duty to defend its insured (*New York City Hous. Auth. v. Commercial Union Ins. Co.*, 734 N.Y.S.2d 590, 592 (2001) and *Century 21, Inc.*, 442 F.3d at 82 (quoting *Seaboard Sur. Co. v. Gillette Co.*, 486 N.Y.S.2d 873, 876 (1984)); see also Question 3 and Question 4).

Effectively, the insurer has a duty to defend unless there is "no possible factual or legal basis on which an insurer's duty to indemnify under any provision of the policy could be held to attach" (*Century 21, Inc.*, 442 F.3d at 82-83 (quoting *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 488 N.Y.S.2d 139, 142 (1985))).

The insurer must provide a defense:

- Even where the policy provisions are ambiguous regarding whether the claims against the insured are covered (see Question 3: Policy Ambiguities).
- Even where claims are predicated on a debatable or even untenable theory.
- If the claim potentially falls within the policy. If there is doubt about whether the claim falls under the policy, it is resolved in favor of the insured.

(*Charles F. Evans Co., Inc. v. Zurich Ins. Co.*, 710 N.Y.S.2d 301, 302 (2000); *Continental Cas. Co. v. Rapid-American Corp.*, 593 N.Y.S.2d 966, 969 (1993); *Century 21, Inc.*, 442 F.3d at 82.)

The duty to defend arises if the claims against the insured arguably arise from a covered event, even if the claims may be meritless or not covered, because **either**:

- The insured is not liable.
- The event is later determined to be outside of the policy's scope of coverage.

(*Rhodes v. Liberty Mut. Ins. Co.*, 892 N.Y.S.2d 403, 405 (2009).)

Duty to Indemnify

In New York, the duty to indemnify is triggered when the insured's liability has been conclusively established (*Servidone Const. Corp.*, 488 N.Y.S.2d at 142-43 (the court stating that, while the duty to defend is based upon the allegations of pleadings, the duty to indemnify is determined by the actual basis for the insured's liability to a third person)). The duty arises after the merits of the lawsuit have been determined by a court or after a settlement agreement has been reached.

TENDERING AND CONTROL OF THE DEFENSE

In New York, an insurer's duty to defend does not arise until the insured requests a defense by the insurer either by providing timely notice of a claim or an intention to seek coverage (*Webster ex rel. Webster v. Mount Vernon Fire Ins. Co.*, 368 F.3d 209, 214 (2d Cir. 2004); *Century Sur. Co. v. EM Windsor Constr. Inc.*, 2017 WL 5952706, at *11 (S.D.N.Y. Nov. 29, 2017)).

Most primary CGL insurance policies provide that the insurer has both the right and the duty to defend the policyholder. Therefore, in New York, if an insurer has a duty to defend its insured, typically it also has the right to control the insured's defense. For an exception to this general rule, see Question 13.

DUTY TO DEFEND: NOTICE

2. Does the duty to defend require notice of claim or loss by an insured in your jurisdiction? Specifically, please discuss:

- Who may provide notice.
- Who the notice must be delivered to.
- When the insurer has not received notice, but has actual or constructive knowledge of a claim or loss.
- The effect of failure to provide notice.

Insurance policies typically include notice provisions that determine how and when notice must be provided. Most insurance policies require notice to the insurer of one of the following as a condition precedent to the duty to defend:

- Claim.
- Potential claim.
- Loss.

Insurers require timely notice of each. This allows the insurer to "take an active and early role in the litigation process" and:

- Investigate the facts and circumstances surrounding the occurrence while they are timely and witnesses are still available.
- Prepare for a defense, if necessary.
- Set adequate reserves.
- Decide whether it is prudent to settle the claim.

(See *Argo Corp. v. Greater New York Mut. Ins. Co.*, 794 N.Y.S.2d 704, 707 (2005); *79th Realty Co. v. Wausau Ins. Cos.*, 776 N.Y.S.2d 96, 97 (2004) (failure to provide timely notice).)

New York law provides specific rules regarding notice provisions included in liability insurance policies (N.Y. Ins. Law § 3420(a)(3)-(5); see Who Can Provide Notice, Who Must Notice Be Delivered To, Knowledge of Insurer, Incomplete Notice, and Failure to Provide Notice).

In New York, notice requirements are construed in favor of the insured (*D. C. G. Trucking Corp. v. Zurich Ins. Co.*, 440 N.Y.S.2d 74, 75-76 (3rd Dep't 1981)).

WHO CAN PROVIDE NOTICE

Under New York law, if notice sufficiently identifies the insured, timely notice can be given by:

- The insured.
- Someone on behalf of the insured.
- An injured person.
- Any other claimant.

(N.Y. Ins. Law § 3420(a)(3); see for example, *Kleinberg v. Nevele Hotel, LLC*, 8 N.Y.S.3d 484, 486 (3rd Dep't 2015) (injured party failed to provide timely notice).)

In New York, where someone other than the insured provides timely notice of a claim or loss, that notice tends to negate prejudice to the insurer and can render the notice reasonable under the circumstances (N.Y. Ins. Law § 3420(a)(5) (prejudice to insurer); see also *Merchants Mut. Ins. Co. v. Anziano*, 300 N.Y.S.2d 187, 190-91 (Sup. Ct. Nassau Co. 1969)).

WHO MUST NOTICE BE DELIVERED TO

In New York, notice of claim or loss may be delivered to:

- The insurer.
- A licensed agent of the insurer that is located in New York.
- Any other party that may be specified by the insurer in a policy's notice provision.

(N.Y. Ins. Law § 3420(a)(3).)

Notice of a claim or a potential claim provided by an insured to its insurance broker is generally not considered notice to the insurer (*Rosier v. Stoeckeler*, 957 N.Y.S.2d 742, 745 (3d Dep't 2012)).

KNOWLEDGE OF INSURER

In New York, the general rule is that none of the following satisfy an insured's contractual obligation to give timely notice to its insurer of a potential claim or loss:

- The insurer's actual knowledge of the claim or loss.
- The insurer's constructive knowledge of the claim or loss.
- Notice provided by another insured.

(*Roofing Consultants v. Scottsdale Ins. Co.*, 709 N.Y.S.2d 782, 783 (4th Dep't 2000); see also *State v. Ackley*, 664 N.Y.S.2d 876, 877-78 (3d Dep't 1997); *Heydt Contracting Corp. v. Am. Home Assurance*, 536 N.Y.S.2d 770, 773 (1st Dep't 1989).)

Incomplete Notice

Under New York law, if an insured provides notice of a potential loss to the insurer and the insurer does not inform the insured that the notice is deficient because it does not include certain required information, the insurer cannot then deny coverage based upon the insured's failure to include the information (*JPMorgan Chase & Co. v. Travelers Indem. Co.*, 880 N.Y.S.2d 224 (Sup. Ct., N.Y. County 2009), *aff'd*, 897 N.Y.S.2d 405 (1st Dep't 2010).)

FAILURE TO PROVIDE NOTICE

In New York, if a CGL policy that is "issued or delivered" in New York after January 16, 2009 includes a timely notice requirement as a condition precedent to coverage and the insured unreasonably fails to comply with this requirement:

- It is not a defense to coverage under an **occurrence** policy unless the insurer can establish that the failure to timely provide notice caused it to be prejudiced. Under New York insurance law, the insurer is not deemed prejudiced unless its ability to investigate or defend the claim was materially impaired.
- It may be a defense to coverage under a **claims-made** policy. The requirement that an insurer establish prejudice before it may deny a claim based on late notice does not apply to claims made policies (N.Y. Ins. Law § 3420(a)(5)). Under a claims-made policy, a reporting requirement that claims be made within the policy period, any renewal of the period, or any extended reporting period is enforceable (assuming it was otherwise reasonably possible to give such notice).
- It is not a defense to coverage under either an occurrence or claims-made policy if it can be shown that **both**:
  - it was not reasonably possible to give the required notice within the prescribed time period; and
  - notice was given as soon as it was reasonably possible thereafter.

(N.Y. Ins. Law §§ 3420(a)(3)-(5); *Indian Harbor Ins. Co. v. City of San Diego*, 586 F. App'x 726, 729 (2d Cir. 2014) (insurer was not required to show prejudice in order to disclaim coverage based on late notice under claims-made policy); *In re SquareTwo Fin. Servs. Corp.*, 2017 WL 4012818, at *6 n.10 (Bankr. S.D.N.Y. Sept. 11, 2017).)

A policy is "issued or delivered" in New York, and, thus, subject to the relevant provisions of the New York insurance law, when the policy covers "both insureds and risks located" in New York. An insured is "located" in New York if it "has a substantial business presence and creates risks in New York." (*Carlson v. Am. Int'l Grp., Inc.*, 67 N.Y.S.3d 100, 111-13 (2017).)

For CGL policies issued and delivered in New York prior to January 17, 2009, New York common law applies, and insurers are not required to show they were prejudiced by late notice to deny coverage (*Power Auth. v. Westinghouse Elec. Corp.*, 502 N.Y.S.2d 420, 421-22 (1st Dep't 1986) (quoting *Allstate Ins. Co. v. Furman*, 445 N.Y.S.2d 236 (2d Dep't 1981))).

POLICY AND COMPLAINT INTERPRETATION

3. In your jurisdiction, in determining whether there is a duty to defend, how do courts typically construe the insurance policy and the complaint? Specifically, please discuss:

- How courts resolve ambiguities in the insurance policy.
- Whether courts apply the four- or eight-corners rule and whether they consider extrinsic evidence.
- Whether courts consider amendments to the complaint.

INTERPRETATION OF INSURANCE POLICIES

The provisions and the language of the insurance policy govern the duty to defend. In New York, the interpretation of an insurance policy is subject to the general rules of contract construction (*Burlington Ins. Co. v. NYC Transit Authority*, 57 N.Y.S.3d 85, 89 (2017)). When interpreting insurance policies, courts carry out the intent of the parties based on the clear and unambiguous language in the policy (*Atlantic Cas. Ins. Co. v. Value Waterproofing*, 918 F. Supp. 2d at 253).

In construing insurance policies, New York courts:

- Give a fair meaning to all of the language used by the parties in the policy and leave no provision without force and effect.
- Analyze the meaning of policy provisions consistent with the reasonable expectations of the average insured.

- Strictly construe ambiguities in the policy against the insurer and in favor of coverage.
- Strictly construe policy exclusions against the insurer.

(See *Fed. Ins. Co. v. Int'l Bus. Machines Corp.*, 942 N.Y.S.2d 432, 434 (2012); *Ben-Avraham v. Lawyers Title Ins. Corp.*, 786 N.Y.S.2d 272, 274 (Sup. Ct. N.Y. Co. 2004).)

New York law provides that insurance companies are generally free to draft the terms of their policies as they see fit, including policy exclusions, provided the policies are not contrary to the law or against public policy (*Cincotta*, 452 F. Supp. at 930; *Bersani v. Gen. Acc. Fire & Life Assur. Corp.*, 354 N.Y.S.2d at 199-200).

In New York, if an insurer relies on an exclusionary clause to deny coverage, it must show that the allegations of the complaint can be interpreted only to exclude coverage. If any allegations of the complaint are even potentially within the language of the insurance policy:

- The insurer has a duty to defend.
- It is immaterial that the complaint against the insured asserts additional claims which fall either:
  - outside the policy's general coverage; or
  - within its exclusory provisions.

(*Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 443-44 (2002).)

Effectively, the insurer has a duty to defend unless all of the allegations concerning all claims in the complaint **either** clearly:

- Fall outside the scope of coverage.
- Are excluded from coverage.

(*Town of Massena*, 98 N.Y.2d at 443-44 (2002).)

POLICY AMBIGUITIES

In New York, if an insurance policy is ambiguous, courts generally:

- Strictly construe the ambiguities against the insurer, in favor of coverage.
- Strictly construe exclusions from coverage against the insurer.
- Read the policy according to the reasonable expectations of the average insured.

(*Fed. Ins. Co.*, 942 N.Y.S.2d at 434; *Ben-Avraham*, 786 N.Y.S.2d at 274.)

In New York, insurance policies are viewed as contracts and are subject to the rules of contract interpretation (see Interpretation of Insurance Policies). Under these rules, ambiguities in any contract are construed against the drafter. If there is a reasonable basis for a difference of opinion regarding the meaning of a policy, the language at issue is viewed as ambiguous and is interpreted in favor of the insured. (*Fed. Ins. Co.*, 942 N.Y.S.2d at 434.)

FOUR CORNERS AND EXTRINSIC EVIDENCE

In New York, an insurer has a duty to defend if **either**:

- The four corners of the complaint suggest a reasonable possibility of coverage, even if facts outside the four corners of the complaint indicate that the claim may be meritless or not covered.
- The insurer has actual knowledge of facts establishing a reasonable possibility of coverage, even if the allegations in the four corners of the complaint do not allege a covered event.

(*Fitzpatrick v. Am. Honda Motor Co.*, 571 N.Y.S.2d 672, 672-76 (1991).)

In determining whether an insurer has a duty to defend, New York courts:

- **Will consider extrinsic evidence** presented by the insured that would potentially bring the claims within the scope of coverage (see *Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 657 N.Y.S.2d 564, 568-69 (1997); *Fitzpatrick*, 571 N.Y.S.2d at 674-75).
- **Will generally not consider extrinsic evidence** presented by the insurer to disprove or deny its duty to defend (see *Fitzpatrick*, 571 N.Y.S.2d at 674; *Avondale Indus., Inc. v. Travelers Indem. Co.*, 774 F. Supp. 1416, 1424 (S.D.N.Y. 1991); *Colonial Tanning Corp. v. Home Indem. Co.*, 780 F. Supp. 906, 920 (N.D.N.Y. 1991), abrogated on other grounds*, Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 121 (2d Cir. 2012)). In rare cases, however, some courts will consider extrinsic evidence that is "unrelated to the merits of the plaintiff's action and plainly takes the case outside the policy coverage" (*Striker Sheet Metal II Corporation v. Harleysville Insurance Company*, 2018 WL 654445, at *9 (E.D.N.Y., 2018) (citing, as an example, *Town of Moreau v. Orkin Exterminating Co.*, 568 N.Y.S.2d 466, 468 (3d Dep't 1991))).

In New York, CGL policies can include a provision expressly stating that extrinsic evidence is permitted in determining whether the duty to defend exists (see *Atlantic Cas. Ins. Co. v. Value Waterproofing*, 918 F. Supp. 2d at 253).

AMENDMENTS TO COMPLAINT

New York courts will consider amendments to the complaint as well as certain additional pleadings in determining whether a duty to defend exists (see, for example, *BP Air Conditioning Corp. v. One Beacon Ins. Grp.*, 840 N.Y.S.2d 302, 306 (2007) (considering amended complaint); *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 82 (2d Cir. 2013) (considering discovery responses but finding argument waived)).

4. In your jurisdiction, will the duty to defend exist even if allegations in the complaint are fraudulent or groundless?

In New York, an insurance policy imposes a duty to defend even if allegations of the complaint are groundless, false, or fraudulent. If a liability covered by the policy is asserted, the insurer has a duty to defend. (See *Seaboard Sur. Co.*, 486 N.Y.S.2d at 875-86; *Goldberg v. Lumber Mut. Cas. Ins. Co., of New York*, 297 N.Y. 148, 154 (1948).)

The duty to defend might also extend to the situations in which the allegations of the complaint falsely indicate non-coverage. In that situation, courts in New York may look beyond the face of the complaint to facts known to the insurer which may bring the claim within the coverage of the policy. If the insurer knows those facts at the outset of the suit, then it has a duty to defend the insured. (*Ogden Corp. v. Travelers Indem. Co.*, 681 F. Supp. 169, 173 (S.D.N.Y. 1988);

Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co., 667 N.Y.S.2d 982, 984 (1997).)

5. In your jurisdiction, who has the burden of proof in establishing the duty to defend?

In New York, the insured has the initial burden of proving that a claim falls within the coverage of the policy, establishing the insurer's duty to defend. The insurer then has the burden of showing that a loss or claim falls within a policy exclusion and therefore that it does not have a duty to defend. (*Atlantic Cas. Ins. Co. v. Value Waterproofing*, 918 F. Supp. 2d at 253.) To the extent the insured asserts that there is an exception to the exclusion that brings the claim within coverage, the insured bears the burden in demonstrating the applicability of the exception (*Borg-Warner Corp. v. Ins. Co. of N. Am.*, 577 N.Y.S.2d 953 (1992)).

To be relieved of its duty to defend based on a policy exclusion, the insurer must show that:

- The allegations of the complaint cast the pleadings wholly within the policy exclusion.
- The exclusion is subject to no other reasonable interpretation.
- There is no possible factual or legal basis upon which the insurer could be held obligated to indemnify the insured under any policy provision.

(*Frontier Insulation Contractors*, 667 N.Y.S.2d at 984-85.)

6. What are the consequences if an insurer fails to defend a claim that is covered under the policy in your jurisdiction?

In New York, an insurer that refuses to indemnify or defend based on a belief that a claim against its insured is excluded from a policy's scope of coverage, rather than defending under a reservation of rights, does so at its own risk. If the insurer is incorrect:

- It bears the consequences, legal or otherwise, of its breach of contract.
- It subjects itself to liability for the amount of any reasonable settlement made by the insured, if the settled claim is clearly within the coverage of the policy.

(See *Servidone Const. Corp.*, 488 N.Y.S.2d at 142-43; *Gladstone v. D.W. Ritter Co.*, 508 N.Y.S.2d 880, 882-83 (Sup. Ct. Columbia Co. 1986); *Park Place Entm't Corp. v. Transcon. Ins. Co.*, 225 F. Supp. 2d 406, 413 (S.D.N.Y. 2002).)

When coverage is questionable, the most common and procedurally safe course is for the insurer to provide a defense under a reservation of rights and to file a declaratory judgment action to determine its coverage obligations (*Commercial Union Ins. Co. v. Int'l Flavors & Fragrances, Inc.*, 822 F.2d 267, 268 (2d Cir. 1987); *Lang v. Hanover Ins. Co.*, 787 N.Y.S.2d 211, 214-15 (2004)).

WRONGFUL FAILURE AND BAD FAITH

If the insurer wrongfully fails to defend its insured, it may be liable for damages sustained by the insured that are the natural and probable consequence of the breach, which may exceed the policy limits (see, for example, *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 92 N.Y.S.3d 231, 233-34 (1st Dep't 2019); *Sabbeth Indus. Ltd. v. Pennsylvania Lumbermens Mut. Ins. Co.*, 656 N.Y.S.2d 475, 477 (3d Dep't 1997)).

In New York, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights concerning coverage:

- Waives the provisions of the policy against a settlement by the insured.
- Becomes bound to pay the amount of any settlement within a policy's limits made in good faith.
- Becomes bound to pay the amount of an excess judgment where an insurer fails to accept a pretrial settlement offer within the policy limits.
- May be liable for expenses and attorneys' fees.

(*Servidone Const. Corp.*, 488 N.Y.S.2d at 142-43; *Gladstone v. D.W. Ritter Co.*, 508 N.Y.S.2d 880, 882-83; *Gov't Employees Ins. Co. v. Saco*, 2018 WL 6531608, at *6 (E.D.N.Y. Dec. 11, 2018); see Question 9.)

To prove a case of an insurer's bad faith disclaimer of coverage in New York, a party must show that the insurer's conduct constituted a gross disregard of the insured's interests (*State Farm Fire & Cas. Co. v. Ricci*, 947 N.Y.S.2d 265, 268 (4th Dep't 2012)).

In New York, once an insurer assumes the defense of its insured, the insurer has a duty to exercise due care and to act in good faith (*Cornwell v. Safeco Ins. Co. of America*, 346 N.Y.S.2d 59, 69 (4 Dep't 1973)). The issue of an insurer's breach of its obligation to act in good faith is generally a question for the jury to decide (*Kulak v. Nationwide Mut. Ins. Co.*, 386 N.Y.S.2d 87, 91-92 (1976)).

7. In determining whether a duty to indemnify exists, how does your jurisdiction interpret insurance policies? Specifically, please discuss:

- The general rules of contract construction that courts apply.
- How courts handle ambiguities in the insurance policy.
- If courts consider the reasonable expectations of the insured.
- Whether coverage will be denied if the insured does not provide timely notice of a loss or claim.

The provisions and the language of the insurance policy govern the duty to indemnify. For more information about how New York courts interpret insurance policies, the general rules of contract construction, ambiguities in the insurance policy, and reasonable expectations, see Question 3.

FAILURE TO PROVIDE TIMELY NOTICE

In New York, if a CGL policy "issued or delivered" in New York after January 16, 2009 includes a timely notice requirement as a condition precedent to coverage and the insured unreasonably fails to comply with this requirement:

- It is not a defense to coverage under an **occurrence** policy unless the insurer can establish that the failure to timely provide notice caused it to be prejudiced. Under New York insurance law, the insurer is not deemed prejudiced unless its ability to investigate or defend the claim was materially impaired.

- It may be a defense to coverage under a **claims-made** policy. The requirement that an insurer establish prejudice before it may deny a claim based on late notice does not apply to claims made policies (N.Y. Ins. Law § 3420(a)(5)). Under a claims-made policy, a reporting requirement that claims be made within the policy period, any renewal of the period, or any extended reporting period is enforceable (assuming it was otherwise reasonably possible to give such notice).
- It is not a defense to coverage under either an occurrence-based or claims-made policy if it can be shown that both:
  - it was not reasonably possible to give the required notice within the prescribed time period; and
  - notice was given as soon as it was reasonably possible thereafter.

(N.Y. Ins. Law §§ 3420(a)(3)-(5); *Indian Harbor Ins. Co.*, 586 F. App'x at 729 (insurer was not required to show prejudice to disclaim coverage based on late notice under claims-made policy); *In re SquareTwo Fin. Servs. Corp.*, 2017 WL 4012818, at *6 n.10.)

A policy is "issued or delivered" in New York, and, thus, subject to the relevant provisions of the New York insurance law, when the policy covers "both insureds and risks located" in New York. An insured is "located" in New York if it "has a substantial business presence and creates risks in New York." (*Carlson*, 67 N.Y.S.3d at 111-13.)

For CGL policies issued and delivered in New York prior to January 17, 2009, New York common law applies, and insurers are not required to show they were prejudiced by late notice to deny coverage (*Power Auth. v. Westinghouse*, 502 N.Y.S.2d at 421-22).

DUTY TO DEFEND: SCOPE AND DURATION

8. In your jurisdiction, is the insurer required to defend against all claims in a suit even if they are not all covered claims (also sometimes referred to as "mixed claims")?

If an insurer has a duty to defend a single claim the complaint presents, it must defend the entire action, including claims that are not covered by the policy (*Frontier Insulation Contractors*, 667 N.Y.S.2d at 984-85). An insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course (see *Nat. Organics, Inc. v. OneBeacon Am. Ins. Co.*, 959 N.Y.S.2d 204 (2d Dep't 2013)).

9. How is the insurer's duty to defend affected by a reservation of rights letter in your jurisdiction? Please discuss:

- The requirements for a valid reservation of rights letter.
- How a reservation of rights letter differs from a non-waiver agreement.
- Whether an insurer can reserve the right to be reimbursed for defense costs.
- Any relevant statutes and cases in your state.

A valid reservation of rights letter allows an insurer to:

- Provide a defense to its insured while continuing to investigate the claim.
- Preserve the option to later litigate or seek a determination of non-coverage.

(Law Offices of Zachary R. Greenhill P.C. v. Liberty Ins. Underwriters, Inc., 9 N.Y.S.3d 264, 267 (1st Dep't 2015).)

REQUIREMENTS FOR A VALID RESERVATION OF RIGHTS LETTER

There are no specific statutory requirements under New York insurance law specifying the language to be included in a standard reservation of rights letter. However, under New York common law, a valid reservation of rights letter must:

- At a minimum, give fair and prompt notice that the insurer intends to assert coverage defenses or pursue declaratory relief at a later date.
- State the possible defenses to coverage, referencing the specific policy provisions that form the basis for the insurer's reservation.
- If further investigation is warranted, notify the insured that the insurer reserves the right to disclaim coverage based upon further factual development.
- Be unambiguous.

(*United Nat. Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 F. Supp. 263, 268 (S.D.N.Y. 1996); *Merchants Mut. Ins. Co. v. Allcity Ins. Co.*, 664 N.Y.S.2d 690, 692 (3d Dep't 1997).)

Where an insurer is disclaiming coverage for bodily injury arising out of an accident in New York, it must give written notice to both the insured and the injured person, or any other claimant, "as soon as is reasonably possible" or the insurer's denial will be deemed ineffective (N.Y. Ins. Law § 3420(d)(2); *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 969 N.Y.S.2d 808, 812 (2013)). An insurer's reservation of rights letter does not extend an insurer's obligation to disclaim "as soon as reasonably possible" (*Vermont Mut. Ins. Co. v. Mowery Const., Inc.*, 996 N.Y.S.2d 747, 749 (3rd Dep't 2014)).

New York courts have found extended unexcused delays by the insurer in disclaiming coverage to be unreasonable as a matter of law (see, for example, *W. 16th St. Tenants Corp. v. Pub. Serv. Mut. Ins. Co.*, 736 N.Y.S.2d 34, 35 (1st Dep't 2002) (30 day delay); see also *First Fin. Ins. Co. v. Jetco Contracting Corp.*, 769 N.Y.S.2d 459, 463-64 (2003) (48 day delay)).

Defenses that the insurer fails to raise at the time it issues its coverage position are deemed waived (see *Roman Catholic Diocese*, 969 N.Y.S.2d at 812-13).

RESERVATION OF RIGHTS VERSUS NON-WAIVER AGREEMENT

While a reservation of rights letter is a unilateral document issued by the insurer, a non-waiver agreement is an agreement between the insurer and the insured. In a non-waiver agreement, the insured generally agrees that the insurer:

- Will investigate the claim or undertake the defense.
- Reserves the right to contest coverage in the future.

(*Greater New York Sav. Bank v. Travelers Ins. Co.*, 570 N.Y.S.2d 122, 123 (2d Dep't 1991).)

Notably, a non-waiver agreement does not remove the insurer's obligation to undertake a timely investigation of claims (see *Mayer's Cider Mill, Inc. v. Preferred Mut. Ins. Co.*, 1523, 879 N.Y.S.2d 858, 859-60 (4th Dep't 2009); *Quincy Mut. Fire Ins. Co. v. Uribe*, 845

N.Y.S.2d 434, 435 (2d Dep't 2007); *Greater New York Sav. Bank*, 570 N.Y.S.2d at 123).)

RESERVING A RIGHT TO RECOUP DEFENSE COSTS

The law in New York regarding the recoupment of defense costs is not settled. Certain decisions have noted that an insurer is permitted to recover defense costs, if **both**:

- The insurer has timely and explicitly reserved its right to recoup the costs upon a determination of non-coverage.
- The insured does not expressly refuse to consent to the reservation.

(*Am. Guarantee & Liab. Ins. Co. v. CNA Reinsurance Co.*, 791 N.Y.S.2d 525, 526 (1st Dep't 2005); *Certain Underwriters at Lloyd's London Subscribing to Policy No. SYN-1000263 v. Lacher & Lovell-Taylor, P.C.*, 975 N.Y.S.2d 870 (1st Dep't 2013); *United Specialty Ins. Co. v. CDC Hous., Inc.*, 233 F. Supp. 3d 408, 414 (S.D.N.Y. 2017); *Century Sur. Co. v. Atweek, Inc.*, 2019 WL 1994172, at *6 (E.D.N.Y. May 6, 2019).)

Other decisions have noted that the law in New York is not clear on this issue and that there is a growing trend to not allow recoupment (*Gen. Star Indem. Co. v. Driven Sports, Inc.*, 80 F. Supp. 3d 442, 459-60 (E.D.N.Y. 2015) (declining to allow recoupment stating that "it is unclear" under New York law whether insurer may recoup defense costs where policy did not expressly provide for recoupment of such costs); *Century Sur. Co. v. Vas & Sons Corp.*, 2018 WL 6164724, at *6-7 (E.D.N.Y. Aug. 31, 2018), *report and recommendation adopted*, 2018 WL 4804656 (E.D.N.Y. Sept. 30, 2018) (also discussing approval of *General Star* decision and holding recoupment not appropriate)).

10. In your jurisdiction, if there are multiple insurers covering the insured, which one will have the duty to defend? Please also discuss how courts allocate costs when more than one policy is triggered and whether excess carriers ever have a duty to defend.

In New York, if the insured carries more than one policy issued by more than one insurer that potentially provide coverage:

- Courts look to the provisions of each policy to determine which insurer(s) is primarily responsible for the defense of the claim (see, for example, *Hartford Underwriters Ins. Co. v. Hanover Ins. Co.*, 653 F. App'x 66, 68 (2d Cir. 2016); *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 16 N.Y.3d 257, 264-65 (2011); see also *Continental Cas. Co. v. Rapid-American Corp.*, 593 N.Y.S.2d 966, 974 (1993) (stating that each insurer must defend if there is an asserted occurrence covered by its policy)).
- There generally is an equitable right to contribution where there is concurrent insurance, even if the policy does not include a provision for apportionment (*Travelers Ins. Co. v. Gen. Accident, Fire & Life Assurance Corp.*, 322 N.Y.S.2d 704, 706-07 (1971)).
- Where each of the policies covering the risk generally purports to be excess to the other, competing excess coverage clauses are held to cancel each other and each insurer contributes in proportion to its limit of insurance (*U.S. Fire Ins. Co. v. Fed. Ins. Co.*, 858 F.2d 882, 885 (2d Cir. 1988); see also *Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.*, 435 N.Y.S.2d 953, 955 (1980)).
- There is a presumption of contribution between two policies unless *both* policies clearly and unambiguously show the parties' intent to negate that presumption (see *Hartford Underwriters Ins. Co.*, 653 F. App'x at 69).

Liability insurance policies typically include "other insurance" clauses. These clauses establish how losses (including defense costs) are allocated or apportioned amongst insurers when multiple policies cover the same loss (see, for example, *Fieldston Prop. Owners*, 16 N.Y.3d at 264-65 (where one policy's other insurance clause provides that it is primary and another policy's other insurance clause specifies that it is primary unless another policy is primary, in which case it is excess, the policy that indicated it was primary only is responsible for entirety of defense without contribution from the other policy); *Liberty Mut. Ins. Co. v. Hartford Ins. Co. of Midwest*, 811 N.Y.S.2d 716, 720 (2d Dep't 2006)).

In New York, when multiple policies that include "other insurance" clauses cover the same loss but purport to be excess over one another, the costs of defense are allocated pro rata, unless a policy **either**:

- Expressly negates contribution with other carriers.
- Otherwise manifests that it is intended to be excess over other excess policies.

(See *Liberty Mut. Ins. Co.*, 811 N.Y.S.2d at 720-21.)

11. When is the duty to defend terminated in your jurisdiction? Specifically, please discuss:

- Whether an insurer's tender of policy limits ends the duty to defend.
- Whether the insurer must defend through the finality of the action.
- Whether an insurer's settlement of the third-party claim against the insured terminates the duty to defend.
- Whether the duty to defend is terminated if the insured breaches a provision of the insurance contract.

In New York, generally the insurer is not relieved of its duty to defend until **either**:

- The insured's case is settled or there has been a judgment.
- The insured agrees that the insurer is relieved of the duty.

(See *Fed. Ins. Co. v. Cablevision Sys. Dev. Co.*, 836 F.2d 54, 57 (2d Cir. 1987).)

CGL policies may include a provision stating that the insurer's duty to defend terminates when policy limits have been exhausted through the payment of either judgements or settlements (see *In re East 51st Street Crane Collapse Litigation*, 923 N.Y.S.2d 64, 65 (1st Dep't 2011)).

TENDER OF POLICY LIMITS

In New York, an insurer's tender of policy limits generally does not extinguish its duty to defend unless the policy expressly states otherwise (*Royal Ins. Co. of Am. v. Lexington Ins. Co.*, 2004 WL 1620877, at *3 (S.D.N.Y. July 20, 2004); *Am. Home Assur. Co. v. Port Auth. of New York & New Jersey*, 2013 WL 4734501, at *3 (Sup. Ct. N.Y. Co. 2013)).

FINALITY OF ACTION

The duty to defend continues until the underlying lawsuit is concluded or it has been determined that there is no coverage under the policy. Moreover, in New York, a duty to defend generally encompasses a duty to appeal an adverse judgment against the insured if there are reasonable grounds for appeal (*Fid. Gen. Ins. Co. v. Aetna Ins. Co.*, 278 N.Y.S.2d 787, 788 (2d Dep't 1967); see also *Schneider v Commonwealth Land Title Ins. Co.*, 2008 WL 650186, at *4 (Sup. Ct. Mar. 10, 2008)).

SETTLEMENT OF THE THIRD-PARTY CLAIM

In New York, an insurer is relieved of its duty to defend when the insured's case is settled or there has been a judgment (*Royal Ins. Co. of Am.*, 2004 WL 1620877 at *4).

INSURED'S BREACH OF CONTRACT

An insured's failure to comply with its obligations under an insurance policy is generally a defense to an action on the policy (*J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 39 N.Y.S.3d 864, 867 (Sup. Ct. N.Y. Co. 2016)).

In New York, an insurer may be relieved of its duty to defend if the insured breaches the cooperation provision of the insurance contract. Breach of the cooperation provision includes situations where the insured fails to provide truthful information when reporting claims (see *Greater New York Mutual Insurance Company v. Utica First Insurance Company*, 102 N.Y.S.3d 175, 177 (1st Dep't 2019)).

An insurer seeking to withdraw due to non-cooperation must show that:

- The insurer acted diligently trying to obtain the insured's cooperation.
- The insurer's efforts were reasonably calculated to obtain the insured's cooperation.
- The attitude of the insured, after its cooperation was sought, was one of willful and avowed obstruction.

(See, for example, *Utica First Ins. Co. v. Arken, Inc.*, 795 N.Y.S.2d 640, 645 (2d Dep't 2005).)

12. In your jurisdiction, when, if ever, are insurers permitted to withdraw their defense?

In New York, generally, if the insurer has undertaken the duty to defend a claim, it may not abandon the defense of the claim midcourse to the prejudice of the insured, even if policy limits have been exhausted (*Royal Ins. Co. of Am.*, 2004 WL 1620877 at *4).

However, an insurer that has reserved the right to withdraw its defense under a valid reservation of rights letter may do so if it has been determined that the insurer has no duty to defend (see *Utica First Ins. Co.*, 795 N.Y.S.2d at 641 (court determined that insurer had no duty to defend due to insured's failure to cooperate); *New York Cent. Mut. Fire Ins. Co. v. Bresil*, 777 N.Y.S.2d 174, 175 (2d Dep't 2004); *Century Sur. Co. v. Atweek*, 2019 WL 1994172, at *6; *United Specialty Ins. Co. v. CDC Hous., Inc.*, 233 F. Supp. 3d 408, 412-13 (S.D.N.Y. 2017) (recognizing that insurer was permitted to withdraw defense due to applicability of exclusion where it reserved its right to do so)).

DEFENSE AND COSTS

13. In your jurisdiction, does an insured have the right to independent counsel?

In New York, if there is a conflict of interest between the insurer and the insured regarding the conduct of the defense of the action:

- The insured can:
  - refuse to accept the counsel selected by the insurer; and
  - seek independent counsel paid for by the insurer.
- The insurer has an affirmative obligation to inform the insured of its right to select independent counsel at the insurer's expense.

(See *Prashker v. U.S. Guar. Co.*, 154 N.Y.S.2d 910 (1956); *Baron v. Home Ins. Co.*, 492 N.Y.S.2d 50, 52 (1985); *Elacqua v. Physicians' Reciprocal Insurers*, 860 N.Y.S.2d 229 (3d Dep't 2008); *Utica Mut. Ins. Co. v. Cherry*, 358 N.Y.S.2d 519 (2d Dep't 1974), aff'd, 38 N.Y.2d 735 (1975).)

A conflict of interest includes the situation where the insurer is potentially liable for some of the grounds for recovery asserted against the insured and not for others (*Public Service Mut. Ins. Co. v Goldfarb*, 442 N.Y.S.2d 422, 427 (1981)).

14. In your jurisdiction, can an insurer recover defense costs that are spent defending uncovered claims?

Under New York law, where several claims arise from the same set of facts, if any of the claims are covered by the policy the insurer has a duty to defend the entire action, including the uncovered claims until such time that the applicability of an exclusion is determined (*CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 82-83 (2d Cir. 2013); see Question 8).

Whether an insurer can recoup defense costs if it is determined that an exclusion does apply is not settled under New York law. Certain decisions have noted that an insurer can recover defense costs, if **both**:

- The insurer has timely and explicitly reserved its right to recoup the costs upon a determination of non-coverage.
- The insured does not expressly refuse to consent to the reservation.

(*Am. Guarantee & Liab. Ins. Co. v. CNA*, 791 N.Y.S.2d at 526; *Lloyd's London v. Lacher*, 975 N.Y.S.2d 870; *United Specialty Ins. Co. v. CDC*, 233 F. Supp. 3d at 414; *Century Sur. Co. v. Atweek*, 2019 WL 1994172, at *6.)

Other decisions have noted that the law in New York is not clear on this issue and that there is a growing trend to not allow recoupment (*Gen. Star Indem. Co.*, 80 F. Supp. 3d at 459-60 (declining to allow recoupment stating that "it is unclear" under New York law whether insurer may recoup defense costs where policy did not expressly provide for recoupment of such costs); *Century Sur. Co. v. Vas & Sons*, 2018 WL 6164724, at *6-7, *report and recommendation adopted*, 2018 WL 4804656 (also discussing approval of *General Star* decision and holding recoupment not appropriate)).

DUTY TO INDEMNIFY: CAUSATION

15. Do courts in your jurisdiction require a duty to indemnify if a loss has multiple causes, one or more of which is excluded from coverage? Please address whether a policy exclusion is effective whether or not there is any causal connection between the excluded risk and the loss.

An insurance policy may be drafted to specifically exclude coverage for losses with multiple causes or for concurrent causation. In New York, if a proximate cause of loss is covered and a concurrent cause is excluded, and neither the policy nor the policy exclusions address the issues of multiple causes or concurrent causation, then coverage exists for the entire loss. (*Tonkin v. California Ins. Co. of San Francisco*, 294 N.Y. 326, 329 (1945).)

If the parties have addressed the issue of concurrent causation or multiple causes in the policy, New York courts do not apply the principles of causation in a way that would circumvent the intent of the parties (*Kula v. State Farm Fire and Cas. Co.*, 628 N.Y.S.2d 988, 991 (4th Dep't. 1995)).

DUTY TO INDEMNIFY: SCOPE

16. Discuss whether your jurisdiction permits insurance companies to provide coverage and indemnification for:

- Punitive damages.
- Intentional damage or injury.

PUNITIVE DAMAGES

New York courts will not enforce liability insurance covering punitive damages (*Hartford Accident and Indemnity Company v. Village of Hempstead*, 422 N.Y.S.2d 47, 53-54 (1979); *Home Insurance Co. v. American Home Prods. Corp.*, 551 N.Y.S.2d 481, 483 (1990)).

INTENTIONAL INJURY

In New York, when the damages are the intended result which flows directly and immediately from the insured's intentional act (rather than arising out of a chain of unintended though foreseeable events that occurred after the intentional act) there is no accident and therefore no coverage (*Leo v. New York Cent. Mut. Fire Ins. Co.*, 20 N.Y.S.3d 842 (Sup. Ct., Oneida Co. 2014), *aff'd as modified*, 24 N.Y.S.3d 567 (4th Dep't 2016)).

17. How does your jurisdiction view policy provisions that limit coverage if the insured has other insurance available?

New York courts generally accept provisions in primary policies (such as excess clauses) that limit coverage if the insured has other insurance available. Although primary policies are intended to provide primary coverage, insureds often carry more than one primary policy.

EXCESS CLAUSES IN PRIMARY POLICIES

An excess clause included in a primary policy:

- Essentially provides that, in the event of a loss, the insurer will only pay after other primary available insurance is exhausted.
- Prevents the insured from receiving double recovery if the insured has multiple primary policies.

In New York, if each of the primary policies that the insured carries include an excess clause, the clauses cancel each other and the insurers must share the loss pro-rata (see *U.S. Fire Ins. Co.*, 858 F.2d at 885-87).

18. In your jurisdiction, can an insurer deny coverage of a settlement entered into by the insured on the grounds that the settlement was not authorized by the insurer?

Liability policies may include a provision stating that the insurer is not liable for any settlement effected without its consent, which consent shall not be unreasonably withheld. In New York, this type of provision is viewed as a condition precedent to coverage. If the insured does not obtain the insurer's consent for settlement, the insurer can generally deny coverage under the policy. (*J.P. Morgan Securities Inc.*, 39 N.Y.S.3d at 867.)

However, where an insurer has improperly denied coverage, the insured is entitled to settle the claim and recover the settlement amount from the insurer, provided the settlement is reasonable (*Park Place Entm't Corp. v. Transcon. Ins. Co.*, 225 F. Supp. 2d 406, 413 (S.D.N.Y. 2002)).

OTHER ISSUES

19. Are there any other statutes, rules, cases, or issues in your jurisdiction that insurers or insureds should be aware of in determining whether a duty to defend or duty to indemnify exists?

New York Insurance Law § 3420 is the most important statute in New York relating to insurance for liability from injury to person or property. Therefore, the statute should be reviewed thoroughly along with the case law interpreting it.

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