

Insurer's Duty to Defend Determined by Both Pleadings and "Reasonable" Investigation

Indiana courts determine the extent and scope of insurance coverage in accordance with a set of established rules of construction. The first cardinal rule of policy construction in Indiana is that when interpreting a policy, the court's goal is to ascertain the intent of the parties as manifested in the contract for insurance. *Lexington Insurance Company v. American Health Care Providers*, 621 N.E.2d 332 (Ind.Ct.App. 1987); *Great Lakes Chemical Corp. v. International Surplus Lines Insurance Co.*, 638 N.E.2d 847 (Ind.Ct.App. 1992). The question of coverage under a liability policy is determined from the tort claimant's pleading allegations read in connection with the plain and ordinary meaning of the policy language. *Great Lakes Chemical Corp.*, 638 N.E.2d 847; *U.S. Fidelity & Guaranty Company v. Baugh*, 257 N.E. 2d 699 (Ind.Ct.App. 1970); *TransAmerica Insurance Service v. Kopko*, 570 N.E.2d 1283 (Ind. 1991). Under Indiana law, an insurer's duty to defend is considerably broader than the duty to indemnify. *Federal Insurance Company v. Stroh Brewing Company*, 127 F.3d 563 (7th Cir. 1997). It is the nature of the underlying claim, not its merits, that establishes the insurer's duty to defend. *National Fire & Casualty Company v. West*, 107 F.3d 531 (7th Cir. 1997). As a general rule, if one claim of a multi-claim complaint potentially falls within the indemnity coverage of the policy, the insurer must defend the entire action. *Handbook on Insurance Disputes*, Ostrager & Newman, 8th Ed. § 5.02. See also *Foreman v. Continental Casualty Company*, 770 F.2d 487 (5th Cir. 1985); *Trizec Properties, Inc. v. Biltmore Construction Company*, 776 F.2d 810 (11th Cir. 1985).

An insurer's duty to defend arises from allegations of the complaint coupled with those facts known to, or ascertainable by, the insurer after a reasonable investigation. *Trisler v. Indiana Insurance Company*, 575 N.E.2d 1021 (Ind.Ct.App. 1991). However, when the underlying factual basis of a complaint, even if proven true at trial, would not result in liability under the insurance policy, the insurance company may properly refuse to defend. *Wayne Township Board of School Commissioners v. Indiana Insurance Company*, 650 N.E.2d 1205 (Ind.Ct.App. 1995). On the other hand, an insurer usually cannot escape its obligation to defend by contending that any damages which may be proven at the trial will fall outside the insurance coverage. For example, if an exclusion may operate to relieve an insurer of its duty to indemnify and the applicability of the exclusion cannot be determined until after a trial, the insurer must defend the underlying suit. See *Avondale Industrial, Inc. v. Travelers Indemnity Company*, 887 F.2d 1200 (2d Cir. 1989). See also *Insurance Coverage Disputes*, §5.02.

Indiana courts have long recognized that an insurance company "may go beyond the face of the Complaint, and refuse to defend based upon the factual underpinnings of the claim." *Cincinnati Insurance Company v. Mallon*, 409 N.E.2d 1100 (Ind. Ct. App. 1980). Thus, Indiana case law holds that an insurer has no duty to defend the insured where (1) the claim is outside coverage limits, or clearly excluded from coverage under the policy, and (2) an investigation by the insurer reveals that the claim is outside the coverage of the policy. *Hoosier Ins. Co. v. Audiology Foundation of America*, 745 N.E.2d 300, 306 *reh'g denied* (Ind. Ct. App. 2001). "[T]he insurer's duty to defend is not

coextensive with liability. The insurer must undertake a reasonable investigation to determine whether a factual basis exists which would bring the claim within the coverage of the policy.” *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1025 (Ind. Ct. App. 1991). Moreover, subsequent cases recognize that an insurer both may and must go beyond the face of the complaint to determine coverage. *Monroe Guarantee*, 677 N.E.2d 620; *Employer’s Insurance Wausau v. Recticel Phone Corporation*, 716 N.E.2d 1015 (Ind. Ct. App. 1999).