THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ARE YOU IN GOOD HANDS?
AN INTRODUCTION TO INSURANCE COVERAGE

Presented by:
Norton A. Colvin, Jr.
Colvin, Chaney, Saenz & Rodriguez, LLP

21st Annual Insurance Law Institute November 10-11, 2016
Hotel Derek, Houston, Texas

ARE YOU IN GOOD HANDS?
An Introduction to Insurance Coverage

Understanding the dynamic between insured and insurer, as well as how the attorney fits in between them, can shape the path a party takes in litigation. This paper provides a basic overview of some of the concepts associated with first- and third-party insurance, pleading into coverage, and acceptance of coverage.

I.
INTRODUCTION

The US Supreme Court, quoting Webster's Dictionary, has defined "insurance" as the "act of insuring, or assuring, against loss or damage by a contingent event; a contract whereby, for a stipulated consideration, called a premium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a risk, the contract being set forth in a document called the policy. *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 211 n. 7, 99 S. Ct. 1067 (1979). This assumption of risk is accomplished by contract, where one party promises to pay for the happening of certain contingencies in exchange for consideration from another party. *See, e.g., Stewart Title Guaranty Co. v. Cheatham*, 764 S.W.2d 315, 318 to 319 (Tex. App.—Texarkana 1988, writ denied). Because insurance policies are contracts, their construction and interpretation will be governed as all other contracts under Texas law. *Trinity Univ. Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997).

The essential elements of an insurance policy are simply:

- Identification of who or what is to be insured;
- What risk is being assumed;
- How long that risk is to be assumed;
- What amount certain of money will be paid should the contingency become reality;
- Premium to be paid by the insured; and,
- A meeting of the minds sufficient to create a contract.

American Nat. Ins. Co. v. Brawner, 93 S.W.2d 450, 451 (Tex. Civ. App.—Eastland 1936, writ dism'd). The insured benefits by insulating himself against certain risks, and the insurer plays the odds over thousands of transactions that premiums will exceed losses. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Royal Drug*, 440 U.S. at 211, 99 S. Ct. at 1073.

Liability insurance insures against loss arising out of legal liability and is usually based upon the insured's negligence. *Highlands Ins. Co. v. City of Galveston*, 721 S.W.2d 469, 471 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). For instance, most people are familiar with auto liability insurance, wherein a carrier will issue liability coverage for a driver against claims arising out of a motor vehicle accident. When an insured is involved in an accident and a third party sues for bodily injury or property damage, the insurer has agreed to pay for the losses associated with the driver's legal responsibility resulting from the accident. For an insured's conduct to be covered, and for the third party to ultimately recover from the insurer, the insured must have had an insurable interest in the subject property/activity. Under Texas law, an insured is not required to have legal title in a property in order to have an insurable interest in that property. *Penn-America Ins. Co., v. Zertuche*, 770 F.Supp.2d 832, 842

(W.D. Tex. 2011). The insured maintains an insurable interest when he derives a pecuniary benefit or advantage by the preservation and continued existence of the property. *Smith v. Eagle Star Ins. Co.*, 370 S.W.2d 448, 450 (Tex. 1963). In making this determination, the courts will review the intention of the parties involved, rather than the legal title of the property. *Logan v. Logan*, 156 S.W.2d 507, 512 (Tex. 1941). Where, for instance, a party insures a vehicle that he purchased in good faith but in fact had previously been stolen, he maintains an insurable interest even though he was not the legal owner of the vehicle. *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905, 908 (Tex. App.—Austin 1997, writ denied).

Additionally, the policy may be an "occurrence" policy or a "claims-made" policy. Occurrence policies provide coverage for incidents that occur during the policy period, even if the claim is made after the expiration of the policy. Commercial General Liability (CGL) policies are generally occurrence-based policies. Claims-made policies, on the other hand, only provide coverage for those claims made during the policy period. This distinction becomes particularly relevant in situations where an insured provides late notice on its claims-made policy. The Texas Supreme Court has held that "an insurer must show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is given within the policy's coverage period." *Fin. Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877, 879 (Tex. 2009). There are two types of claims-made policies: (1) claims-made and reported policies and (2) general claims-made policies. Both cover claims made against the insured during the policy period, but a "claims made and reported" policy also requires that the claim be reported to the carrier within the policy period.

II.
FIRST-PARTY VS THIRD-PARTY POLICIES

First-party coverage protects against loss or damage that directly impacts the insured himself. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 n. 2 (Tex. 1997). Some of the most common examples of first-party coverage include property insurance, homeowner's insurance, life insurance, and title insurance. The Texas Insurance Code stipulates that a first-party claim "must be paid by the insurer directly to the insured or beneficiary." Tex. Ins. Code Ann. § 542.051 (West). All first-party losses belong "only to the insured and [are] in no way derivative of any loss suffered by a third party." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

Third-party coverage, on the other hand, insures specifically against liability to others for the acts and omissions of the insured. *Giles*, 950 S.W.2d at 54 n. 2; *see also City of Galveston*, 721 S.W.2d at 471 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). For this reason, liability insurance policies are by definition third-party coverage. Examples include malpractice insurance, auto liability insurance, and CGL policies.

By insuring for personal liability and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks. *Warrilow v. Norrell*, 791 S.W.2d 515, 528 (Tex. App.–Corpus Christi 1989, writ denied). Because of the lack of privity, a third party cannot bring suit directly against an insured's

Title search: Are You in Good Hands? An Introduction to Insurance Coverage

Also available as part of the eCourse
2016 Insurance Law eConference

First appeared as part of the conference materials for the
21st Annual Insurance Law Institute session
"In the Trenches: Litigation from the Insured's Perspective"