Insurer Responses to Tenders of Defense and the Consequences

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Insurer Responses to Tenders of Defense

I. Introduction

Whether a liability insurance policy affords coverage continues to spawn expensive and complicated litigation. The claims for coverage asserted on liability insurance policies often seem one step ahead of policy exclusions. In addition, environmental and toxic tort claims, frequently from quasi-administrative proceedings, are forcing insurers to reference old policies written decades ago to determine if liability coverage is owed years after the policies expired.

II. Identify All Potential Liability Coverages

Before there can be a contract dispute as to whether a given liability policy affords coverage for a given claim, the insurance policy itself must have been in existence. In the overwhelming majority of cases, it will be plainly evident whether a person has insurance coverage. However, there are a growing number of toxic tort, state and federal remediation orders for soil and water contamination and other unconventional "suits or claims" for "property damage," "bodily injury," and "personal injury," creating more insurance coverage litigation. One treatise has underscored the problem by stating the following:

> [In] underlying delayed-manifestation toxic tort cases . . . policyholders need to know about the existence, location, and terms of their policies in order to notify the appropriate insurance companies of underlying claims, to prove the existence of policies and their terms if a coverage dispute later arises, or to assert a claim against an insolvent insurance company. Insurance companies also need to know exactly what they sold their policyholders in order to prove the existence of any policy exclusions or limitations to coverage, to assess the availability of "other insurance" which may be applicable to potential claims, to provide notice to reinsurers, and to prepare for early documentation productions if a coverage dispute arises.
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> Oshinsky, Jerold and Birnbaum, Sheila L. 1 Practitioner's Guide To Litigating Insurance Coverage Actions: Commentary. Forms. § 1.01, pp. 1-3 (1996).

The insured generally has the burden of establishing a prima facie case of coverage. *See SCSC Corp. v. Allied Mutual Insurance Company*, 536 N.W.2d 305, 311 (Minn. 1995) *overruled* on other grounds by *Bahr v. Boise Cascade Co.*, 766 N.W.2d 910 (Minn. 2009). "[T]he existence and contents of missing insurance policies [may be proved] by using secondary evidence . . . [such as] risk bulletins and insurance coverage notes . . . evidence of payment of premiums, declaration sheet[s] and affidavits from [a] company president and insurance agent . . . [all may prove] an existence of lost policies . . . [or] a certificate of insurance, cover letter from the broker indicating that the policy was in effect, invoices indicating payment of premiums, and references to the missing policy and later policies, along with the absence of evidence of withdrawal or cancellation of the policy," all may be sufficient to prove the existence of lost or destroyed insurance policies. *See* Oshinsky, Jerold and Birnbaum, Sheila L. 1 Practitioner's Guide To Litigating Insurance Coverage Actions: Commentary. Forms. § 1.2, pp. 1-4 (1996).

Once a prima facie case of liability insurance coverage is established, "the burden then shifts to the insurer to prove the applicability of the exclusion as an affirmative defense." *See SCSC Corp.*, 536 N.W.2d at 313. The insurer can throw the burden of proof back to the insured with an exclusion. "[O]nce the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion 'restores' coverage for which the insured bears the burden of proof." *See SCSC Corp.*, 536 N.W.2d at 314.

In other words, in Minnesota, the insured must plead and prove the existence of the liability insurance policy. Once the insured has made out a prima facie case for liability insurance coverage, the burden shifts to the insurer to prove the "application of an exclusion" precluding coverage. If the insurer proves application of that exclusion, the burden shifts back to the insured to prove that the liability claim against the insured is accepted from the application of that exclusion so that insurance coverage is "restored." *Id.*

This burden of proof and shifting burdens of proof will never occur if the "insuring agreement" or "exclusions" cannot be proved. Hence, it is imperative for both the insured and the insurer to identify all possible liability insurance coverage.

III. Avoid Prejudice

A recurrent theme in insurance coverage litigation is whether one side or the other has been prejudiced. *See Gamble-Skogmo, Inc. v. St. Paul Mercury Indemnity Co.*, 64 N.W.2d 380 (Minn. 1954) *overruled* on other grounds by *Woodrich Construction Co. v. Indemnity Insurance Co. of North America,* 89 N.W.2d 412 (Minn. 1958); *Faber v. Roelofs*, 250 N.W.2d 817 (Minn. 1977); *Iowa National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 464 N.W.2d 564 (Minn. Ct. App. 1990) r*eview denied* (March 15, 1991); *Van Kampen v. Waseca Mutual Insurance Co.*, 754 N.W.2d 578 (Minn. Ct. App. 2008). Insurers frequently are required to prove actual prejudice before they will be relieved of their contractual duties to defend and/or indemnify. *See Hooper v. Zurich American Ins. Co.*, 552 N.W.2d 31, (Minn. Ct. App. 1996) *review denied* (Sept. 20, 1996). Conversely, insureds in the same instances will be presumed to be prejudiced. For example, if an insurer defends a liability claim without a reservation to deny coverage, the insurer will be estopped to deny coverage. The law is stated as follows:

> Prejudice is presumed because the insurer, by taking control of the defense without a reservation of rights, takes away from the insured his right to control the defense as he sees fit and to make or negotiate a settlement. Because the insurer has available to him the simple procedure of giving a notice of reservation of rights to estop him from denying liability when he controls the defense without having given such a notice is not a harsh result. *See Faber*, 250 N.W.2d at 821.

Simply put, the insurer must provide written notice of its intention to rely upon any policy definition, limitation on liability or exclusion before it undertakes the defense of a case. The failure to interpose that reservation of rights may result in a waiver of those policy conditions. *Id.*

In short, coverage cases turn on whether there is prejudice. In some cases, prejudice may be presumed. Because prejudice may be presumed, it is very important that both the insured and the

insurer carefully handle notices of claims, tenders of defense, reservations of rights, declination letters, and other issues related to claims that are arguably with and without liability insurance coverage.

IV. Notice

Notice by the insured to an insurer of a possible claim is a routine condition in most commercial and personal liability policies. Sometimes the policy will state the type of notice (usually written) and how quickly it must be provided. One insurer has conditions which state as follows:

Duties after Accident or Loss

We have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement, or defense of any claim or suit.

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

3. Submit, as often as we reasonably require:

a. To physical exams by physicians we select. We will pay for these exams.
b. To examination under oath and subscribe the same.

4. Authorize us to obtain:

a. Medical reports; and
b. Other pertinent records.

5. Submit a proof of loss when required by us.

C. A person seeking Uninsured Motorist Coverage must also:

1. Promptly notify the police if a hit-and-run driver is involved.

2. Promptly send us copies of the legal papers if suit is brought.

D. A person seeking Coverage for Damage to Your Auto must also:

1. Take reasonable steps after loss to protect "your covered auto" or a "non-owned auto" and their equipment from further loss. We will pay reasonable expenses incurred to do this.

2. Promptly notify the police if "your covered auto" or any "non-owned auto" is stolen.

3. Permit us to inspect and appraise the damaged property before its repair or disposal.

Fire, Casualty and Surety Bulletins, Guide to Policies II, FW-11 (The National Underwriter Co. 2005).

Commercial policies also have notice provisions as conditions precedent under sections with titles, such as, "Duties in the Event of Occurrence, Offense, Claim or Suit." One insurer has conditions which state:

Duties in the Event of Occurrence, Offense, Claim, or Suit

A. You must see to it that we are notified as soon as practicable of an "occurrence" or another offense which may result in a claim. To the extent possible, notice should include:

1. How, when, and where the "occurrence" or event took place;

2. The names and addresses of any injured persons and witnesses; and

3. The nature and location of any injury or damage arising out of the "occurrence" or offense.

B. If a claim is made or "suit" is brought against any insured, you must:

1. Immediately record the specifics of the claim or "suit" and the date received; and

2. Notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

C. You and any other insured must:

1. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

2. Authorize us to obtain records and other information;

3. Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

4. Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

D. No insured will, except at that insured's cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Fire, Casualty and Surety Bulletins, Guide To Policies I, FAU-11 (The National Underwriter Co. 2007).

Minnesota has liberally construed the notice requirements. *See St. Paul Fire & Marine Insurance Co. v. Metropolitan Urology Clinic, P.A.*, 537 N.W.2d 297, 300 (Minn. Ct. App. 1995). A phone call providing an injured party's name and the possibility of a malpractice action may be sufficient to comply with a medical malpractice policy. *Id.* When the content of a notice is insufficient, an insurer who has received some form of notice has the opportunity to further investigate the claim and obtain the information it needs. *UnitedHealth Group Inc. v. Columbia Cas. Co.*, 941 F.Supp.2d 1029 (D. Minn. 2013). When the problem with the notice is that it did not reach the person or department specified in the policy, the insurer has no reason to suspect that the insured has made a claim and therefore has no duty. *Id*.

In a case where an insured was seeking coverage for remediation of soil and groundwater contamination, a State agency's Request for Information to the insured accused of soil and groundwater contamination constitutes a "suit" under comprehensive general liability policies. *See SCSC Corp. v. Allied Mutual Insurance Co.*, 536 N.W.2d 305, 315 (Minn. 1995). In *SCSC Corp.*, the insured informed its insurer that it was subject to claims by the State's Pollution Control Agency alleging property damage to the State's natural resources. The insured asked the general liability insurer to indemnify it and provided the insurer with relevant policy numbers and coverage periods during which the alleged property damage may have occurred. *Id.* at 316. The information provided by the insured in *SCSC Corp.* obligated the general liability insurer to investigate the claims for coverage and to provide a coverage opinion.

In a lengthy footnote in the *SCSC Corp.* decision, the Minnesota Supreme Court noted that, when faced with the information presented by the insured presenting an arguable claim for coverage, the general liability insurer had a duty to investigate the claim for coverage or had an obligation to defend the insured. *Id*. at 316, n. 3. In sum, the general liability insurer in *SCSC Corp.* failed to inform the insured of the general liability insurer's belief that the pollution exclusion applied, precluding coverage to the insured, or the general liability insurer flatly failed to provide a definitive coverage position. In either event, the general liability insurer's "silence," when presented with a "claim for arguable coverage under its policies," was wrong. It had a duty and obligation to tell its insured that coverage was excluded (under the pollution exclusion, for example) or it had a duty to

state exactly what the general liability insurer's position was on the insured's claim for arguable coverage. *Id.*

While a telephone call to an insurance broker advising the broker that there will be a possible claim may have been sufficient under the *Metropolitan Urology* decision, the casual mention of a lawsuit to one's insurance agent is not a tender of defense and will not be sufficient notice under many commercial policies. *See Hooper v. Zurich-American Ins. Co*., 552 N.W.2d 31, 37 (Minn. Ct. App. 1996) *review denied* (Sept. 20, 1996).

Hooper was a manufacturer of sewer plugs. Its sewer plugs were very similar to a competitor's. As a result, the competitor sued Hooper in state and federal court. Hooper had comprehensive general liability (CGL) policies with Zurich American Insurance Company (Zurich) and Western National Mutual Insurance Company (Western). Both the Zurich and Western CGL policies provided that "written notice" of an occurrence shall be given by the insured, as soon as practicable. *See Hooper*, 552 N.W.2d at 33. In addition, both the Zurich and Western policies mandated that the lawsuit papers be immediately forwarded to the insurer, as a tender of defense. *Id*.

In *Hooper*, there was a casual mention to the insurance agent that Hooper had some lawsuits to deal with and Hooper actually pointed to some papers on his desk as he mentioned the lawsuits to his insurance agent. *Id.* That casual mention was insufficient notice and was definitely not a tender of defense. The Minnesota Court of Appeals stated as follows:

> Where a policy mandates that an insured notify its insurance company of a lawsuit, the insured does not have the option of tendering defense by mentioning the lawsuit to a broker. *See Hooper*, 552 N.W.2d at 36.

After the underlying cases were resolved, and after Hooper brought a legal malpractice lawsuit against the firm that unsuccessfully defended Hooper in the state and federal court actions, Hooper commenced suit against Zurich and Western claiming insurance coverage. *Id.* at 34. The delay in making a claim on the policies, a suit by Hooper against Zurich and Western after the underlying cases had been tried and settled, denied both Zurich and Western the opportunity to control the litigation, to seek a declaratory judgment regarding coverage or to attempt settlement. Zurich and Western were prejudiced. *Id*. at 36-7. Hence, because Hooper failed to comply with the notice and tender of defense requirements of the Zurich and Western policies, the trial court was correct in dismissing Hooper's claims against the insurers.

V. Tender of Defense

A strong argument may be made that as soon as a liability insurer receives notice from its insured of a claim, the liability insurer must investigate the claim to determine whether it is arguably covered. The insured must only give the insurer notice of the claim and is not required to request a defense in order to trigger the duty to defend. *See Home Insurance Company v. Nat. Union Fire Ins. of Pittsburg*, 658 N.W.2d 522, 532 (Minn. 2003). If arguably covered, the insurer must defend the claim, or state its position on coverage, reserves its rights to deny, or limit coverage, and then defend the claim. If the claim is not covered, the insurer must provide that position to the insured. The liability insurer must promptly respond upon that initial notice. *See SCSC Corp*., 536 N.W.2d

at 316, n. 3. That notwithstanding, where contractual indemnification is sought, a "tender of defense is a condition precedent to the creation of an obligation to indemnify." *See Seifert v. Regents of Univ. of Minn.*, 505 N.W.2d 83, 87 (Minn. Ct .App. 1993), *review denied* (Oct. 28, 1993); *Pedro Cos. v. Sentry Insurance*, 518 N.W.2d 49, 51 (Minn. Ct. App. 1994), *citing St. Paul Fire & Marine Ins. Co. v. Estate of Hunt*, 811 P.2d 432, 434-35 (Colo. App. 1991) (for the proposition that notice is a condition precedent to coverage where claims-made policy contains notification requirement). As a matter of simple fairness, an insurer cannot be required to investigate a claim until it receives notice of that claim.

The advice to an insured seeking coverage is simple. Give notice of the claim promptly, tender the defense of the claim early and tender and retender often. While the duty to defend will be evaluated at the time of the tender, if a claim is arguably within the liability coverage, the insurer must investigate the claim and arguably owes defense from the time of the tender forward. The insurer will likely be ordered to pay defense costs from the moment of the tender forward. *See Pedro*, 518 N.W.2d at 52. If the initial notice and/or tender of defense are rejected, and more facts are developed to bring the claim arguably within the liability coverage, a re-tender should be made. *See Iowa National*, 464 N.W.2d at 568. Where the letter forwarding the lawsuit to the insurer states that "the enclosed information is not being sent as a claim," the insured is making a huge mistake. The notice or tender letter must be clear. It must explicitly state that a tender of defense is being made. *See Towne Realty, Inc. v. Zurich Insurance Company*, 548 N.W.2d 64, 65 (Wis. 1996) *reconsideration denied* (555 N.W.2d 818 (Wis. 1996).

Where it is unclear that the insured is tendering its defense to the insurer, the Wisconsin Supreme Court has held as follows:

> [I]f it is unclear or ambiguous whether the insured wishes the insurer to defend the suit, it becomes the responsibility of the insurer to communicate with the insured before the insurer unilaterally forgoes the defense. . . . [T]his holding should not create an onerous duty for insurers: a simple letter requesting clarification of the insured's position should suffice. *See Towne Realty, Inc*., 548 N.W.2d at 67.

The Wisconsin Supreme Court in *Towne Realty* further noted that "[t]he insurer fulfills its duty once it requests the insured for clarification of its position. If the insured is uncooperative or unresponsive, the insurer need not pursue the matter further. This will prevent a sophisticated insured from intentionally vacillating on whether it wants the insurance company to defend the action and, then, after significant legal expenses have accumulated, demanding indemnification." *Id.* at 67, n. 2. Obviously, if the insured *explicitly* states that it is waiving its contractual right to defense and indemnity, the insurer has no obligation to the insured.

If the insurer receives notice or tender of defense, does an investigation of the claims, rejects the tendered claims as not covered and its rejection is correct, it will owe nothing, neither defense nor indemnification to the insured. *See Wakefield Pork, Inc. v. Ram Mutual Ins. Co.* 731 N.W.2d 154 (Minn. Ct. App. 2007).

The insured is well served by sending the notice and/or tender of defense letter early and by providing enough information to place the claim arguably within coverage but no information that

would provide a basis for denial of the tender. *See Senger v. Minnesota Lawyers' Mutual Ins. Co.*, 415 N.W.2d 364, 367 (Minn. Ct. App. 1987). In *Senger*, the defendants tendered their defense to its professional liability insurer and stated in their letter tendering the lawsuit that "this action arises out of a business" owned by the insured lawyers and others. *See Senger*, 415 N.W.2d at 366-67. The admission in the tender letter, which forwarded the summons and complaint, that the suit arose from a business owned by one of the insureds, but not scheduled under the liability policy, was used to deny defense and indemnification coverage. *See Senger*, 415 N.W.2d at 369. Hence, it behooves an insured to make neither statements nor any admissions in the tender letter.

Where the summons and complaint is arguably within coverage, the insured's tender letter should provide more facts to bring the arguably covered claim within coverage or provide those facts excepting the arguably covered claim from exclusion under the policy. In *Senger*, the Minnesota Court of Appeals stated, in part, as follows:

> When it is established by the insurer that the facts are such that there is no coverage under the policy for any resulting liability, no duty to defend arises even if the complaint can be read to alleged set of facts which, if proved, would be within coverage of the policy. *See Senger*, 415 N.W.2d at 369.

On the other hand, if any claim on a complaint is arguably within the liability coverage, the insurer owes a duty to defend all the claims pled in the complaint. *See Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165-166 (Minn. 1986). The insurer "who wishes to escape that duty has the burden of showing that all parts of the cause of action fall clearly outside the scope of coverage." *Id.*

It is in the insured's best interests to tender defense as soon as possible. "[A]n insurer cannot be held responsible for defense costs incurred prior to the tender of the defense request giving rise to the insurer's duty to defend." *See Domtar, Inc. v. Niagara Fire Ins. Co.***,** 563 N.W.2d 724, 739 (Minn. 1997).

An insurer's duty to defend is not, however, determined exclusively by the allegations in the complaint. *See St. Paul Fire & Marine Ins. Co. v. National Computer Systems, Inc.*, 490 N.W.2d 626, 632 (Minn. Ct. App. 1992). When the insurer is aware of facts outside the complaint that conclusively established that the acts giving rise to the claim are not covered under the policy, the insurer is not obligated to defend. *Id.* Denying the duty to defend, however, should be done cautiously because, if a duty to defend is subsequently found, the insurer will be obligated to pay the insured's litigation expenses for forcing the insurer to assume that burden. *See Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 420 (Minn. 1997).

For more than 100 years, Minnesota has held that a party may not collect attorney's fees absent a contractual agreement or statute granting a prevailing party a right to collect attorney's fees. *See Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 714 (Minn. 1991). The sole exception to this rule is found in coverage disputes between insurers and insureds. In *American Standard Ins. Co. v. Le*, the Minnesota Supreme Court held when an insured breaches a contractual duty to its insured, the insured is "entitled to recover attorney fees incurred in maintaining or defending a declaratory action to determine the question of coverage." 551 N.W.2d 923 (Minn. 1996), *abrogated by*

Milwaukee Mut. Ins. Co. v. Val Pro, Inc., 2013 WL6388669 (D. Minn. 2013). Attorney fees are recoverable in a declaratory judgment action only if there is a breach of a contractual duty or statutory authority exists to support such an award. *Id*. In essence, the *Le* decision stands for the proposition that, when an insurer breaches the insurance contract, it "is liable for the loss that naturally and proximately flows from the breach." *See Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). In order for an insured to recover over the policy limit it must show that the insurer breached the title insurance policy and that lost benefits were the natural and proximate breach. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012).

VI. Miller-Shugart Agreements

The Minnesota Supreme Court has approved settlement agreements in which an insured stipulates to a money judgment in favor of a plaintiff that releases the insured from personal liability, and the plaintiff agrees to seek coverage for the agreed upon amount from the insurer. *Miller v. Shugart*, 316 N.W.2d 729, 731 (Minn. 1982). These agreements, also referred to as Miller-Shugart agreements, are enforceable against an insurer if 1) the named insured is a party to the agreement, 2) the insurer denied coverage, 3) the insurer was given notice of the agreement, and 4) the agreement is reasonable. *Id*.

Miller-Shugart agreements arose out of an automobile accident in which a plaintiff was injured in a car owned by the insured and driven by a third party. The insured's auto liability carrier denied coverage claiming that the driver was not an agent of the insured. *Id* at 732. The court in that case held that although the insurer had never abandoned its duty to defend, the case presented a difficult situation in which the insured's desire to extricate herself from personal liability must be balanced by her duty to cooperate. The court stated that it would be unreasonable to expect an insured to forgo a settlement that is in her best interest at a time when coverage under the policy is being questioned, exposing her to great personal liability. In a case in which the insurer denies coverage, the insured is allowed to settle with the plaintiff, possibly binding the insurer, so long as the settlement is reasonable and free of collusion.

In order for a Miller-Shugart agreement to be enforceable an insurer must 1) deny all coverage, and 2) be at risk of personal exposure for damages. *Amer. Fam. Mut. Ins. Co. v. Donaldson*, 820 F.3d 374 (8th Cir. 2016). If these elements are met, an insured is allowed to breach its cooperation clause with its insurer. *Id*. Disputes over policy limits are not enough to show a complete denial. If an insurer denies some claims but not all, courts have held a complete denial is lacking. *Buysse v. Baumann-Furrie & Co*., 448 N.W.2d 865 (Minn. 1989). A reservation of rights does not mean complete denial is lacking as long as the reservation of rights reserves the right to challenge or deny all indemnity coverage. *Id* at 873. If a reservation of rights is used and the insurer provides counsel to the insured, the insurers counsel must sign off on any settlement for it to be enforceable. *Buyssee v. Baumann-Furrie & Co*., 481 N.W.2d 27, 29 (Minn. 1992). The key is abandonment. If an insurer abandons its insured, the insured is allowed to break the cooperation clause and enter into a Miller-Shugart agreement.

After a complete denial or abandonment is shown, the insured must give notice to the insurer that they are entering into a settlement agreement. If the insurer has denied coverage through a reservation of rights, the insured must give the insurer notice of intention to enter into settlement,

and allow the *insurer* the chance to decide if they want to settle the claims or litigate them. *Rivers v. Richard Shwarts/Neil Weber, Inc*., 459 N.W.2d 166 (Minn. Ct. App. 1990) *Abrogated* on other grounds by *Board of Directors of Rivers Ass'n v. Maun, Green, Hayes,Simon, Johanneson and Brehl*, 1992 WL 189342 (Minn. App. Aug. 11, 1992). If the insurer completely denied coverage, the insured is not obligated to give any notice to its insurer prior to entering into the agreement, but still must give notice after. *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). In general, notice to the insurer should be given within at least 30 days. *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). As per the content of the notice, Minnesota is silent, but at the very least an insured should inform their insurer of the amount of the proposed settlement.

Once an insured and plaintiff have entered into a settlement agreement, the burden rests on the plaintiff to enforce the agreement. *Miller v. Shugart*, 316 N.W.2d at 735. The plaintiff can enforce the agreement either through a garnishment procedure or direct declaratory action. In a garnishment procedure the insurer must respond within 20 days with a written disclosure statement indicating whether it holds any property in which the judgment debtor (plaintiff) has an interest. An insurer disputing coverage can respond by indicating it is not holding property that would be responsible for responding to the debt. Minn. Stat. §571.75. Plaintiffs can bypass the garnishment process by commencing a declaratory action against the insurer. *Britamaco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 870 (Minn. Ct. App. 2002). In order to commence a declaratory action against the insurer, the plaintiff must have received an assignment of the claims from the insured. *See Anderson v. St. Paul Fire & Marine, Ins. Co*., 414 N.W.2d 575 (Minn. C.t App. 1987). ("[A]n injured third party claimant is not privy to the insurance contract and cannot sue an insurer directly for failure to pay a claim but must first obtain a judgment against the insured.").

After a district court has approved a settlement agreement, an insurer may, in a garnishment, declaratory judgment, or separate action, challenge coverage, validity, and reasonableness of the settlement. *Daberkow by and Through Daberkow v. Remer*, 2019 WL 664505 (Minn. Ct. App. 2019). The insurer is entitled to challenge the validity of the settlement in a separate action because the judgment entered against the insured is not "an adjudication on the merits" and the insured "would have been quite willing to agree to anything as long as the plaintiff promised them full immunity." *Id*. The judgment is binding on the stipulating parties and it's the claimant's (plaintiff; judgment creditor) burden to show that the settlement is reasonable and prudent. *Id*.

The validity of a Miller-Shugart agreement is analyzed under a two part test: 1) whether the agreement was the product of fraud or collusion perpetrated on the insurer by the settling parties; and 2) whether the judgment amount reflected a reasonable and prudent settlement. An insurer may also challenge whether an agreement is free from fraud or collusion by showing lack of adversity between policy holder and claimant. *Ind. Sch. Dist. No 197 v. Accident & Cas. Ins. Of Winterthur*, 525 N.W.2d 600 (Minn. App. 1995). The fact that an insured's motivation entering into a settlement was to avoid personal liability is not enough to void a settlement. *Vetter v. Subotonik*, 844 F.Supp. 1352, 1356 (D. Minn. 1992). Collusion may exist if the settlement purports to add or alter claims or facts to create coverage obligations. *Kohler v. State Farm Mut. Auto. Ins. Co*., 416 N.W.2d 865, 873 (Minn. 1989).

An insurer may also challenge whether the settlement agreement was reasonable by showing that "a reasonably prudent person in the position of the insured would not have settled on the merits of the plaintiffs claim. *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982). Reasonableness is evaluated by the nature and extent of the claimed injury or damage, risk of trial, expert testimony (if any) on the range of likely jury awarded, and the judge's own personal experience with jury awards. *Jorgensen v. Knutson*, 662 N.W.2d 893, 904 (Minn. 2003). Prior settlement demands are relevant to reasonableness where the amount of the confessed judgment exceeds prior offers to settle. *Burbach v. Armstrong Rigging and Erecting, Inc.*, 560 N.W.2d 107, 111 (Minn. Ct. App. 1997). Reasonableness can also be determined by whether a settlement fails to allocate the amount of the judgment between multiple defendants or between covered and non-covered claims. *Ebenezer Soc. v. Dryvit Systems, Inc.*, 453 N.W.2d 545 (Minn. Ct. App. 1990). Whether a Miller-Shugart agreement is found to be unreasonable, the parties return to square one and try the underlying case on the merits, both as to liability and damages. The desire to avoid trial may deter an insured from entering into an unreasonable agreement.

If there is no coverage, the insurer is not bound to pay any portion of the stipulated settlement. *McNicholes v. Subotnik*, 12 F.3dd 105, 108 (8th Cir. 1993). Historically, it was the insurer or the claimant who paid the price for an incorrect determination of coverage. Since *Corn Plus Co-op. v. Continential Cas. Co*., an important element has been added to the insured's list of duties, the allocation of settled losses among those which are covered and noncovered under the policy. 516 F.3d 674 (8th Cir. 2008). Failure allocate will render the Miller-Shugart agreement unenforceable even if coverage has previously been established for some elements of the claimed loss against the policy holder. *Id*. Absent an allocation between covered and noncovered items, the Miller-Shugart agreement is unreasonable as a matter of law. *Id*. This means that the types of damages sustained needed to be addressed in a form of allocation that could later be used by a court to resolve the dispute regarding coverage. *Id*.

Again the burden of proof is on the plaintiff to show that the settlement is reasonable and prudent, and an insurer is not relieved of all obligations under its policy once a settlement is found to be unreasonable. *Hennings v. State Farm Fire and Cas. Co*., 438 N.W.2d 680, 686 (Minn. Ct. App. 1989). If the court finds that there is coverage but that the agreement was unreasonable, the insurer is still liable for damages. *Id*.

> "Nevertheless, it seems to us, if a risk is to be borne, it is better to have the insurer escapes the risk. Of course, the insurer escapes the risk if it should be successful on the coverage issue and, in that event, it is the plaintiff who loses."

Miller v. Shugart, 316 N.W.2d at 734. Therefore, if there is no coverage the insurer is not bound to pay and it is the plaintiff who loses. It is important for insurers to be sure that coverage is really lacking or they may be forced to comply with a settlement agreement which they had no control over negotiating in their favor. If an insurer questions coverage, it is best that the insurer retain representation for the insured through a reservation of rights which will allow the insurer to maintain control over litigation until coverage is eventually determined.

VII. Response to Tender

It is possible that a liability insurance policy may provide time constraints by which the liability insurer must respond to a tender of defense. The common law does not state a specific time parameter for responses to tenders of defense. Minnesota's Unfair Claims Practices Act, however, states that within ten business days after receipt of notification of the claim, the liability insurer must do the following:

A. Acknowledge receipt of notification of claim.

B. Provide all necessary claim forms and instructions to the insured to process the claim.

C. Provide the insured with the telephone number and name of an insurer representative who can assist the insured in complying with the policy conditions.

See Minn. Stat. § 72A.201, subd. 4(1).

The Unfair Claims Practices Act prohibits an insurer from failing to acknowledge and act reasonably prompt with respect to claims under insurance policies. *See* Minn. Stat. § 72A.20, subd. 12(2). Obviously, an insurer should do all things necessary to comply with the Unfair Claims Practices Act. Notwithstanding the insurer's best efforts, they may not always comply with the Unfair Claims Practices Act. When that occurs, while the insurer may be exposed to disciplinary action from Minnesota's Commerce Department, that failure to comply with the Unfair Claims Practices Act will not result in a private cause of action against the insurer for violating the Unfair Claims Practices Act. *See Morris v. American Family Mutual Insurance Company*, 386 N.W.2d 233 (Minn. 1986).

Liability policies frequently state that notice of an occurrence must be provided by the insured to the insurer "as soon as is practicable." Those same policies frequently require that the notice by the insured to the insurer be in writing. As it regards a claim or suit, the condition precedent for a tender of defense routinely require that the insured "must" provide the claim or suit papers immediately to the insurer.

Common sense, then, would provide that an insurer should provide the following in its response to a tender of defense:

1. The response should be in writing.

2. The response should be promptly provided or provided as soon as is practicable.

3. If the insurer relies on exclusion or other policy provision to deny or reserve rights to deny the claim, that language must be quoted by the insurer to the insured.

4. In essence, the insurer's response to a tender of defense must provide the insured with the insurer's opinion on coverage.

Oshinsky, Jerold and Birnbaum, Sheila L. 1 Practitioner's Guide To Litigating Insurance Coverage Actions: Commentary. Forms. § 2.05, pp. 2-11 through 2-13 (1996).

If the tender does not provide enough information to trigger coverage and the insurer denies coverage, the burden shifts to the insured:

> "The insured . . . may revive the insurer's duty to defend and indemnify by coming forth and making some factual showing that the suit is actually one for damages resulting from events which fall within the policy terms."

See Senger at 415 N.W.2d at 370.

In construction defect cases, where some damage occurs within the policy period, there is a presumption of coverage that triggers the insurer's duty to defend. In *Donnelly Bros Const. Co. v. State Auto*, 759 N.W.2d 651, 653 (Minn. Ct. App. 2009) Donnelly Brothers performed stucco work on homes between 1994 and 2003. Some of the homes suffered damage due to water intrusion. State Auto provided Donnelly Brothers with liability insurance starting in 2004. State Auto denied it owed defense and indemnity coverage on the ground that it had no duty to defend because the property damage was due to a discrete event – application of the stucco – which occurred prior to its insurance policy. *Id*. at 657. Rejecting this argument, the court held "property damage does not necessarily occur when defective stucco work is performed; rather, the insurer's duties depend on when the defective work causes damage to the property." *Id*. The court also held that "the date of defective work cannot be substituted for the commencement of water intrusion or resulting damage. *Id*. at 657-658. The court held that because there was an issue of fact regarding the cause of the water intrusion, State Auto had a duty to defend Donnelly Brothers. *Id*. at 658.

VIII. Reservation of Rights

Sometimes the allegations of the complaint, the investigation and all of the other information provided to or developed by the insurer prevent the insurer from unequivocally admitting the coverage. *See Prahm v. Rupp Construction Company*, 277 N.W.2d 389, 390 (Minn. 1979). The duty to defend under an insurance policy is broader than the duty to indemnify. *See St. Paul Fire & Marine Insurance Company v. Briggs*, 464 N.W.2d 535, 539 (Minn. Ct. App. 1990). The Minnesota Court of Appeals recently stated, "The obligation to defend is contractual in nature and is determined by the allegations of the complaint and the indemnity coverage of the policy." *See Hornberger v. Wendel*, 764 N.W.2d 371, 376 (Minn. Ct. App. 2009).

Hence, in order to avoid prejudice to the insured, an insurer may reserve its rights to deny coverage but still defend the insured under a reservation of rights or non-waiver agreement, subject to further investigation.

"A reservation of rights letter must inform the policyholder in detail of all potential defenses to coverage the insurance company has developed in its preliminary analysis of the underlying claim . . . . [and] should at a minimum:

- refer to the underlying complaint and the specific allegations contained therein;
- identify the claims which are covered and those which are not covered;
- identify each and every policy exclusion which may bar coverage;
- detail the insurer's position regarding coverage; and
- advise the policyholder that it has the right to independent counsel in the underlying suit.

Oshinsky, Jerold and Birnbaum, Sheila L. 1 Practitioner's Guide To Litigating Insurance Coverage Actions: Commentary. Forms. § 2.05[B], pp. 2-12 through 2-13 (1996).

Good practice dictates that the insurer's reservation of rights letter should raise every possible defense to coverage and should preserve the right to assert other defenses upon further investigation. If the insurer rejects the tender and denies coverage, the insurer's letter should advise the insured of the applicable limitation statute and time within which to commence suit on the policy. *Id.*

A reservation of rights letter should be used when the insurer is uncertain whether it is obligated to provide coverage for a given claim. *See St. Paul Fire & Marine Ins. Co. v. National Computer Systems, Inc.* 490 N.W.2d 626, 632 (Minn. Ct. App. 1992)

A reservation of rights letter should clearly state that the insurer is thereby intending to reserve its rights. In *Auto-Owners Ins. Co. v. NewMech Companies, Inc.*, 678 N.W.2d 477 (Minn. Ct. App. 2004), the Minnesota Court of Appeals addressed a coverage dispute between a condominium developer and its insurer. The court held that a letter an insurer issued to its insured was a denial of coverage letter rather than a reservation of rights letter. *Id.* at 482. Though the letter did not contain a complete denial of coverage, it was not titled as a reservation of rights letter. *Id.* The letter did not lead off with that clear statement in the first paragraph that states "[d]ear insured: This is a reservation of rights letter. If you have any questions, consult competent legal advice." *Id.* Consequently, the court found that that the insured did not breach its cooperation clause by entering into repair agreements without the insurer's consent. *Id.* at 482-483.

IX. Coverage for Less Than all of the Claims

In those instances where the complaint alleges claims and causes of action clearly outside the policy but sets forth some or at least one claim that may arguably be covered, the insurer still has a duty to

defend the entire lawsuit. *See Meadowbrook v. Tower Ins. Co.*, 559 N.W. 2d 411, 417 (Minn. 1997). It is best in these situations to send to the insured a reservation of rights letter that clearly sets out the basis for a lack of coverage, with specific exclusions, for those claims that are believed to be outside the coverage under the policy. For those claims that are arguably covered claims, the reservation of rights letter should make it very clear that a duty to defend is being undertaken by the insurer solely because some of the claims that appear in the complaint may be covered. *Id*. at 417, n. 15. Further, it should be suggested to the insured that the insured retain counsel of their own choosing to help them defend against claims in the complaint that are not covered by the insurance policy.

It is imperative that the insurer, in sending out the reservation of rights letter, inform the insured that in the event that the covered claim is finally resolved by way of judgment and/or settlement, the duty to defend may be extinguished and the defense of the entire lawsuit may be withdrawn. *Id*. at 417. If this reservation is not stated in the reservation of rights letter, an estoppel argument may be used against the insurer to foist a duty to defend on the insurer.

Obviously, litigation of multi claim lawsuits that only contain one or two claims for which there is arguable coverage can be difficult. The Minnesota Supreme Court has found in *Meadowbrook* that the granting of summary judgment dismissal of the only arguably covered claim does not, in and of itself, relieve the insurer of a duty to defend. *Id.* Rather, once summary judgment is achieved with respect to the only arguably covered claim, the insurer should, in the context of that declaratory judgment action, seek a certification from the trial court so that the finality of the dismissal of the covered claim can be achieved through the appellate process rather than waiting for all claims to be determined. *Id*. In addition, settlement of the arguable covered and dismissed claim extinguishes the insurer's duty to defend the entire lawsuit. *Id*.

X. Consequences for Wrongful Denial of Tender of Defense

When an insurer wrongfully denies a tender of defense, the insurer owes the insured those damages which naturally and proximately flow from the insurer's breach. *See Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979).

In a first party coverage situation, the Minnesota Supreme Court has held that an insurer may be held liable to its insured for contractual damages in excess of its policy limits. *Id*. at 388. Those damages may not include any sort of punitive damages.

Minnesota does not recognize an independent common law tort of bad faith breach of insurance contract. *See Haagenson v. National Farmers Union Property and Casualty Company*, 277 N.W.2d 648, 652-653 (Minn. 1979); *Saltou v. Dependable Insurance Company, Inc*., 394 N.W.2d 629, 633 (Minn. Ct. App. 1986). Even if there is malice or bad faith by the insurer in breaching the insurance contract, that maliciousness or bad faith does not convert the contract action into a tort action for bad faith. *See Saltou*, 394 N.W.2d at 633. In addition, if the insured can show consequential damages that are the natural and proximate result of the insurer's breach, then the insured may recover those damages, in addition to the costs incurred in proving defense and indemnity coverage owed under the contract. *See Olson*, 277 N.W.2d at 388; and Carr, Michael D. "Avoiding Insurer Bad Faith in Minnesota," Minnesota Defense, (Spring 1996).

The Minnesota Legislature also enacted a statute in 2008 that provides statutory penalties for insurers who act in bad faith when making first party coverage decisions. Under Minn. Stat. § 604.18, subd. 2(a), the court may award taxable costs to an insured if the insured can show:

> (1) there was no reasonable basis for denying to the insured the benefits of the insurance policy, and
> (2) the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of such a reasonable basis.

If the court finds a violation of these duties, the court may award to the insured the following taxable costs:

> (1) an amount equal to one-half of the proceeds awarded that are in excess of an amount offered by the insurer at least ten days before the trial begins or $250,000, whichever is less; and
> (2) reasonable attorney fees actually incurred to establish the insurer's violation, not to exceed $100,000.

Minn. Stat. § 604.18, subd. 3.

This new statute only applies to first party claims and not to third party claims. The statute also continues the common law tradition of not allowing an independent claim of bad faith breach of an insurance contract. Instead, the insured must first file a complaint alleging breach of the insurance contract and then amend his pleadings to request recovery of the taxable costs provided in the statute. Minn. Stat. § 604.18, subd. 4.

In sum, if an insurer breaches its insurance contract with the insured by failing to accept a tender of defense, the insurer may be held liable for the costs of the insured's defense in the tendered action, the costs the insured incurs in proving that defense was owed, indemnification, if it was owed, and the costs of proving indemnification. (These costs are normally proved in a separate declaration judgment action). *See Le* at 551 N.W.2d 923. But also *see M.W. Johnson Constr., Inc. v. W. Nat'l Ins. Co.*, 2004 Minn. App. LEXIS 1164 (Minn. Ct. App. 2004), *petition for further review denied*, December 22, 2004.

XI. Reimbursement of Defense Costs

Whether an insurer is entitled to reimbursement of defense costs from its insured if a court ultimately determines the insurer had no duty to defend is still an open question in Minnesota. In *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F.Supp. 1169, 1170 (D. Minn. 1996), the insurer agreed to defend its insured subject to reservation of rights. In its reservation of rights letter, the insurer explicitly stated that it reserved the right to later seek attorney's fees and costs if coverage was later denied. *Id*. The U.S. District Court for the District of Minnesota held that in this case, the insurer was entitled to recover its defense costs. *Id*. at 1172. The court based its decision on the facts that the insurer clearly indicated its intention to later seek reimbursement for attorney's fees and that the insured accepted the defense without protest. *Id*.

However, the Eight Circuit Court of Appeals recently reached an opposite decision. In *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707, 710 (8th Cir. 2009) the insured sought coverage from its insurer under a Directors and Officers policy. The insurer initially denied coverage, but then agreed to defend under a reservation of rights. *Id.* In its reservation of rights letter, the insurer explicitly stated it reserved the right to reimbursement of defense costs in the event a court found the insurer had no duty to defend. *Id*. The insured objected to the insurer's reservations, but accepted the defense. *Id.* The Eight Circuit Court of Appeals adopted the minority position and held the insurer was not entitled to reimbursement of its defense costs. *Id*. at 719. The court based its decision on the facts that the insured objected to the terms of the insurer's reservations of rights and that the insurer could have addressed reimbursement of defense costs in the insurance policy. *Id*.

XII. Loan Receipt Agreements

If there are multiple primary insurers on risk, the insured may seek coverage from any insurer. Each insurer has a separate and distinct obligation to defend. If the defending insurer enters into a loan receipt agreement with its insured, the insurer may seek contribution from other insurers. Under a loan receipt agreement, an insurer agrees to loan the insured the amounts necessary to defend a lawsuit in exchange for the insured's promise to pursue an action in its own name to recover defense or indemnification costs from other insurers. *See Home Ins. Co. v. National Union Fire Insurance*, 658 N.W.2d 522 (Minn. 2002). Money recovered will be used to repay the loan. Loan receipt agreements can be an attractive option for plaintiffs. The plaintiff receives a fully funded defense and only had to deal with one insurer. A loan receipt agreement is also attractive for a settling insurer because it allows the insurer to "cap" its liability at the loaned amount with the possibility of recovering some or the entire loaned amount through subsequent coverage litigation.

However, the existence of a loan receipt agreement does not guaranty that an insurer will be able to recover against other insurers potentially on risk. *See Christensen v. Milbank Ins. Co*., 658 N.W.2d 580 (Minn. 2003). In *Tony Eiden Co. v. State Auto*, 2009 WL 233883 (Minn. Ct. App. 2009), Pet. for Review Denied, April 29, 2009. Three insurers agreed to indemnify and defend Tony Eiden, their common insured. A fourth insurer, State Auto, refused to participate. The participating insurers entered into a loan receipt agreement with Tony Eiden. The agreement obligated Tony Eiden to repay the loan if it successfully recovered against State Auto. *Id* at *6. However, in a declaratory judgment action Tony Eiden did not successfully recover against State Auto and did not appeal. As Tony Eiden did not pursue an appeal, the court held the participating insurers were precluding from recovering against State Auto in their own names. *Id*. The court held the participating insurers were only entitled to recovery against State Auto to the extent Tony Eiden was entitled to recovery.

XIII. Targeted Tender

In some cases, an insured may have multiple insurance policies and there may be multiple insurers on risk for a particular occurrence. In such cases, each insurer has a separate and distinct obligation to defend that allows the insured to call upon any insurer to fulfill its policy obligations. *See Cargill v. Ace American Ins. Co*., 766 N.W.2d 58, 63 (Minn. Ct. App. 2009). As a result, upon an

event that triggers coverage, an insured may strategically choose to which insurer it wishes to tender the suit. This is referred to as a "targeted tender."

The Court of Appeals of Minnesota decision was reviewed, de novo, by the Minnesota Supreme Court and was affirmed on other grounds. *See Cargill Incorporated v. Ace American Insurance Company,* 784 N.W.2d 341, 344 (Minn. 2010).

In *Cargill*, the State of Oklahoma sued Cargill for damages related to Cargill's waste disposal practices at poultry operations around the state. *Id*. at 344. Cargill sought a declaratory judgment against over 50 insurers who were allegedly on risk. *Id*. Several primary insurers, including Liberty Mutual, offered to provide Cargill with a defense, subject to Cargill entering into a loan receipt agreement with the insurers. *Id* at 345. Cargill declined these offers. *Id.* Cargill instead chose to tender defense of the entire suit to Liberty Mutual. *Id*. Cargill moved for summary judgment against Liberty Mutual, arguing it had no obligation to enter into a loan receipt agreement with Liberty Mutual. *Id*. at 345-6.

In essence, the Court of Appeals of Minnesota held that a court may order primary insurers, who insure the same insured for the same risk, and whose policies are triggered for defense purposes, to be equally liable for the costs of defense where there is otherwise no privity between the insurers. *Cargill, Inc. v. Ace* 766 N.W.2d at 60. In resolving this matter de novo the Minnesota Supreme Court restated what has been known in Minnesota as the "*Iowa National*" rule as follows:

> Where it can be argued, legitimately and in good faith, that either of two insurers has *primary* coverage for a claim, both insurers have a duty to defend that claim. If either insurer undertakes the defense, it is responsible for its own defense costs and cannot later seek reimbursement from the other.

Cargill, Inc. v. Ace American Insurance Company, 784 N.W.2d at 344.

In *Cargill* the Minnesota Supreme Court cited this *Iowa National* rule as developed in *Jostens, Inc. v. Mission, Ins. Co.* 387 N.W.2d 161, 167 (Minn. 1986). The Minnesota Supreme Court carefully reviewed the *Iowa National* rule and exceptions to that rule. For years, in Minnesota, an insurer defending an insured needed to obtain a "loan receipt" from its insured in order to sue other insurers who owed a concomitant duty to defend in order to recoup the costs of defending the mutual insured. Sometimes, just like *Cargill*, the insured refused to provide the necessary loan receipt. The Minnesota Supreme Court noted that the "better reasoned position" should allow "a co-primary insurer's right to contribution from other primary insurers that have a duty to defend…." *Cargill*, 784 N.W.2d at 353. The Minnesota Supreme Court held as follows:

> A primary insurer that has a duty to defend, and whose policy is triggered for defense purposes, has an equitable right to seek contribution for defense costs from any other insurer who also has a duty to defend the insured, and whose policy has been triggered for defense purposes.

784 N.W.2d at 354. Citing *Wooddale Builders, Inc. v. Maryland Cas. Co*., 722 N.W.2d 283, 303-04 (Minn. 2006). The Minnesota Supreme Court stated that "an equal sharing for costs of

defense among co-primary insurers is consistent." So, though an insured may target its tender of defense to a specific insurer, hoping only that insurer defends the insured, provided other insurers are co-primary with the targeted insurer and owe a duty to defend, the other co-primary insurers with notice of a suit and an opportunity to defend may owe contribution to the targeted insurer for the costs of defending the insured. This rule does not require an insurer to assume an obligation its policy expressly declined to perform. *James River Insurance Company v. Interlachen Propertyowners Association*, 2016 WL 3093382 (D. Minn. 2016).

XIV. Choice of Defense Counsel

Upon an insurer's decision to defend its insured, the insurer has the right to appoint defense counsel. This is based upon insurer's contract right, as stated in the insurance policy, to "defend the insured against any suit" seeking damages because of "bodily injury" or "property damage." In dicta, the Minnesota Supreme Court has stated, "The assumption of control and defense of a lawsuit by the insurer deprives the insured of its right to retain its own counsel so as to control its own defense and further requires the insured to cooperate with the insurer in such defense." *See Faber v. Roelofs*, 250 N.W.2d 817, 825 n.12 (Minn. 1977).

However, there is one situation in which the insured has the right to select its own defense counsel. In *Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 383 (Minn. Ct. App. 1991), the court held an insured is "entitled to counsel of its own choice" in the event of an "actual conflict of interest" between the insurer and the insured. The court also held that defending under a reservation of rights and instituting a declaratory judgment action do not create an actual conflict of interest. *Id*. at 369. Hence, where the liability insurer defends under a reservation of rights, it pays for the counsel it retains to defend the insured.

XV. Conclusion

The insured and the insurer are obliged to discover all potential liability coverage when they receive notice of a claim arguably within coverage. The insured must promptly provide notice to the insurer of an occurrence and otherwise comply with the notice provisions of the insurance policy. When an actual "suit" or "claim" is presented, the insured must tender the defense of that suit or claim to the insurer. Upon receipt of notice of a possible occurrence, and, upon receipt of a tender of defense, the insurer must promptly investigate the occurrence, claim or suit, and must promptly state in writing its position on coverage. Both the insured and the insurer must scrupulously avoid prejudicing the other side throughout this process.

INSURANCE COVERAGE REFERENCE MATERIAL

COVERAGE: COMMITTEE ON INSURANCE COVERAGE LITIGATION
LexisNexis / Matthew Bender
1275 Broadway
Albany, NY 12204
(800) 223-1940
www.lexisnexis.com

FIRE, SURETY & CASUALTY BULLETINS
The National Underwriter Company
5081 Olympic Boulevard
Erlanger, KY 41018
(800) 543-0874
www.nationalunderwriter.com

MEALEY'S LITIGATION REPORTS - INSURANCE
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Albany, NY 12204
(800) 223-1940
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Eagan, MN 55123
1-800-328-4880
www.west.com

PROPERTY INSURANCE LAW REVIEW
Property Loss Research Bureau
3025 Highland Parkway Suite 800
Downers Grove, IL. 60515-1291
(888) 711-7572
www.plrb.org

TORT & INSURANCE LAW JOURNAL
American Bar Association, Tort Trial and Insurance Practice Section
321 North Clark Street
Chicago, IL 60654-7598
(800) 285-2221
www.abanet.org/tips/journal/lawjournal.html

NOTICE TO INSURER

Brokers' Name
Brokers' Address

Re: Possible Claim
[Insert Date of Loss, if known]
[Insert name of claimant, if known]

Dear Insurance Broker:

This letter confirms the information we relayed to you last evening by telephone.

Our insurance policy number is [insert policy or policy numbers] and the named insured under this policy [insert named insured]. Yesterday morning, one of our tractor and trailers was attempting a right hand turn off of Kellogg Boulevard in downtown St. Paul onto the Wabasha Street bridge. Unbeknownst to our truck driver, the bridge had been removed months earlier. Our driver attempted to stop before going over the edge of the road and, unfortunately, struck and killed a pedestrian in a crosswalk. The pedestrian's name is I. Am Dead whose address is 123 Summit Avenue, St. Paul, MN. We are advised by the officers at the scene that I. Am Dead is survived by his wife, Gladys Dead.

Attached is a copy of the Traffic Accident Report which provides the names of the witnesses.

Also, we did receive by Fax this morning a "Request For Information" from the State of Minnesota. It concerns the gasoline from our trailer leaking into the Mississippi River. Finally, we received a letter from the Federal Environmental Protection Agency naming us as a potentially responsible party for cleaning up the Mississippi River.

Please immediately provide all of this information to our liability insurance carriers and demand that they investigate and protect us.

Very truly yours,

I AM INSURED

INSURER'S RESPONSE TO NOTICE

I AM INSURED
I AM'S ADDRESS

Re: Policy Number: 123 - XYZ
Named Insured: Joe Insured
Claimant: Heirs of I Am Dead, including Gladys Dead

Dear Mr. Insured:

We acknowledge receipt of your notice of an accident that occurred on October 1, 2009.

The undersigned claims professional is assigned to handle this claim. As far as we are aware, the only applicable liability coverage is as referenced above.

We are investigating this matter. Please advise us of the name and address of the driver of your tractor and trailer so that we may set up a time to interview that driver.

Should you receive any correspondence, calls or legal papers regarding this accident, immediately forward those calls and papers to the undersigned at the above-referenced address.

Very truly yours,

INSURANCE COMPANY

TENDER OF DEFENSE

INSURANCE COMPANY
INSURER'S ADDRESS

Re:	Policy Number:	123 - XYZ
	Named Insured:	Joe Insured
	Claimant:	Heirs of I. Am Dead, including Gladys Dead

Dear Claims Professional:

In connection with the above-referenced subject, enclosed please find a Summons and Complaint which was served upon us today.

By return mail, please acknowledge receipt of this letter and this Summons and Complaint. Also, in that same letter, confirm your obligation to defend and indemnify us.

Very truly yours,

I AM INSURED

RESERVATION OF RIGHTS LETTER

I AM INSURED
ADDRESS

Re: Policy Number: 123 - XYZ
Named Insured: Joe Insured
Claimant: Heirs of I. Am Dead, including Gladys Dead

Dear I Am Insured:

You will recall that the undersigned has investigated your claim since first notification.

The Summons and Complaint that was served upon you makes the following allegations: ["All pertinent allegations and claims"].

In relevant part, your insurance policy has the following insuring agreement, definitions, conditions, exclusions and limitations on liability: [Insert the appropriate language]

The allegations and claims asserted in the Complaint are not clearly covered under your liability insurance policy. Your policy definitions may afford coverage for this claim but Exclusion [insert the name of the exclusion] clearly may exclude coverage for these claims.

We need more time and more information to investigate these claims.

That notwithstanding, we have retained counsel to interpose an Answer to the Complaint and to defend your company in this lawsuit.

By retaining counsel, it is not our intention to waive our right to contest coverage for the claims asserted in the Complaint. By retaining counsel, under this reservation of rights, we are protecting your interest, and we expect these attorneys to defend all of the claims asserted against you in the Complaint.

We encourage you to consider retaining your own attorneys, at your own expense, in connection with this lawsuit, particularly those claims that are not covered or are arguably not covered by your insurance policy. Your own counsel can also provide you with legal advice as to this reservation of rights.

Upon further investigation, if it is determined that the claims are not covered because of Exclusion [insert the exclusion] or otherwise, we reserve the right to withdraw from the defense of this liability action. In addition, if [insert claim] is dismissed, settled and finally resolved, we reserve the right to withdraw from the defense of the entire lawsuit. Further, at that time, we will re-tender the defense of the lawsuit back to you.

If you have any questions, please feel free to contact us.

Very truly yours,

INSURANCE COMPANY