

FREQUENTLY ASKED QUESTIONS (F.A.Q.)

Regarding

Insurance Defense

by Lawrence Linville



1. If I am sued as a contractor or subcontractor on a construction project for a construction defect, how do I get my insurance company involved to protect me?

Most builders on construction projects have builder's risk insurance policies. Often, subcontractors are also named as additional insureds on a builder risk policy obtained by the general contractor on such a project. If the lawsuit is filed naming you as subcontractor or general contractor on a construction project for construction defects your first step should be to find and locate your builders risk insurance policy and/or talk to your general contractor about that policy. A careful review of the insurance policy should be made. Your next step should be for you or an attorney to write a "tender letter" to the insurance company enclosing a copy of the lawsuit and requesting that the insurance company defend and indemnify you in the lawsuit. The insurance company will hire an attorney on your behalf to represent you in the lawsuit. In the context of indemnity, the insurance company, if insurance coverage is applicable, will pay a settlement to resolve your liability in the lawsuit and/or pay any judgment that may be entered against you at the trial (up to policy limits). It is very important that the "tender letter" be sent to a carrier as soon as possible after you receive a lawsuit regarding a construction project.

2. What if I am involved as a contractor in a project and I receive a demand letter from the customer about construction defects, threatening a lawsuit?

In this case, you should immediately write a "tender letter" to your builders risk insurance carrier for the project. You should enclose the customer's demand letter and request that the insurance company hire you an attorney to respond to the demand. It often makes sense in these situations to immediately hire an attorney as well to ensure that the tender to the insurance company is done correctly. In addition, an attorney can assist you regarding questions about possible insurance coverage issues regarding whether or not the claim is a covered claim under your insurance policy.

3. What if I own property and discover that my house is built across the property line with my neighbor; do I have insurance coverage for such a problem?

Yes, most home owners and commercial property owners have title insurance policies that were issued when you purchased

the property. Under a typical policy for a residential home, an endorsement is issued with the title insurance policy that protects you if your residential structure encroaches across the property line. A tender letter should immediately be sent to the title insurance company explaining the problem and requesting that the title insurer provide you counsel and assistance to correct the encroachment. In the case of commercial properties, such a problem involving encroachment is often covered by either an extended coverage title insurance policy or by endorsement to the policy protecting you against such encroachments. In either case, a tender letter needs to be sent to the title insurance carrier as soon as possible to explain the problem, how it was discovered and request assistance from the title insurer to correct the problem. Most often, a title insurer will hire counsel to protect your rights in your property including your encroaching structure. Often, the solution will involve the title insurance carrier purchasing a small section of the neighboring property and adjusting the boundary line to accommodate the encroaching structure. In the alternative, the title insurance company will pay to move your house or other structure back onto your property.

4. What if I make a claim to my builders risk insurance carrier regarding a construction defect claim and the claim is denied?

In this case you should immediately consult an attorney familiar with insurance coverage matters. The attorney may write again to the insurance company with a detailed letter explaining why in fact the claim is covered. In addition, the attorney can argue for the carrier to at least provide an attorney to defend you in the lawsuit based on the presumption that coverage may be in fact available to you under the insurance policy depending on how the facts are developed during the course of the lawsuit. Often, a carrier, when persuaded by an attorney, will provide a defense of the lawsuit to protect its insured against any harmful effects of a judgment or other adverse action that may potentially be covered under the insurance policy. This part of the insurance policy obligation is called the "duty to defend." In the context of insurance coverage in the State of Washington, the duty to defend an insured is much broader than the duty to indemnify. Because of this, an insurance carrier will often provide you an attorney to try to defend you and resolve the claim even if questions continue to exist regarding whether or not the claim is actually a covered claim.

5. If one of my workers at a construction site intentionally causes harm to the project or another individual, is this type of claim covered under my insurance policy?

In some instances, a contractor will have as part of their insurance coverages, a defalcation policy that protects the contractor or employer against the intentional and/or dishonest acts of its employees. However, such coverage is often not part of the insurance policy that is purchased by a builder. In that case, intentional acts by your employees causing damage or harm at a construction site would not be covered. Typically, liability and property damage insurance provides coverage for accidental acts or damage caused by lack of care or negligence. Intentional acts are most often excluded from most insurance policies for coverage. In this situation you should consult an attorney immediately to determine whether or not you have insurance coverage for the problem at hand.

6. If I have an insurance claim involving a construction project and the insurance carrier does decide to accept coverage, can I pick my own attorney to defend myself?

No, in most cases the insurance carrier has the right to choose its counsel to defend you as the insured in the lawsuit. However, in some instances with a larger contractor or other commercial customer an insurance carrier may defer to your choice of counsel if the counsel has experience with construction defect claims and with insurance issues. Our firm has been hired numerous times by insurance carriers on behalf of our clients who are also insureds. This situation depends on unique circumstances of each case and must be explored with an attorney as soon as possible after you become involved in an insurance claim.

7. What if I make a claim under my title insurance policy regarding my property and the policy lists in Schedule B a recorded document involving the claim, do I still have a valid claim?

It depends on the individual circumstances. Sometimes under a title insurance policy items are listed on what is called Schedule B of the policy as a special exception to coverage. This means that the title insurer has found this recorded document in the public records prior to your purchase of the property and the title insurance company is stating that they will not provide insurance regarding issues surrounding that document. However, even if the initial reaction of a title insurance company is that an item is not covered it is often best to consult an attorney because arguments can be made that the exception listed in the title insurance policy does not affect the specific claim you are making under the policy for coverage. These issues are best handled by an experienced title and real estate attorney.

8. In the event that I make a claim under my builders risk policy for construction defect lawsuit and coverage is denied by the insurance carrier, what are my options?

In this case, you should consult an attorney immediately regarding the insurance coverage and insurance claim issues. Often, a careful review of the facts of the case and the specific language of the insurance policy may turn up reasons why in fact the claim should be covered or at least that the duty to defend has been triggered. These types of issues require immediate legal advice in order to explore your options and to best preserve your rights under the insurance policy.

9. In the event that I need to sue my insurance company for coverage can I recover my attorney's fees?

Yes. Under case law in Washington when an insured contractor or other individual is forced to sue their insurance company to determine whether or not a claim is actually covered and the court rules that the insurance company must take action to protect the insured, then the court is required to award attorneys fees to the insured party. In general, the courts in Washington are friendly to consumers and businesses with insurance coverage problems. In particular, the Washington courts have tended to interpret insurance policies in favor of the insureds. Typically any ambiguity or "gray area" in an insurance policy are interpreted in favor of the consumer or business with the insurance. Again, you need to consult an attorney regarding your rights about any insurance coverage dispute.

10. As an insurance carrier, when I receive a tender letter from an insured, what are my options for responding to

that letter?

First, a written response should be given to the insured within ten days of receiving the initial written tender of the claim in order to comply with the Washington State insurance regulations regarding prompt response to claims made by an insured (WAC 284).

Second, after analysis of coverage is made based on the allegations made in the complaint or lawsuit against the insured, you as the insurance carrier must determine whether coverage is provided by the insured's policy. If it is clear that insurance coverage is provided in the insurance policy for the claim made, then you are obligated to hire defense counsel for the insured to defend the claims and eventually indemnify the insured up to the stated terms of the policy. In the event that there is a real question as to whether or not coverage is available under the policy, but the allegations of the complaint, when taken as true, suggest an ambiguity or that potential coverage may exist, there is a strong possibility that a "duty to defend" still exists. In this case, a reservation of rights letter needs to be written to the insured explaining to them that there are real questions regarding coverage and that the carrier reserves all rights to determine coverage at a later time. The reservation of rights letter should also specify that the carrier is hiring counsel for the insured in order to defend the insured in the lawsuit subject to the reservation of that coverage stated in the reservation of rights letter. This is an important duty for the carrier to be aware of, especially in the Washington Courts, where this duty is applied much more broadly than the duty to indemnify under insurance policies. The carrier must be mindful that a wrongful denial of coverage without providing a defense can expose the carrier to a potential bad faith claim or other claim for breach of the coverage and defense obligations under the insurance policy.

The final option is for the insurance carrier to write a letter to the insured denying coverage if it is clear that the claims alleged in the complaint/lawsuit are not covered under the terms of the insurance policy. The denial letter written to the insured should always express that if there is any additional information that the insured has regarding the claim, they should bring it to the immediate attention of the carrier so that the carrier can reevaluate coverage in light of any new facts or circumstances. Often, an insurance carrier will wish to employ outside counsel to assist in this process of replying to the initial claim of an insured.

11. What if an insurance claim is tendered by an insured and a significant question exists as to whether or not it is a covered claim-what are my options as an insurance company to respond to the tender of claim?

First, the insurance carrier should obtain a coverage opinion from counsel regarding the claim and whether or not it fits under of the coverage provisions of the insurance policy at issue and whether or not the claim is excluded or excepted from coverage in some particular manner by the terms of the insurance policy issued to the insured. The coverage opinion obtained early on from counsel can be valuable in assessing the risk and exposure of a carrier on a particular claim. Furthermore, such a coverage opinion can allow the insurance carrier to bring an immediate action for declaratory relief into court to determine whether or not coverage is provided to the insured under the insurance policy. In certain circumstances, it makes sense for the insurance carrier to be proactive and bring a lawsuit for declaratory relief as soon as possible in the event that the carrier feels strongly that no coverage is available under the insurance policy and the carrier wishes to have a judicial determination confirming that.