PRACTICE TIPS

Title Insurers' Evolving Duty to Defend?

By Gerald W. Heller

The Insurers' Duty to Defend

The usual rule applicable to insurance policies requires the insurance company to provide a complete defense to an insured if one of the claims alleged against the insured is potentially within the coverage provisions of the policy. This "complete defense" rule, sometimes also referred to as the "in for one, in for all" rule, generally imposes an obligation on the insurer to defend the entire lawsuit against the insured if the allegations assert a potentially covered claim under the policy.

The complete defense rule has engendered considerable litigation over the years, as counsel for policyholders and insurance carriers clash over whether any of the claims against an insured satisfy the potentiality of coverage threshold, thereby requiring the carrier to defend all the claims asserted against the insured.

Maryland: Complete Defense Rule

Maryland, like several other jurisdictions, follows the complete defense rule. "If any claim raised by the insured potentially falls within the scope of policy coverage, the insurer must defend against all claims raised by the insured." *Back Creek Partners, LLC v. First American Title Insurance Company*, 213 Md. App. 703, 715, 75 A.3d 394, 400 (2013) (citing *Utica Mutual Insurance Company v. Miller*, 130 Md. App. 373, 746 A.2d 935 (2000)). That is, "[i]f any claims potentially come within the policy coverage, the insurer is obligated to defend all claims, 'notwithstanding alternative allegations outside the policy's coverage, until such times . . . that the claims have been limited to ones outside the policy coverage.'" *Utica Mutual*, 130 Md. App. at 383, 746 A.2d at 940 (citations omitted).

The insurer's duty to defend is separate from an insurer's duty to indemnify the insured against any judgment, and "[t]he duty to defend is broader than the duty to indemnify." *Walk v. Hartford Casualty Insurance Company*, 382 Md. 1, 15, 852 A.2d 98, 106 (2004). The complete defense rule has been recognized by Maryland courts in cases involving various types of insurance policies including, for example, general liability policies, *see, e.g., Southern Maryland Agricultural Association, Inc. v. Bituminous Casualty Corp., 539 F.Supp. 1295* (D. Md. 1982); errors and omissions policies, *see, e.g., Utica Mutual*, 130 Md. App. 373, 746 A.2d 935 (2000); and title insurance policies, *see, e.g., Back Creek Partners*, 213 Md. App. 703, 75 A.3d 394 (2013).

Massachusetts and Illinois: Moving Away from Complete Defense Rule

Courts from other jurisdictions that have traditionally followed the complete defense rule have recently questioned the rationale of this obligation in the context of title insurance. These courts have concluded that the complete defense rule should not apply in the title insurance arena and, accordingly, have relieved title insurers from their complete defense obligation for claims outside the policy's coverage provisions.

In a case labeled by certain commentators as "a monumental decision," the Massachusetts Supreme Judicial Court in *GMAC Mortgage, LLC v. First American Title Insurance Company*, 464 Mass. 733, 985 N.E.2d 823 (2013), broke ranks with the complete defense rule and concluded that the rule was inapplicable to title insurance. Jerel J. Hill, Amelia K. Steindorff and Vanessa

H. Widener, *Recent Developments In Title Insurance Law*, 49 Tort Trial & Ins. Prac. L. J. 425, 437 (Fall 2013). The court held that under Massachusetts law, "[a] title insurer does not have a duty to defend the insured in the entire lawsuit where one claim is within the scope of the title insurance coverage and other claims are not." 985 N.E.2d at 831.

In *GMAC*, in answer to a certified question from the United States District Court, the state court held that the complete defense rule did not apply "[i]n the unique title insurance context" because title insurance "[i]s fundamentally different from general liability insurance." *Id.* at 828. These differences between title insurance and general liability policies include, among other things, the coverage assumed by the carriers and premium payment structure for the policies:

> Such differences are reflected in the differing payment schemes and length of coverage as between title and general liability insurance: title insurance typically requires a single premium payment (often a percentage of the property value) for indefinite coverage, whereas general liability insurance requires continuation premiums (based on the likelihood a future event will occur) for coverage during a set term. In light of the limited purpose and scope of title as compared to general liability insurance, title insurers should not be obliged to defend against noncovered claims just because they may be asserted in litigation that also implicates title-related issues to a limited extent.

Id. at 828-829 (citations and footnotes omitted); *see also Deutsche Bank National Association v. First American Title Insurance Company*, 465 Mass. 741, 745-746, 991 N.E.2d 638, 642 (2013) (*GMAC*'s ruling that the complete defense rule was inapplicable to title insurance "[w]as predicated on the unique purpose of title insurance as compared to general liability insurance."); *see generally* B. Burke, Law of Title Insurance, §2.01, at pp. 2-3 to 2-22.2 (3d ed. 2015); 1 J. D. Palomar, Title Insurance Law, §§1.14-1.17, at pp. 38-46 (2014-2015 ed.)

The *GMAC* court further noted that a "rationale" underpinning the complete defense rule for general liability policies "[i]s that dividing representation between covered and noncovered claims is impractical." 985 N.E.2d at 828. On the other hand, "[b]ecause title issues are discrete, they can be bifurcated fairly easily from related claims, . . . thus, the central policy behind 'in for one, in for all' --- that parsing multiple claims is not feasible --- is not implicated to the same extent in the title insurance context as in the general liability insurance context." *Id.* at 829.

The Massachusetts court also concluded that the title insurer was not required to defend counterclaims against the insured in situations where the insurer initiated litigation to cure a title defect, at least in cases where the counterclaim was permissive as opposed to compulsory under state procedural rules. *Id.* at 829-831.

More recently, in *Philadelphia Indemnity Insurance Company v. Chicago Title Insurance Company*, 771 F.3d 391 (7th Cir. 2014), the United States Court of Appeals for the Seventh Circuit, interpreting Illinois law, adopted the reasoning of *GMAC* and also concluded that the complete defense rule was inapplicable to title insurance. The court held that the insurer was not required to provide a defense for all the claims against the insured, even though some of those claims were within the title policy's coverage.

In *Philadelphia Indemnity*, a lender made certain loans to finance the purchase of a commercial building, secured by various mortgages on the property. The mortgages were insured under a title policy based on the standard 1992 form developed by the American Land Title Association that required the title insurer, among other obligations, to "'[p]ay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage,'" subject to the "Conditions and Stipulations" contained in the policy. *Id.* at 394. One of the Conditions of the policy stated that "The Company *will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.*" *Id.* at 395 (emphasis in original).

Various lawsuits ensued, with several claims asserted against the insured lender, Western Capital Partners LLC. The insurer, Chicago Title Insurance Company, agreed to pay the defense costs related to some of the counts against the insured, but declined to pay defense costs for counts that the insurer argued were outside the title policy's coverage, which the insurer claimed it had no duty to defend. Western Capital and its general liability insurer, which had paid certain of Western Capital's litigation costs, argued that Chicago Title owed Western Capital a defense on all claims asserted against it in the underlying litigation. The district court agreed and held that the insurer was required to provide a defense on all claims.

On appeal, the Seventh Circuit framed the issue before it as follows:

> The primary issue on appeal is the scope of Chicago Title's duty to defend Western Capital in the underlying litigation. The policy language specifically limits Chicago Title's defense obligation to claims alleging defects in title, lien priority, encumbrances 'or other matter insured against by this policy,' and disclaims any duty to defend 'causes of action which allege matters not insured against by this policy.'
> *Id.* at 397.

The appellate court reversed the district court, concluding "[t]hat the complete-defense rule does not apply to title insurance." *Id.* at 401. The court drew a distinction between general liability insurance policies, where the complete defense rule is applicable, and title insurance, which the court characterized as "much narrower":

> Title insurance is much narrower. A title insurer only assumes risks associated with defects in property title . . . . The indemnification coverage is limited to losses from defects in title, lien priority, encumbrances, and other similar title risks, . . . and the defense duty is likewise specifically limited to claims that are covered by the title policy, ...
> *Id.* at 399 (footnotes and citations omitted).

The Seventh Circuit found no Illinois precedent directly on point. It believed, however, that the Illinois Supreme Court would likely reach the same result as *GMAC*, in which the Massachusetts court held the complete defense rule inapplicable to title insurance. 464 Mass. 733, 985 N.E.2d 823

Maryland's Duty to Defend Change?

Whether Maryland ultimately will adopt the reasoning and conclusion of the courts in *GMAC* and *Philadelphia Indemnity* remains to be determined. In *Back Creek Partners*, a case involving title insurance, the court acknowledged a title insurer's complete defense obligation. 213 Md. App. 703, 75 A.3d 394 (2013). The court noted that the insurer's "[d]uty to defend is not limitless," but also "recognize[d]" that if any claims against the insured triggered the potentiality of insurance, the insurer must defend against all claims. *Id.* at 399, 400. In *Back Creek*, however, because the title insurance policies at issue "[c]ould not possibly have covered" the claims against the insured, "[t]he duty to defend never attached in the first place." *Id.* at 398, 401. Thus, the

issue whether the complete defense rule is applicable to title insurance does not appear to have been squarely before the court.

The reasoning adopted by the courts in *GMAC* and *Philadelphia Indemnity* legitimately raises the question whether the complete defense rule merits reconsideration in Maryland in the context of title insurance. "[B]ecause title insurance is fundamentally different from general liability insurance," *GMAC*, 985 N.E.2d at 828, and for the other reasons summarized in these recent cases, a strong argument can be made that the complete defense rule should not apply with respect to title insurance. This is particularly true in situations such as in *Philadelphia Indemnity*, where the title policy itself makes clear that the carrier "will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy." *Philadelphia Indemnity*, 771 F.3d at 395 (emphasis omitted). Imposing a complete defense obligation on a title insurer in these circumstances is at odds with both the policy's contractual language and the intentions of the parties based on that language. In any event, though, the rationale endorsed by recent decisions from other jurisdictions suggests that the validity of the complete defense rule in cases involving title insurance should be examined anew to determine whether the rule deserves continued application.

Mr. Heller is a Partner in the Bethesda office of Linowes and Blocher LLP. His practice concentrates on real estate and business litigation.