

ROGERS PARTNERS COVERAGE CHECKLIST
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There are a number of issues that should be considered when performing a coverage analysis. On a high level, non-exhaustive basis, those issues include the following:

Is the Person or Entity Covered/Insured: *Coverage typically extends to:*

- Named insured;
- Additional insureds pursuant to an additional insured endorsement; and potentially,
- Within the expanded definition of insured in the policy *i.e.* family member of insured; employee of insured corporation, etc.

Did the Loss or Triggering Event Occur During the Policy Period?

- Occurrence based – date of loss falls in policy period;
- Claims Made - claim made in writing during policy period, and reported as required by the policy.

Does the Claim Fall Within the Grant of Coverage?

- Carefully review the insuring agreement in the policy, and consider whether the claim(s) advanced against the insured falls within the scope of the grant of coverage provided;
- Consider the cause of the loss - under certain policies, certain causes of loss, like flooding, are not covered;
- For liability claims, are the property damages and /or bodily injuries claimed for covered?
- Consider whether fundamental nature of policy is potentially contingent on certain underlying conditions or events being met, e.g.: coverage only available if there is no underlying coverage such as in a contingent lessor's policy. This is different than a priority provision as there is no overlap in coverage in such circumstances;
- Is the coverage grant worded so as to cover only direct and not indirect or consequential losses?

- Does the grant not extend to intentional acts (note: s. 118 of the *Insurance Act*, as it relates to intentional and criminal acts)?

Are the Damages Covered?

- Does the policy cover only compensatory damages?
- Does the policy purport to cover punitive damages?
 - Is the coverage of punitive damages against public policy and/or otherwise unenforceable?

Geographic Limits of Coverage

- Location of loss: consider the policy territory definition as it is often confined to Canada and the US.

Exclusions

- Consider whether there are any operative exclusions;
- Find and carefully review exclusion section in policy;
- Exceptions: look for and consider any **exceptions** to the stated exclusions.

Relief from Forfeiture

- Consider whether any potential coverage breach or denial could be relieved against by the courts on application by the insured;
- Relief typically applies to imperfect compliance rather than non-compliance with a term of coverage and will usually only be granted where the insured has “clean hands” *and* the insurer has not suffered prejudice as a consequence of the breach or failure of the insured.

Waiver and Estoppel

- Consider whether the insurer could be seen to have waived or be estopped from relying on the breach of condition or failure by the insured;
- *Waiver*: generally includes conscious and deliberate waiving of legal rights by the insurer. Detrimental reliance on the waiver by the insured is not required;

- *Estoppel*: generally includes an express or implicit communication by insurer to insured that it does not intend to rely on the policy term or breach thereof. The insurer must have intended this assurance to affect the legal relationship between it and the insured, and the insured must have relied on the assurance to the insured's detriment.

Non-Waiver Agreements and/or Reservation of Rights Letters

- Communication from insurer to insured which makes it clear that by undertaking investigations and steps in furtherance of the contract, the insurer is not affirming coverage. The purpose is to permit investigations prior to making a decision on coverage.

Interpretive Aids

- Be mindful of canons of construction and interpretation whereby coverage granting language is construed broadly and coverage limiting provisions are construed narrowly;
- Any genuine ambiguity is to be resolved against the insurer;
- *Contra proferentem* (ambiguity is interpreted against the interests of the drafter – usually the insurer).

Other Insurance Clauses - Priority of Coverage

- Consider whether the loss may be covered by another overlapping policy of insurance available to the insured;
- Consider the 'other insurance' clauses in the policy;
- Generally speaking, if the policies cover the same risk at the same layer, then they are overlapping;
- If they are overlapping, then if both either say they are excess or both say they are primary, then they would likely share *pro rata*; otherwise, follow the priority provisions as stipulated *e.g.* if one policy says it is primary and the other says it is excess.

Duty to Defend vs. Duty to Indemnify

- Duty to defend is based on allegations in the statement of claim and not on what may be found by the court to have occurred, whereas duty to indemnify is based on

the facts as ultimately found by the court;

- To determine if there is a duty to defend, a careful analysis of the allegations in the statement of claim against the insured needs to be undertaken and compared with the grant of cover and the exclusion sections of the policy;
- Duty to defend is, generally speaking, broader than the duty to indemnify and requires only the mere possibility of indemnification under the policy (if the allegations in the statement of claim are proven true) to be triggered;
- If there is a chance that one or more of the damages sought may not be indemnified against if awarded against the insured (*i.e.* punitive damages), then that needs to be explained in a carefully worded reservation of rights letter from the insurer to the insured.

Duty to Defend and Covered vs. Uncovered Claims

- If uncovered claims are, or can be, defended at no extra cost through the defence of covered claims, then there is no allocation issue;
- If there are extricable defence efforts that will be expended in defence of uncovered claims, then an allocation of defence costs between insurer and insured is appropriate;
- Generally speaking, allocation of defence costs occurs at the end of the case, once the nature of the defence efforts are known and quantifiable. In the interim, the insurer is usually required to defend (fund) all defence efforts during the conduct of the litigation.

Duty to Defend: Concurrent Duty to Defend Between Two or More Insurers

- Distinct from the situation between insurer and insured set out above. This is an allocation between insurers who have an overlapping or concurrent duty to defend the insured;
- Allocation is appropriate in this context and will depend upon whether only some (or all) of the allegations against insured engage overlapping duties between insurers and the anticipated efforts expended by defence counsel on the various allegations or claims;
- Court will often allocate defence costs 50/50 between two concurrent insurers during conduct of litigation, with potential reallocation to occur at end of the case based on the issues identified above.