

**DELAWARE  
BUSINESS COURT INSIDER**

# Policyholders Cannot Use Settlements With Claimants to Manufacture Insurance Coverage for Uncovered Claims

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**T**he Delaware Supreme Court has issued the most recent in a series of court decisions to reject the argument that a settlement agreement is a “transformative document” that creates indemnity insurance coverage for an otherwise uncovered claim as to which the insurer had no duty to defend. The court said that settlement agreements are not necessarily reliable “coverage indicators” because they are subject to “manipulation” by policyholders and plaintiffs. Here, we provide an overview of this doctrine and recent significant case law.

Generally, a duty to defend is implicated where the allegations in the underlying complaint against the policyholder allege a risk within the coverage of the policy, while the narrower duty to indemnify a judgment or settlement is determined by the actual facts of the insured’s liability. Generally, if there is no duty to defend, then there can be no duty to indemnify. Where the complaint’s allegations fail to establish a



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duty to defend, policyholders have sometimes attempted to use carefully worded settlement agreements to create indemnity coverage for the settlement, trying to “transform” an uncovered claim into a covered one by describing the loss in terms designed to invoke insurance coverage. For instance, a policyholder and underlying plaintiff might agree to include language in a settlement agreement characterizing a loss as “accidental” or as involving “bodily injury” in an effort to implicate liability insurance cover-

age that applies only to damages because of bodily injury caused by an accident.

In arguing that language in a settlement agreement should be considered evidence that the underlying claim is covered, policyholders have asserted that, if an insurer fails to defend and participate in the settlements, the insurer should be found to have waived any objection to the language the policyholder put in the settlement agreement. Such a rule, however, would penalize insurers for appropriately declining to defend claims for which no defense is owed. Until recently, there were few published decisions addressing whether the characterization of a loss in a settlement agreement between policyholder and claimant can create insurance coverage.

Several courts have acknowledged the potential for collusion in settlements between policyholders and underlying plaintiffs, where one or both parties may have an incentive to include language in the settlement agreement designed to manufacture insurance coverage that would not otherwise exist. For example, as the U.S. Court of Appeals for the Tenth Circuit noted, it would be “hesitant to look to the settlement agreement for guidance because the parties certainly have an incentive to negotiate a settlement agreement that will create liability for the insurer, regardless of the true nature of the action.” See *Banner Bank v. First American Title Insurance*, 916 F.3d 1323, 1328 (10th Cir. 2019). The U.S. District Court for the Middle District of Florida similarly has recognized that “mere reference” to covered terms in a settlement agreement to which the insurer is

not party does not demonstrate that the insurer has a duty to indemnify the policyholder. See *Colony Insurance v. Suncoast Medical Clinic*, 726 F. Supp. 2d 1369, 1379 (M.D. Fla. 2010).

Some policyholders argued that certain Delaware trial court decisions suggested that a claim for which there was no duty to defend could be transmuted into a covered claim based on language that the policyholder and underlying claimant inserted into a settlement agreement. However, Delaware trial courts—and the Delaware Supreme Court—have recently had the opportunity to address the matter head-on, and have rejected this policyholder argument.

In the case of *In re AmerisourceBergen (n/k/a Cencora) Delaware Insurance Litigation*, 2024 WL 5203047 (Del. Super. Ct. Dec. 23, 2024), the Delaware Superior Court considered whether commercial general liability insurers had a duty to indemnify a pharmaceutical company for opioid-related lawsuits brought by government entities that sought to recover for economic harm allegedly caused by the opioid epidemic. In particular, the court considered whether the lawsuits sought “damages” for or because of “bodily injury” as required for coverage under the policies at issue. The policyholder pointed to language in an underlying settlement agreement stating that the settlement resolved claims for bodily injury. The Superior Court, however, refused to “blindly adopt” the settlement agreement’s characterization of the claims. In the court’s view, to do so would be to “encourage litigants to manipulate settlement language to secure CGL insurance coverage where it would otherwise not exist.”

Last month, in the matter of *In re CVS Opioid Insurance Litigation*, 2025 WL 2383644 (Del. Aug. 18, 2025), the Delaware Supreme Court likewise rejected a policyholder's argument that a settlement agreement created indemnity coverage for a claim as to which the insurers had no duty to defend. The court held that the "bodily injury" liability policies at issue in the case did not provide coverage for thousands of opioid-related lawsuits brought against the policyholder by various government and private entities. In reaching this conclusion, the court rejected the policyholder's argument that an underlying settlement agreement was a "transformative document" that demonstrated that it had been sued for damages because of "bodily injury" covered by the policies. The policyholder invoked language in the settlement agreement characterizing the settled claims as being "for bodily injury." The court dismissed the policyholder's arguments as unpersuasive, holding that an underlying settlement agreement is "not a reliable

coverage indicator" and cautioning that "the settlement process can leave insurers on the outside and potentially be collusive." The court held the settlement agreement "does not change the fact that the underlying lawsuits do not seek specific damages tied to individualized injuries" as required for coverage under the policies.

While in some circumstances an insurer may be bound by a policyholder's decision to settle and by the amount of the settlement, courts have held that a policyholder cannot transform an uncovered claim into a covered claim by inserting specific phrases into the settlement agreement. Magic words in an underlying settlement agreement cannot create indemnity coverage where there is no duty to defend in the first place.

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