In for One, and Only One – Title Insurers' Limited Duty to Defend

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If you've read an insurance coverage case, you've probably heard the phrase "in for one, in for all." Sometimes referred to as the "complete defense rule," this old saw is used to force liability insurers to defend their insureds against every count in a complaint, even when only one count even arguably contains a covered claim, or could conceivably trigger the duty to indemnify. Courts tell liability insurers that the duty to defend is simply broader than the duty to indemnify. They usually undertake an "eight corners" analysis: do any of the allegations within the four corners of the complaint fall within the four additional corners of the policy? If so, then the insurer is "in for one, in for all. Courts say that this is a practical approach, since it's tough to divide a complaint neatly into covered and non-covered claims, and awkward to ask one lawyer to defend just one count while another lawyer defends all the rest.

But, as with so many generally applicable rules of insurance law, title insurance is different. And for good reason. The unique and narrow purpose of the title policy is not to protect an insured from suits brought on by the insured's future conduct, but to cover actual losses caused by defects in, or encumbrances on, title – and only if those defects existed at the time the policy issued, not defects that arose afterward. Title insurance is backward-looking, not forward-looking. The risk is primarily limited by title curative activity before closing. Its core purpose is not to defend insureds against future litigation. Instead, litigation is just as often brought *by the insurer* as a way to avoid actual loss as a result of a question about title. By contrast, the liability insurer limits risk by defending the insured against claims that arise from the insured's post-policy conduct, no matter what that might be. The litigation defense is a much more substantial part of the underwritten risk.

Just as important, the pragmatic rationale for the complete defense rule often doesn't apply to title claims. The types of claims brought against a title policy holder actually *are* often neatly distinct from the other, uncovered issues that arise in those cases. For example, a lender forecloses because the borrower doesn't pay her mortgage. Both the lender and the owner have title policies. The borrower raises a slew of defenses against the lender like fraudulent inducement, TILA violations, and the like, but also throws in a claim that the mortgage lien is defective. The insured owner probably isn't covered under her title policy for this alleged defect, because she's the only one asserting that the defect exists.But the insured lender makes a title claim, and the title insurer exercises its right to defend and try to prove the mortgage lien is enforceable. It's quite easy for the title insurer to retain counsel for the insured to appear in the case and handle that one discrete issue. It makes no sense for that lawyer to also be forced to defend the uncovered TILA and fraud claims, which are most often based on totally different allegations from the covered claim. Nor does it make sense, once the validity of the lien is established, to force retained counsel to finish the foreclosure that the insured lender would otherwise have paid for on its own.

This is why the language of most standard American Land Title Association title insurance forms says that a title insurer need defend only covered claims. Some courts have honored that language, and recognized that title insurers shouldn't be bound by the complete defense rule. Others, however, have simply failed to understand this key distinction, and have wrongly (in our view) applied the rule to title insurers. Even though title insurers have long understood that their duty to defend is narrow and limited, cases like these should remind the industry to take such coverage disputes seriously. Title insurers shouldn't lightly assume that the court in which they find themselves will be familiar with the good reasons why title insurers can and should be treated differently when it comes to the duty to defend.