

II. STARTING THE CASE — THE EARLY STAGE: CROSS CLAIMS AND THIRD PARTY CLAIMS TO MAKE OTHERS PAY YOUR CLIENT'S LEGAL BILLS AND LIABILITIES

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In the July edition of *Quarterly*, we tackled drafting a complaint and responding with an answer. With this installment, we will explore the next stage of the proceedings, raising cross claims and third-party claims with an eye toward asserting potential insurance and indemnity rights. If your client is sued, nothing will ease the fears of litigation like having someone else foot the bill. There are two primary ways you can make someone else pay for your client's legal fees and liabilities: insurance and indemnity. The way to enforce insurance and indemnity rights is through cross claims and third party claims.

A cross claim is a claim that a party asserts against an already existing party on the same side of the "v." For defense attorneys, this will be a claim against a co-defendant. A third party claim, on the other hand, is a claim against a non-party. As indicated last time, both cross claims and third party claims are treated as "pleadings" under MCR 2.110(A).

Rules of Pleading Apply

Whether you file a cross claim or a third party claim, the same basic

rules of pleading apply. The cross defendant or third party defendant must file an answer, MCR 2.110(B), which is due within 21 days MCR 2.108(4). All of the requirements for filing a complaint also apply, such as the requirement that the pleader must provide sufficient facts so as to adequately apprise the other party of

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the nature and basis of the cause of action. MCR 2.111(A) and (B). If the cross or third party claim is vague and not clearly designated as a pleading, the court can treat it as such and require that an amended pleading be filed. MCR 2.110(C)(2).

MCR 2.110(C) provides that a cross claim or third party claim "may" be

filed with your answer, but simultaneous filing is not required. You do, however, need to be aware of issues concerning waiver. While a cross claim may be filed with your answer, if you fail to file it with the answer, you have to seek leave of the court or an agreement by opposing counsel in order to file a cross claim. MCR 2.203(D); MCR 2.118.

Third Party Claim Against an Insurer

Third party claims are a little trickier than cross claims, since a third party claim is often asserted against your client's insurer. If you represent a defendant who is served with a complaint and you believe that a liability policy covers this potential liability, be prepared to file an action against the insurer if the insurer refuses to provide a defense.

MCR 2.204 specifically notes that third party claims arise often in the insurance context: "a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plain-

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tiff's claim." This language applies to a defendant's suit against its insurer, but strangely enough, some courts refuse to allow third party actions against an insurer on the basis that it is inappropriate to have a defendant's liability insurer as a party in the case. This general notion is correct, but filing a third party action does not make the insurer a party to the initial lawsuit by the plaintiff.

The fact that coverage lawsuits against insurers are contemplated by MCR 2.204 is demonstrated by the fact that the rule expressly states that third party practice is "[s]ubject to the provisions of MCL 500.3030." MCL 500.3030 prohibits plaintiffs from filing a direct action against a defendant's insurer:

In the original action brought by the injured person, or his or her personal representative in case death results from the accident, as mentioned in section 3006, the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial.

Michigan Rule of Evidence 411 confirms this policy, "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."

Read together these various provisions mean that an insurer cannot be

made a party defendant in the underlying personal injury action, but they do not prohibit third party claims. Despite this common sense approach, some judges refuse to allow a defendant to pursue a third party action seeking coverage from an insurer. So, by way of warning, if you intend to file a third party action on a policy of

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insurance, be prepared that a judge may dismiss the case on this basis. If so, you can still file a separate declaratory action seeking coverage, and it should be assigned to the same judge.

Third Party Claim Against an Indemnitor

You should also look to see whether your client has a right to indemnity from another entity. The procedure is the same as with an insurer. If this other entity is already a

party to the lawsuit, file a cross claim; otherwise, file a third party claim.

Indemnity clauses are common in contracts, especially in construction contracts, and in many purchase orders. The important thing is to read every contract and look for potential sources of indemnity. One common example of using indemnity to your advantage is when the underlying plaintiff is an employee of a subcontractor. This employment relationship alone is generally sufficient to meet the causality requirement in an indemnity agreement. The fact that the employee could not sue his employer has no bearing on whether your client is entitled to contractual indemnity from the employer for the employee's injury.

One notion you should ignore is that express contractual indemnity bears any relationship to the primary concept for all lawyers: fairness (well, maybe not all lawyers). Instead, an indemnity contract can require a party that is free of fault to indemnify a party who is at fault. When considering a contractual indemnity action, you should put tort concepts aside; equity has nothing to do with contractual indemnity.

If successful on an indemnity claim, you can often spare your client not only the cost of any judgment or liability, but an indemnity obligation may also entitle your client to defense costs and attorney fees. Nothing will make your client happier than having someone else foot the legal bill. It is also an easy way as a young lawyer to impress your senior partner.