

5. (2.25 points)

XYZ is a liability insurer facing the following cases:

- Case A: Insured A is being sued for sexual assault. XYZ is the primary insurer.
- Case B: Insured B is being sued for fraud. XYZ is the primary insurer.
- Case C: Insured C is being sued for negligence for an amount within Insured C's primary limits. XYZ is the excess insurer.

Discuss whether XYZ is likely to have a duty to defend in each case, citing any relevant precedents used to support the conclusion drawn.

CONTINUED ON NEXT PAGE

QUESTION 5**TOTAL POINT VALUE: 2.25****LEARNING OBJECTIVE(S): A3, A4****SAMPLE ANSWERS**Sample

Case A:

XYZ has no duty to defend

Sansalone v. Wawanesa

It is intentional act, and injury is possible result of the action. So the injury caused by intentional action which is beyond coverage. So no duty to indemnify.

Case B:

XYZ has no duty to defend

Nichols v. American Home

Fraud is excluded in policy. Duty to defend triggered by duty to indemnify. So no duty to indemnify

Case C:

XYZ has duty to defend

Alie v. Bertrand

Excess policy without specific exclusion follows the form of underlying policy. So it has duty to indemnify => duty to defend

Case C alternate sample

Case C:

Unlikely to have duty to defend

Case: Alie v. Bertrand & Frere

In this case, it was ruled that excess insurer's duty to defend follow the policy terms of the underlying policy (unless specifically exclude duty to defend) since the amount isn't in excess of the primary limits, the excess isn't triggered and there is no duty to defend (would have if limit was breached)

EXAMINER'S REPORT

Candidates were expected to understand the relationship between having a duty to indemnify and a duty to defend. Candidates were also expected to know why there was no duty to indemnify.

For Case C, candidates had to either explain why the excess insurer had a duty to defend or explain that there is no duty to defend provided the amount is within the primary limits.

A common error included:

- For all cases, stating that there was no duty to defend but not providing an explanation based on an actual court case