

DUTY TO DEFEND UNDER THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY

There are two very important promises that are contained in the commercial general liability insurance policy (the "CGL policy"). These promises are referred to as the duty to pay and the duty to defend. The duty to pay originates under the CGL policy Insuring Agreement. Here it provides that the insurance carrier is obligated "to pay sums that the Insured becomes legally obligated to pay because of Bodily Injury or Property Damage". The duty to defend also originates under the insuring agreement. It states that the insurance carrier will have the right and duty to defend all lawsuits that seek bodily injury or property damages.

The duty to defend means exactly what it suggests. If a lawsuit is filed and served on the insured and any part of the claims contained in the lawsuit are covered under the insuring agreement as we have discussed, the insurance company is obligated to retain and pay counsel to represent the insured. Let's look at this in more detail through an example:

CASE EXAMPLE:

A Complaint is filed by a developer who purchased floor joists that were installed in a condominium project. The homeowners complained of sloping floors and demanded they be fixed by the developer. The developer in turn sued the floor joist supplier claiming defective design and manufacturing of the floor joists. The complaint asserts several causes of action including contract based causes of action and negligence based causes of action. At least one of the causes of action asserts property damages as that term is defined under the CGL policy. Since at least one of the causes of action, if proven true, would be covered under the CGL policy the insurance company has an obligation to defend the entire complaint and all the causes of action contained in the complaint.

The duty to defend is far broader than the duty to pay and the two promises are separate and apart from each other. The basis for this conclusion is twofold. The insurance carrier is required to defend claims even if the insured is ultimately found in the trial to have no legal obligation to pay damages. The only requirement is that the suit must assert claims that if true are covered under the CGL policy. And as we saw in the case example, the duty to defend applies to the entire suit including theories and claims that are clearly outside the CGL policy.

The CGL policy actually uses the term "suit" as what triggers the duty to defend. A complaint as we know is clearly a suit as it is a civil proceeding commenced by a plaintiff.

The definition of "suit" as used in the CGL policy also includes arbitration proceedings if the insured is required to submit to such proceedings or if the insurance carrier consents to arbitration.

An example of what is not a "suit," and therefore does not obligate the insurance carrier to provide a defense, is an action filed against an insured for negligent homicide. A negligent homicide proceeding is typically a criminal complaint, and thus does not meet the definition of "suit."

Assuming the definition of "suit" is satisfied, the duty to defend arises if the claims made in the suit could conceivably fall within the scope of an insurance policy's coverage. This means that if hypothetically a lawsuit asserts five causes of action against an insured and only one cause of action is potentially covered under the insurance policy, the insurance company nevertheless has the duty to defend the case.

The amount expended by the insurance carrier in defending a claim is furthermore not credited against the occurrence or aggregate Limits under the CGL policy. Nor do the limits in any way cap the amount that can be spent in the defense. In other words, if the policy limits are \$500,000, and the insurance company needs to spend \$1.0 million to defend it must do so and the limits of \$500,000 are in no way impacted. This fact can be very beneficial to the insured as the costs to defend many cases can be significant.

An insurance company will generally not be able to recover from an insured the cost of defending any claim that was potentially covered by the CGL policy but ultimately was determined not to be a covered claim, although there are

exceptions. The cost of such defense is considered part of the insurer's independent duty to defend. The insurance company furthermore, despite popular belief to the contrary, does not have the right to terminate its defense obligation by simply offering to pay the limits under the policy to the plaintiff. The insurance carrier may be tempted to try this tactics when faced with defending a suit where the damages sought far exceed the limits of the insurance policy. Such a tactic would be counter to the notion that the duty to defend is an independent duty arising out of a separate promise of protection within the CGL policy. Defense of an insured must continue until the case reaches its conclusion, either by settlement with the plaintiff or until a judgment is entered.