

DUTY TO PAY 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 pay means in theory that the insurance company is not obligated to pay the plaintiff until a court awards a judgment. This judgment would need to be against the insured for a claim otherwise covered under the policy. Since most lawsuits do not go to trial, but are instead settled, this determination of whether the insured is obligated to pay is not made by the courts, but by the insurance company itself.

As a practical matter this is how a claim will progress. The insured will be served with a summons and complaint which sets forth the claim. The complaint will need to set forth an “occurrence” and claims for either “bodily injury” or “property damage” for there to be any coverage under the CGL policy. The summons will stipulate the time by which an answer needs to be filed to the complaint. Pursuant to the notice obligations under the CGL policy, the insured defendant will notify the insurance company and request that the lawsuit be investigated, defended and paid if necessary pursuant to the terms of the CGL policy.

The insurance company will conduct its own investigation of the loss and its assessment of the insured’s responsibility for whatever injury or damage has taken place. That investigation and assessment may result in the insurance company determining it is best to settle the claim by making a payment to the plaintiff in exchange for a release of liability of the insured. The insurance company’s right to investigate and settle under the CGL policy.

In the event the insurance company chooses not to settle, obligations are due to the insured to under the duty to defend. The insurance company furthermore retains the right to settle while it is defending the lawsuit. Assuming a judgment is entered against the insured and the claims comprising the lawsuit were covered under the CGL policy; the rendering of the judgment requires the insurance company to make payment to the plaintiff under the duty to pay.

If a lawsuit proceeds through a trial to judgment, determining whether the lawsuit is truly covered under the CGL policy is far easier as this determination can be based on true facts not merely allegations made by a plaintiff as you will see in a complaint.

What will the insurance company pay? The CGL policy again is fairly specific in this regard. With respect to any claim the insurance company defends it will pay the following:

- All expenses the insurance company incurs.
- The costs of any bonds required assuming a judgment is taken against the insured. As a judgment enables the plaintiff to begin attachment of assets owned by the insured, the bond prevents this from happening as an appeal is considered or pursued and at the same time secures the right on the part of the plaintiff to collect on its judgment while such appeal is being considered or pursued.
- All reasonable expenses incurred by the insured at the request of the insurance company to assist them in their investigation or defense of the lawsuit.
- All costs of court.
- All prejudgment interest.
- All post-judgment interest.