Anatomy of a Liability Insurance Policy

Part 3: The Primary Promise to Defend

The Insuring Agreement of a typical liability policy contains the language by which the insurer makes both of its primary promises to the policyholder. In only one sentence, the insurer promises to defend the policyholder in any lawsuit "seeking" a judgment covered by the promise to indemnify found in the policy contract. The promise to defend differs significantly from the promise to indemnify, which is described in Part 2.

Typical policy language expressing the promise to indemnify is:

"We will have the right and duty to defend the insured against any 'suit' seeking those damages."

- "We" refers to the particular insurance company, which is usually identified in the Declarations.
- The phrase "right ... to defend" confers upon the insurer a contractual right to appoint defense counsel and control the defense. However, the insurer's contractual right to control the defense is severely limited by statutory and case law. Since the insurer is not licensed to practice law, its express promise to defend creates an obligation which the insurer cannot lawfully discharge by itself.[1] As a financial institution, the only thing a liability can do to fulfill its promise to defend is pay a lawyer to conduct a defense.[2] Thus, the "right" to defend means that the insurer initially is allowed to choose and control a lawyer who actually conducts the defense at the direction of the insurer. The insurer gets to decide how much effort goes into the defense, whether to settle, and how much to pay.
- The phrase "duty to defend" means that the insurer is required to provide the policyholder a defense. The distinction between the "right" and the "duty" is that the insurer is the beneficiary of the "right", while the policyholder is the beneficiary of the "duty."
- The phrase "any 'suit'" means that the insurer has no obligation until an actual lawsuit is filed. Still, the policyholder usually must notify the insurer when somebody threatens to sue, even though insurer is not required to act until a lawsuit is filed.
- The word "seeking" means that the insurer promises to defend regardless of the outcome of the lawsuit. It is not necessary that the plaintiff recover "damages", only that the plaintiff "seek" to recover potentially covered damages. Thus, the duty to defend is not dependent upon the duty to indemnify ripening into a judgment. The insurer promises to defend whether the policyholder wins or loses the lawsuit. The duty to defend usually ripens at the beginning of the lawsuit and is not extinguished simply because the policyholder wins the plaintiff's lawsuit or an adverse judgment is not covered for indemnity.
- The phrase "those damages" refers to the promise to indemnify which specifies the kinds of damage that the policy covers, such as 'bodily injury', 'property damage', 'personal injury', or 'advertising injury'.

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[1] "No person shall practice law in California unless the person is an active member of the State Bar." (Bus.&Prof. Cd. § 6125.)

[2] "[T]he insurer's duty to defend . . . entails the rendering of a service, viz., the mounting and funding of a defense. . . . It arises as soon as tender is made. It is discharged when the action is concluded." (Citations omitted.) (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 46.)

The obligation to defend is the first primary duty which the insurer must discharge, while the obligation to indemnify is the last. The breadth of the duty to defend is compelled in part by ignorance. At the outset of a lawsuit, nobody knows how it will come out. Maybe the policyholder is innocent, maybe not. Maybe some of the plaintiff's accusations are true while others are not. No matter how compelling the evidence may be to support one outcome or another, no one can accurately say how a jury might decide until the lawsuit is over.

The Supreme Court has described the duty to defend as follows: "[T]he nature of the obligation to defend is itself necessarily uncertain. [W]e cannot absolve the carrier from the duty to defend an insured for loss of the nature and kind against which it insured. [T]he insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage."[3]

In addition to the policy contract language and case law, the duty to defend is described by Civil Code § 2778, which provides in part: "(3) An indemnity against ... liability ... embraces the costs of defense against such ... liability incurred in good faith, and in the exercise of reasonable discretion. (4) The [insurer] is bound, on request of the [insured], to defend actions ... brought against the [insured] in respect to the matters embraced by the indemnity, but the [insured] has the right to conduct such defenses, if he chooses to do so. (5) If, after request, the [insurer] neglects to defend the [insured], a recovery against the [insured] suffered by him in good faith, is conclusive in his favor against the [insurer]. (7) A stipulation that a judgment against the [insured] shall be conclusive upon the [insurer], is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action."

[3] *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 271-76 (citations and ellipses omitted.)