

Various Policy Defense Language

Introduction

California authorizes insurers to issue policies in over twenty different classes,¹ one of which is liability insurance. While the insurance industry tends to use standardized policy language,² liability policies do use significantly different language, which the courts have interpreted to create differing obligations. Most case law addressing the duty to defend³ focus on standard CGL policy language. Professional malpractice policies frequently supplement CGL language with an express right to select defense counsel. Title policies tend to limit the insurer's obligation to pay for a defense to only specified causes of action. Often, Directors and Officers insurance is not liability insurance at all, but is reimbursement insurance, which creates a qualitatively different obligation to indemnify the policyholder for the costs of defense one incurs and pays.

1. CGL Policy

A standard CGL policy provides: "We will have the right and the duty to defend the insured against any 'suit' seeking those damages."

2. Auto Policy

An ISO auto form provides: "We will defend, as we consider appropriate, any claim or suit asking for these damages."

3. Homeowner Policy

A standard Homeowners policy provides: "We will provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent."

4. Professional Malpractice Policy

A typical attorney malpractice policy provides: "The Company shall have the right and duty to defend, in the Insured's name and on the Insured's behalf, a claim covered by this policy even if any of the allegations of the claim are groundless, false or fraudulent. The Company shall have the right to appoint counsel and to make such . . . defense of a claim as is deemed necessary by the Company."

5. Title Policy⁴

A typical CLTA title insurance policy provides: "[T]he Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. . . . The company will not pay any fees, costs or expenses incurred by an insured in the defense of those causes of action which allege matters not insured against by this policy."

6. D&O Policy

The language of a Directors and Officers insurance varies widely from insurer to insurer. One policy provides: "The Company shall pay on behalf of a Director or Officer all Loss, which such Insured Person becomes legally obligated to pay on account of any claim(s) made against him during or after the Policy Period for a Wrongful Act, committed before or during the Policy Period; and Reported to the Company."⁵ Note that this language omits any promise to defend.

¹ Ins. Code § 100.

² The Insurance Services Office (ISO) drafts policy language which a vast majority of insurers use verbatim or adapt to manuscripted forms.

³ See, *Duty to Defend* at DutytoDefend.com.

⁴ See, *Duty to Defend - Title Insurance* at DutytoDefend.com.

⁵ *Olson v. Federal Ins. Co.* (1990) 219 Cal.App.3d 252, 258 (ellipses omitted).

“Unlike a comprehensive general liability policy, D&O policies . . . are indemnity-only policies, whereby the insurer reimburses defense expenditures only after the insured selects counsel, controls the defense, and submits the defense bill”⁶ “An insurer may assume a duty to reimburse for defense costs without assuming a duty to defend. Therefore, an obligation to reimburse is not determinative of an obligation to defend. [T]herefore, the [insurers] do not have a duty to defend under Cal.Civ.Code § 2778(4), because a contrary intention appears. A liability policy provides coverage for a loss which the insured becomes legally obligated to pay, whereas an indemnity policy provides coverage only for those losses actually paid out by the insured. If an insurer has an obligation to pay defense costs under a liability policy, as opposed to an indemnity policy, the insurer must pay the costs as they are incurred.”⁷

7. Excess Policy

A form of excess policy provides: “If a claim is made or a suit is brought against the ‘insured’ for damages . . . we will provide a defense at our expense by counsel of our choice, even if the suit is groundless, false, or fraudulent.”

8. Various Policies

Some forms of policies include a sentence like the following: “However, we have no duty to defend any ‘insured’ against a ‘suit’ seeking damages . . . to which this insurance does not apply.” This language appears to equate the duty to defend with the duty to indemnify. However, the enforceability of such a provision in California is doubtful.⁸

⁶ *Executive Risk Indem., Inc. v. Jones* (2009) 171 Cal.App.4th 319, 324, fn. 4.

⁷ *Save Mart Supermarkets v. Underwriters at Lloyd’s London* (ND Cal. 1994) 843 F.Supp. 597, 603 (citations and ellipses omitted.)

⁸ See, *Duty to Defend* at DutytoDefend.com.