

Anatomy of a Liability Insurance Policy

Part 2: The Primary Promise to Indemnify

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 indemnify the policyholder for a judgment entered in a court of law that satisfies all of the other provisions of the policy contract. The promise to indemnify differs significantly from the promise to defend, which is described in Part 3.

Typical policy language expressing the promise to indemnify is:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’, ‘property damage’, ‘personal injury’, or ‘advertising injury’ to which this insurance applies.”

- “We” refers to the particular insurance company, which is often identified in the Declarations.
- “The insured” refers to the person named in the Declarations as the “named insured” and as supplemented in the jacket under a section usually labeled “Who is Insured.”
- The phrase “becomes legally obligated” means a final adverse judgment must be entered in a court of law. Thus, the duty to indemnify cannot ripen until the end of a lawsuit.
- The phrase “to pay as damages” has special meaning in the law. There are lots of remedies for which a defendant can be sued, but not all of them require payment of money, nor will an obligation to pay money necessarily constitute “damage”, as that word is interpreted to mean in case law. Many remedies available in court do not constitute “damage” and therefore are not covered, such as equitable remedies of declaratory or injunctive relief and disgorgement.
- The next series of terms (“bodily injury”, ‘property damage’, ‘personal injury’, and ‘advertising injury’) all have special meaning found in the Definitions. Each of these defined terms operate to limit the scope of coverage.
- The phrase “to which this insurance applies” effectively incorporates the remainder of the policy, clarifying that establishing the duty to indemnify requires that all of the intricacies of the policy must be satisfied. Significantly, the promise to defend usually is not limited by this phrase: “to which this insurance applies,” which constitutes one of the bases upon which the duty to defend is considered to be broader than the duty to indemnify.

Note that the language of the Insuring Agreement’s promise to indemnify is very broad. If the sentence ended with “We will pay those sums that the insured becomes legally obligated to pay”, the policyholder may not need to buy any other insurance. The insurer would be obligated to pay any money judgment in any lawsuit, of any nature, at any time, for any activity. The use of the phrase “to which this insurance applies” incorporates the limits, exclusions, conditions, definitions and other restrictions, which ultimately renders the promise to indemnify quite narrow.

Note also that the insuring clause usually makes no express promise to settle any lawsuit. Instead, the insuring agreement grants to the insurer the rights, but not the obligation to settle. The law does recognize an implied duty to settle under very limited circumstances.