Duty To Defend
Step by Step Analysis

Simplicity

Liability insurance policies make two primary promises: 1) a promise to **indemnify** the policyholder for liability to a third party plaintiff that is **actually** covered; and 2) a promise to **defend** (pay for a lawyer to conduct the policyholder's defense) that is **potentially** covered for indemnity. Analyzing the duty to indemnify can be mind numbingly arcane. Analyzing the duty to defend is much simpler and quicker.

A policyholder usually need only show that it is conceivable that the plaintiff's lawsuit could result in a covered judgment.[1] The burden then shifts to the insurer to prove conclusively that it cannot.[2] "[I]f it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." (*Woo v. Fireman's Fund Ins. Co.* (2007) 161 Wn.2d 43, 53.)

Five Qualifiers

A typical liability policy has five qualifiers which must be satisfied to trigger the obligation to defend: who, what, how, when and where. If truthful evidence establishes that all five qualifiers exist, then the insurer should agree to defend. To analyze the presence of all five qualifiers, ask: **Does the complaint**:

1. identify a defendant who is an insured? (Who)
2. seek the kind of damage covered for indemnity? (What)
3. allege the kind of activity covered for indemnity? (How)
4. allege loss during the period of time covered by the policy? (When)
5. allege loss within the coverage territory? (Where)

Policy Structure

Liability policies are generally divided into two broad parts: 1) The Lord Giveth; and 2) The Lord Taketh Away. The Lord Giveth portion typically consists of a sentence or two which say "This is what I promise you." The Lord Taketh Away portion is typically the remainder of the policy which says: "I didn't really mean it."

Standard policies are highly structured contracts. The "Declarations" state all the unique variables, such identifying the insured, the policy period, policy forms, and limits of liability. The "Insuring Agreement" states the broad promises to: 1) defend the policyholder; and 2) indemnify the policyholder. Some insuring clauses are written so broadly that, taken alone, the policy might cover the policyholder for just about anything, anywhere, at any time, in any amount. However, the remainder of the policy chips away at these broad promises. "Definitions" narrow the meaning of key words and phrases. "Exclusions" excise broad categories of what might otherwise be covered. "Conditions" describe the policyholder's obligations in order to perfect coverage. Usually, the Insuring Agreement, Definitions, Exclusions, and Conditions are included in a continuously paginated document, often called a "Jacket". A "Package Policy" may include more than one Jacket. "Endorsements" further modify the policy coverage in specified ways.

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[1] See, e.g., *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.

[2] *Id.* at 300.

The Promise to Defend

Standard Commercial General Liability (CGL) policy language is: 1) **The Promise To Indemnify**: "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." 2) **The Promise To Defend**: "We will have the right and duty to defend the insured against any 'suit' seeking those damages."

A typical professional liability policy states: 1) **The Promise To Indemnify**: "The Company shall pay on behalf of any INSURED all DAMAGES . . . which any INSURED becomes legally obligated to pay as a result of CLAIMS first made against the INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD . . . by reason of any WRONGFUL ACT occurring on or after the RETROACTIVE DATE." 2) **The Promise To Defend**: "The Company shall have the right and duty to defend, including selection of counsel . . . any CLAIM for DAMAGES to which this POLICY applies, . . . even if such CLAIM is groundless, false or fraudulent."

Note that none of the foregoing language includes the word "negligence". It is a common, and sometimes fatal error, to believe that an allegation of "negligence" guarantees coverage. Securing coverage usually turns on establishing the existence of the qualifiers identified in the policy and summarized here, none of which expressly requires "negligence".

The Duty to Defend

"We summarize familiar principles pertaining to an insurers duty of defense. An insurer must defend its insured against claims that create a potential for indemnity under the policy. The duty to defend is broader than the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded. Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be covered. Moreover, that the precise causes of action pled by the third party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability. The defense duty arises upon tender of a potentially covered claim and lasts until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage. When the duty, having arisen, is extinguished by a showing that no claim can in fact be covered, it is extinguished only prospectively and not retroactively. On the other hand, in an action wherein none of the claims is even potentially covered because it does not even possibly embrace any triggering harm of the specified sort within the policy period caused by an included occurrence, the insurer does not have a duty to defend. This freedom is implied in the policy's language. It rests on the fact that the insurer has not been paid premiums by the insured for [such] a defense. . . . [T]he duty to defend is contractual. The insurer has not contracted to pay defense costs for claims that are not even potentially covered. From these premises, the following may be stated: If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurers duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance."[3]

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[3] *Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 654-55 (citations, quotation marks omitted).

An insurer's denial letter is usually a good guide to understand the insurer's position regarding its duty to defend.[4]

Qualifier #1: Who

The policyholder/defendant seeking coverage must qualify as an "insured" identified by the policy language. The declarations page usually identifies the "named insured." A provision typically entitled "Who Is An Insured" identifies others who are also protected by the policy as additional insureds. These often include officers, directors and employees of the named insured. Sometimes an endorsement will identify additionally named insureds.

Qualifier #2: What

A phrase in the insuring agreement such as "damages because of 'bodily injury', 'property damage', 'personal injury', or 'advertising injury'" requires that the plaintiff's complaint must seek to recover loss for the limited type of damage identified in the policy. Capitalized terms or those in quotation marks are typically defined in the "definitions" portion of the policy. "Bodily injury" is typically defined in the policy to mean: "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "Property damage" is typically defined in the policy to mean: "Physical injury to tangible property, including all resulting loss of use of that property." "Personal injury" and "advertising injury" are usually defined to include a discrete list of offenses, such as malicious prosecution, invasion of privacy, and wrongful eviction. Not all liability policies insure for all of these typical "what" qualifiers. Some liability policies do not cover bodily injury or property damage at all.

Qualifier #3: How

Liability policies include language identifying how covered loss must happen. The word "occurrence" in a typical CGL insuring agreement requires that the plaintiff's complaint seek to recover loss caused by a qualifying activity. "Occurrence" is typically defined in the policy to mean: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[5] A lawsuit may allege one or more "occurrences." If there are multiple occurrences, the policyholder may have to pay more than one deductible and/or the insurer may have to pay more than one per occurrence policy limit. Not all policies require an "occurrence" as a "how" qualifier. For example, the activity required to establish coverage under a typical professional liability policy requires that the insured commit an "act or omission [in] the performance of professional services for another." Note again, the word "negligence" is usually not a qualifier.

Qualifier #4: When

The phrase "during the policy period" in a typical CGL insuring agreement requires that the plaintiff's complaint must seek to recover loss that happened during an identified period of

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[4] "[E]very insurer ... shall . . . accept or deny the claim, in whole or in part. . . in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such rejection or denial. [If] based on a specific policy provision . . ., the written denial shall include reference thereto and provide an explanation of the application of the provision, condition or exclusion to the claim." (Cal. Code Regs. § 2695.7(b).)

[5] "No all-inclusive definition of the word 'accident' can be given . . . as a source and cause of damage to property, within the terms of an accident policy, [accident] is an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." (*Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 559.)

time. The "policy period" is typically a one year period specified on the declarations page. However, case law addresses whether the wrongful act of the policyholder, the resulting damage, or both must happen during the policy period. Also, case law addresses whether a policy covers an activity which happened during the policy period but results in damage after the policy period. Also some CGL policies include language seeking to limit coverage to damage that "first occurred" during the policy period. The intent of such language is to not cover damage which started prior to the policy inception but continues into the policy period. Some CGL policies also include language seeking to limit coverage if an policyholder **knew** of damage prior to the policy period. Not all policies require that damage "occur" during the policy period as a "when" qualifier. For example, a typical professional liability policy may be triggered by when a "claim" is made rather than when the damage happened.

Qualifier #5: Where

The phrase "coverage territory" in the insuring agreement requires that the plaintiff's complaint must seek to recover loss that happened in an identified geographical area. "Coverage territory" is typically defined in the policy to mean: "The United States of America" or "anywhere in the world." Thus, rarely does the "where" qualifier defeat coverage.

Trigger the Duty to Defend?

If following the foregoing steps yields a conclusion that the insurer is undeniably correct in denying coverage, the policyholder and/or plaintiff may decide to simply accept its decision. If analysis shows that the insurer is justified in denying coverage, but it has failed to consider certain allegations and/or additional facts, the policyholder and/or plaintiff may decide to properly cooperate with each other to urge the insurer to reconsider its denial.

Since the duty to defend arises from a comparison of the language of the policy to the allegations of the complaint, the plaintiff has a great deal of influence over the "potential" for coverage. Therefore securing coverage may provide an incentive for the plaintiff and the policyholder to cooperate with one another to resist a wrongful denial of coverage by the insurer.