

## **PROTECTING YOUR INSURANCE PROTECTION #3**

### **THE INSURANCE COMPANY'S DUTY TO DEFEND**

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Let's face it, the present insurance environment is difficult for policy holders. Premiums are increasing, but at the same time insurance companies are consistently trying to avoid providing coverage or even paying for an attorney in the event that a policy holder is sued. Policy holders should be made aware that, with regard to the litigation coverage provided by their insurance policies, an insurer's duty to provide and pay for an attorney to defend a claim is broader than its duty to pay for a covered loss.

The insurance company's duty to defend is triggered whenever the allegations of a complaint might possibly fall within the scope of the coverage provided, regardless of how false or groundless the allegations contained in the complaint might be, and irrespective of whether the insurer ultimately has to pay for any covered loss. The legal principles applicable to this aspect of insurance coverage require that an insurer must provide and pay for an attorney for the policyholder when the insurance company has actual knowledge of facts establishing a reasonable possibility of coverage. The breadth of the duty to defend applies both to the (1) merits of the claim(s); and the (2) cost of the defense.

The duty to defend is not contingent on the insurer's ultimate duty to indemnify, that is, whether it must in the end pay the losses covered under the policy. In most cases, it is also not important that the complaint against the insured asserts additional claims that fall outside the policy's general coverage or within its exclusory provisions. The insurer

has to defend the whole case. Once again, the sole and essential issue determinative of the duty of the carrier to defend the policy holder is whether the complaint alleges any facts or grounds which bring the action within the purchased insurance protection.

To avoid its duty to defend, an insurer must show that, as a matter of law, there is no reasonable, possible factual or legal basis by which the insurer might be held obligated to indemnify the insured under any provision of the insurance policy. In short, if there is anything within the four corners of the complaint and the policy that raises the possibility of coverage, the insurer should be required to, at the least, provide and pay for an attorney to represent the policy holder.

This basic and established principle was confirmed by the highest court of New York in a recent decision in which the court explained that the duty to defend is ‘exceedingly broad’ and an insurer will be called upon to provide a defense whenever the allegations of the complaint ‘suggest...a reasonable possibility of coverage.’”

From an economic and strategic standpoint, the litigation coverage aspect of an insurance policy is often the most valuable and useful. Lawsuits are costly. It goes without saying that having the insurance company pay for the lawyers to work on your case, instead of you as the policyholder having to pay those legal bills, is a great benefit. It is a benefit that policyholders pay for through their premiums.

Since most of the lawsuits that involve insurance coverage – personal or property damage cases – are settled at some point, having an attorney to represent you is extremely important. Even if the insurance company believes that the loss is not covered or is excluded, meaning that the insurance company will not have to pay for any liability assessed to its policyholder, insurance companies will often contribute to a settlement to

end the litigation. One of the key issues in the insurance company's decision to contribute to a settlement is the payment of legal fees. Under some policies, the amount the insurance company pays for legal fees does not reduce the policy limits for the claim. The insurance company has to pay the legal fees and on top of that might have to pay the covered loss up to the amount of the policy limit. The added exposure for the payment of the legal fees is often a strong incentive to settle the case, even if the insurance company believes it might not ultimately have to pay indemnity under the policy.

### **G & C Commentary**

It is significant to note that an insurer's obligation or duty to defend an insured will often depend on the specific facts and variables unique to each particular circumstance. Do not let a carrier attempt to confuse or obscure its obligation to defend a policy holder with issues concerning coverage of the ultimate losses involved. In any instance where insurance defense and indemnity to a claim may be an issue, it would be prudent to seek counsel of an attorney or insurance professional to protect and maximize your insurance protection.