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PERSPECTIVE

Scrutinize every lawsuit for claims of defamation

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Insurers market and sell commercial general liability insurance policies which promise their policyholders a defense against lawsuits brought by third parties. However, policyholders often overlook these policies as a source of funding for the defense of commercial litigation. For this reason, either the lawsuit is not tendered to the CGL insurer, or, if tendered and denied, the insurer's denial is accepted without challenge.

There are two main reasons why CGL insurance is often overlooked by policyholders when defending commercial litigation. First, most policyholders do not read their policies. They are unaware, therefore, that their CGL policy — in addition to insuring against third-party claims alleging liability for property damage and bodily injury — may also cover them against liability for certain other enumerated torts.

One such tort that CGL insurance policies almost always cover is defamation, i.e., libel and slander. In contentious commercial litigation, it is not uncommon for a complaint to include some allegation — perhaps buried in the complaint's recitation of the background facts — that the defendant made some defamatory, disparaging, or derogatory remark about the claimant. The claimant may also make such an allegation — if not in the complaint itself — in deposition or in responses to written discovery. Defendants are often simply unaware that such an allegation might trigger a duty to defend and entitle them to a legal defense paid for by their CGL insurer.

The second reason CGL insurance is frequently overlooked is because few policyholders are aware of the broad scope of an insurer's duty to defend in California. The following three "duty to defend" rules reflect the breadth of this duty. First, an insurer owes a duty to defend whenever a lawsuit filed against its insured alleges any claim "potentially" covered by its policy. *See Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275 (1966). Second, in evaluating whether a "potentially" covered claim is alleged, the focus is not on the formal "causes of action" pled, but instead on the factual allegations made in the complaint or in any extrinsic materials (such as in discovery). *See, e.g., Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 655 (2005) ("[T]hat 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."); see also *Pension Trust Fund For Operating Engineers v. Federal Ins. Co.,* 307 F.3d 944, 951 (9th Cir. 2002) ("California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty."). And third, if any allegation made in a lawsuit is potentially covered by the insurer's policy, then the insurer has a duty to defend the entire lawsuit. *Buss v. Superior Court*, 16 Cal. 4th 35, 48 (1997).

Applying these duty to defend principles, California courts have long held that CGL insurers owe a duty to defend potential claims of defamation regardless of whether a tendered complaint pleads a formal cause of action for "slander" or "libel," and regardless of whether every element of a slander or libel claim has been alleged. *See, e.g., CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 608 (1986) (duty to defend owed based upon allegations made in antitrust lawsuit that the insured had "misrepresented the business, property and rights possessed by [plaintiffs] to persons with whom plaintiffs did business"); *Barnett v. Fireman's Fund Ins. Co.,* 90 Cal. App. 4th 500, 510, n.5 (2001) (finding duty to defend where complaint alleging causes of action for breach of fiduciary duty, intentional interference with contractual relations, breach of the implied covenant of good faith and fair dealing, and fraud contained allegations the insured made "disparaging" statements); *Dobrin v. Allstate Ins. Co.,* 897 F. Supp. 442, 443 (C.D. Cal. 1995) (duty to defend was owed to an attorney sued by his former law partner based upon allegation the attorney had breached his fiduciary duty by "misrepresenting the nature and circumstance of the dissolution" to the firm's clients).

As applicable to defamation claims, the duty to defend principles laid down exactly 50 years ago in *Gray v. Zurich* were recently affirmed by two federal district court decisions in California. *See KM Strategic Management LLC v. American Cas. Co. of Reading PA*, 15 1869 (C.D. Cal. Dec. 21, 2015), and *MedeAnalytics Inc. v. Federal Ins. Co.,* 15— 04101 (N.D. Cal. Feb. 19, 2016). Both of these decisions involved underlying lawsuits whose captions reflected what most policyholders might consider to be "uncovered" causes of action, e.g., breach of contract, interference with contract, and interference with prospective economic advantage. However, included in the underlying lawsuits were factual allegations suggesting the insureds might be facing potential liability for defamation. The district courts in both cases held that despite the absence of any cause of action for libel or slander, the CGL insurers owed their insureds a duty to defend.

These decisions demonstrate that the duty to defend is not determined by captions, labels, theories of liability, or causes of action. Instead, the duty is determined by factual allegations, and whether they suggest any potential that an insured defendant might ultimately face at least some liability covered by its policy. For this reason, CGL insurance and its coverage for claims of defamation should not be overlooked when defending commercial litigation.

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