Published on *The National Law Review* https://natlawreview.com

CGL Insurer Has Duty to Indemnify Notwithstanding that Underlying Complaint Did Not Trigger Duty to Defend

Article By:

Seth Lamden

The court in **Gilbane Building Co. v. Admiral Insurance Co., 664 F.3d 589 (5th Cir. 2011)**, held that an insurer that had no duty to defend was nevertheless obligated to indemnify the insured for a settlement with the underlying claimant because evidence from the underlying litigation established that the insured was liable for covered damages. CGL insurers often argue that a finding of no duty to defend in a lawsuit precludes a duty to indemnify. The Gilbane decision aptly illustrates why that argument is incorrect.

Standard form CGL policies impose two distinct contractual obligations on insurers: (1) to defend the insured against any third-party claim that is "seeking" damages that are potentially covered under the policy; and (2) to indemnify the insured for a settlement or judgment that is actually covered under the policy. Because defense and indemnity coverage provide fundamentally different protections, different standards determine when the insurer is obligated to perform each of these separate obligations. In general, the duty to defend arises whenever allegations in a suit brought against the insured create the potential for covered liability. Neither adjudicated facts nor the ultimate basis for liability, if any, is relevant to the determination of the duty to defend. Indemnity coverage, on the other hand, is contingent only on the actual facts, and whether the suit initially brought against the insured was "seeking" covered damages should not be relevant to whether the insurer must pay damages on behalf of the insured. As the Gilbane court recognized, an insurer may be obligated to defend a claim in which no covered damages ultimately are awarded, and an insurer may have a duty to pay covered damages even if it had no duty to defend.

The insured in Gilbane was a general contractor that sought a defense and indemnity as an additional insured under a CGL policy issued to its subcontractor for a lawsuit brought by one of the subcontractor's employees who was injured at a construction site when he slipped and fell from a muddy ladder. The underlying complaint alleged that the sole cause of the employee's injuries was that the general contractor "failed to keep the construction site in a clean and functional condition," thereby allowing the accumulation of mud on a ladder. The insurer denied coverage for the lawsuit. After settling the underlying lawsuit with the employee, the general contractor sued the insurer for breach of contract for failing to defend and indemnify.

The court in the coverage action held that the insurer was not obligated to defend the general contractor because the underlying complaint did not allege facts that fell within the scope of coverage

provided by the additional insured endorsement on the policy, which applied only if the injury was "caused, in whole or in part, by . . . acts or omissions [of the subcontractor or its employees] . . . ." Under Texas law, the duty to defend is determined pursuant to an "eight corners rule" that requires an insurer to defend an underlying lawsuit only if the facts affirmatively alleged in the "four corners" of the complaint potentially state a claim that falls within the coverage provided by the "four corners" of the policy. The underlying complaint did not allege that the subcontractor (or the employee) was negligent or in any way caused the employee's injuries. Accordingly, the court found that the general contractor was not entitled to a defense.

Notwithstanding its ruling that the insurer was not obligated to defend the general contractor in the underlying lawsuit, the court held that the insurer was obligated to indemnify the general contractor for its settlement with the injured employee based on evidence that the employee had told a co-worker immediately after his fall that his "feet got wrapped up" in an extension cord he had been carrying while climbing the ladder. Noting that "the duty to indemnify . . . is controlled by facts proven in the underlying suit," the court concluded that the settlement was covered because a jury in the underlying lawsuit would have found the subcontractor or the injured employee to be "1% or more responsible for causing the occurrence and/or injuries at issue." Accordingly, the settlement was covered because the employee's injuries were "caused, in whole or in part, by . . . acts or omissions [of the subcontractor or its employees]." Citing D.R. Horton v. Markel Int'l Ins., 300 S.W.3d 740 (Tex. 2009), theGilbane court acknowledged that "this may seem like an unusual result, where there is no duty to defend but the narrower duty to indemnify is triggered," but explained that it is the correct result because "it is possible to prove facts at trial that give rise to a duty to indemnify even when those same facts were not sufficiently pleaded to trigger the duty to defend."

Other courts also have recognized that because the duty to defend and duty to indemnify are separate contractual obligations, the absence of the duty to defend does not necessarily preclude the duty to indemnify. See, e.g., Grinnell Mut. Reins. Co. v. Reinke et al., 43 F.3d 1152 (7th Cir. 1995) ("because of the possibility that the legal theory of the underlying suit may change, a conclusion that the insurer need not defend does not imply that it need not indemnify. It need not indemnify on allegations found insufficient to activate a duty to defend, but the theory of recovery is not fixed until the case ends"); Lee v. Aetna Cas. & Surety Co., 178 F.2d 750 (1949) (recognizing that due to "the plasticity of modern pleading that no one can be positive that that could not happen" the duty to indemnify may arise even in the absence of a duty to defend because an injured party "might conceivably recover on a claim, which, as he had alleged it, was outside the policy; but which, as it turned out, the insurer was bound to pay"); Burlington N. & Santa Fe Railway v. Nat'l Union Fire Ins. Co., 334 S.W.3d 217 (Tex. 2011) (holding that the duty to indemnify for settlements or judgments is determined by the evidence and may exist even where the pleadings did not trigger the duty to defend); Scholle Corp. v. Agric. Ins. Co., 2008 Cal. App. Unpub. LEXIS 2940 (Cal. App. 4th Dist. Apr. 9, 2008) ("[A]lthough the duties to defend and to indemnify may be related, they are not necessarily mutually dependent or coextensive . . . . [T]he fact that the duty to defend is generally broader than the duty to indemnify does not mean . . . that where there is no duty to defend there can be no duty to indemnify"). See also Keystone Consol. Indus, Inc. v. Employers Ins. Co. of Wausau, 456 F.3d 758 (7th Cir. 2006) (reversing trial court's ruling that insurer had no duty to indemnify in an environmental regulatory action in which no underlying lawsuit was filed because "while a lawsuit may be sufficient to trigger an insurer's duty to indemnify, it is not a necessary condition under Illinois law").

Source URL:https://natlawreview.com/article/cgl-insurer-has-duty-to-indemnify-notwithstanding-underlying-complaint-did-not-trigg