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How Broad Is the Duty to Defend? This Broad

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How many times have you seen a court decision or commentary stating that the duty to defend is broader than the duty to indemnify? A lot I bet. Essentially, a policy with a duty to defend provides "litigation" insurance to the policyholder, even though the claim may never result in any indemnity payment. Most courts will liberally construe the allegations in the complaint and generously interpret the provisions of the insurance policy to find the duty to defend. A recent First Circuit case construing Maine law provides another example of exactly how broad the duty to defend is as interpreted by many courts.

In *Zurich American Insurance Co. v. Electricity Maine, LLC*, No. 18-1968 (1st Cir. Jun. 17, 2019), a D&O insurer brought a declaratory judgment action in Maine federal court for a declaration that it had no duty to defend the policyholder against an underlying putative class action over alleged misconduct in charging customers high electric bills. The insurer's argument was simple. The complaint did not allege any bodily injury and the actions complained of did not qualify as an occurrence under the policy. The district court found in favor of the policyholder and this appeal ensued. The First Circuit affirmed.

In affirming, the circuit court was careful to note that it was not saying that the negligent misrepresentation or negligence claims had merit. Nevertheless, the court found that, under Maine law, the factual allegations supporting the claim for negligent misrepresentation and for negligence (same allegations incorporated) fit "comfortably within the definition of an 'accident,' as these claims require proof only of 'event[s] that take [] place without one's forethought or expectation.'" (citations omitted). The court noted that Maine's highest court, the Law Court, has held multiple times that "broad conclusory allegations of 'negligence,' 'pled in the alternative to claims that require proof of intentional misconduct, constitute allegations of 'accidental' or '[un]intentional' activity that suffice to trigger the duty to defend under policies that cover 'accidents.'" (citations omitted).

Even though the facts that supported the complaint's intentional tort and RICO allegations were incorporated by reference to support the negligent misrepresentation and negligence allegations, the court found that this did not require concluding that the policyholder acted intentionally rather than inadvertently. The court held that broad, conclusory allegations such as negligence that were legally insufficient to withstand a motion to dismiss will trigger an insurer's duty to defend whenever the allegations show a potential that liability will be established within the insurance coverage (citations omitted).

On the bodily injury point, the court found that allegations of bodily injury were not necessary to trigger the duty to defend. Citing Maine case law, the court noted that if the tortious conduct alleged in the complaint could have resulted in bodily harm due to emotional distress, the duty to defend was triggered even if there were no express allegations of emotional distress. The court also side-stepped the insurer's definitional argument that "bodily injury" only included mental injury resulting from bodily injury, by stating that the policy was ambiguous because it did not expressly say that it excluded "bodily injury" caused by emotional distress. The court resolved the ambiguity in favor of the policyholder. Nevertheless, the court recognized that "one might doubt whether, in the context of this case, the alleged negligence is of a type that could cause distress that would result in bodily injury."

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