



No Duty to Defend for Trespass Claim

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Insurance carriers are frequently faced with an argument that a duty to defend exists because of the "potential" for indemnity under the insurance policy. This "potential" argument has the potential to broaden coverage under the insurance policy beyond what the insurance carrier intended. That is, insureds often argue that even though the underlying complaint alleges only intentional torts, the potential exists that the facts may support a covered claim. The Ninth Circuit Court of Appeals recently issued a decision that carriers may find helpful in responding to potential claims.

In *Zimmerman v. Allstate Ins. Co.*, the claimants alleged that the insured and three neighbors trespassed upon the claimants' property. The homeowners policy required Allstate to "pay damages . . . arising from an occurrence to which this policy applies." The Policy defined an "occurrence" as "an accident . . . resulting in bodily injury or property damage." Allstate also owed a duty under the Policy to "provide a defense" if the Zimmermans were "sued for [covered] damages."

The Ninth Circuit evaluated the duty to defend based on whether the insured could potentially be liable under the complaint for damages resulting from an "accident." Citing California law, the Ninth Circuit defined "accident" as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." In applying that definition to the facts, the Ninth Circuit held that trespass is an intentional tort, and "it is well settled that intentional . . . acts are deemed purposeful rather than accidental."

Significantly, the Ninth Circuit held that a duty to defend was not triggered by the possibility that the claimants might amend their complaint to allege that the insured was negligent. The court stated, "'Negligent' and 'accidental' are not synonymous." Based on the facts before it, the Ninth Circuit held that the insured's conduct was purposeful and the damage caused could not be unexpected or unforeseen.