



Petersen v. Columbia Casualty Company: A Case Study in the Differences Between the Duty to Advance and the Duty to Defend

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On August 21, 2012, in *Petersen v. Columbia Casualty Company, et al.*, No. SACV-12-00183, U.S. District Judge James V. Selna held that a professional liability insurance policy, which provided that the insurer had a duty to advance defense expenses, should *not* be interpreted under the standards that govern policies containing the broader “duty to defend.”

The Facts

Gregory Petersen (Petersen) was an attorney with the law firm of Jackson, DeMarco, Tidius & Peckenpaugh (JDTP). Petersen – while working at JDTP and for some time thereafter – represented the San Diego Police Officers’ Administration (the SDPOA) in various employment benefits and labor negotiations cases. The SDPOA subsequently terminated Petersen as its counsel and brought a legal malpractice action against both Petersen and JDTP. JDTP’s professional liability carrier, Columbia Casualty Company (Columbia), paid all of the defense costs incurred by JDTP and Petersen in defending the legal malpractice action in excess of the Columbia policy’s \$150,000 retention, which JDTP paid. JDTP and Petersen eventually settled the legal malpractice action with SDPOA, and Columbia funded the settlement pursuant to its obligations under the policy.

After the settlement of the legal malpractice action, JDTP commenced an arbitration against Petersen seeking reimbursement of the \$150,000 it paid to satisfy the retention under the Columbia policy and approximately \$100,000 in additional fees it incurred stemming from two other malpractice actions against Petersen prior to his departure from the firm. Petersen, in turn, tendered JDTP’s

arbitration demand as a claim under the Columbia policy, and requested that Columbia advance the costs of his defense as well as indemnify him. When Columbia denied coverage, Petersen filed a declaratory judgment action. Columbia moved for summary judgment in its favor, and Petersen cross-moved.

The Decision

In the coverage action, Petersen contended that the duty to advance defense expenses is sufficiently analogous to the duty to defend such that the same standard should apply. Petersen argued that, under that standard, “Insurers have to show there is no possibility of coverage in the underlying dispute,” but that here a possibility of coverage for the underlying matter existed.

Columbia, on the other hand, argued that the “possibility of coverage” standard and other rules governing duty to defend policies do not apply to policies containing only a duty to advance defense costs. Columbia asserted instead that the issue should be analyzed similarly to a duty to indemnify.

In analyzing the issue, the court initially noted that the cases relied on by Petersen did not compel the conclusion he advocated. In *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989), the court merely held that the insurer had a duty to pay defense costs as they are incurred. Judge Selna also found *In re Worldcom Securities Litigation*, 354 F. Supp. 2d 455 (S.D.N.Y. 2005) and the cases cited therein unpersuasive because *Worldcom* did not apply California law and several of the cases the court relied on stood only for the point of law stated in *Gon*.

Judge Selna then noted that courts applying California law have found the rules regarding interpreting a duty to defend are not applicable to a duty to advance defense expenses. See, e.g., *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F. Supp. 2d 995 (C.D. Cal. 2009); *Legacy Partners, Inc. v. Clarendon American Ins. Co.*, 2010 WL 1495198 (S.D. Cal. Apr. 14, 2010).

Judge Selna also observed that the policy “provides for claim expenses to be advanced subject to several conditions.” In that regard, the court stated that the policy specifically provided that the assureds must consult with the insurer about incurring reasonable defense costs and must obtain the Insurer’s consent prior to making any settlement or settlement offers. The policy also required the parties to allocate defense expenses between covered and uncovered matters and allowed the insurer to set an allocation unilaterally if one could not be agreed upon.

Judge Selna concluded that the above conditions, when “[c]ombined with the explicit disclaimer of any duty to defend,” rendered it inappropriate to analyze the insurer’s duty to advance defense expenses according to rules formulated in cases regarding duty to defend policies. Accordingly, Judge Selna held that Petersen bore the burden of establishing that the underlying claims were within the

scope of coverage in order to obtain any advancement of fees for each claim. The court then analyzed each of the underlying claims asserted against Peterson, determined that they were not covered for various reasons, and held that he was not entitled to any advancement of defense fees.

Conclusion

The *Petersen* decision clearly analyzes the differences between a policy that provides a “duty to advance claims expenses” and a policy that provides a “duty to defend.” The decision is important because it illustrates the different standards and burdens of proof that apply in interpreting an insurer’s obligation to pay defense fees under these two very different types of policies.

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