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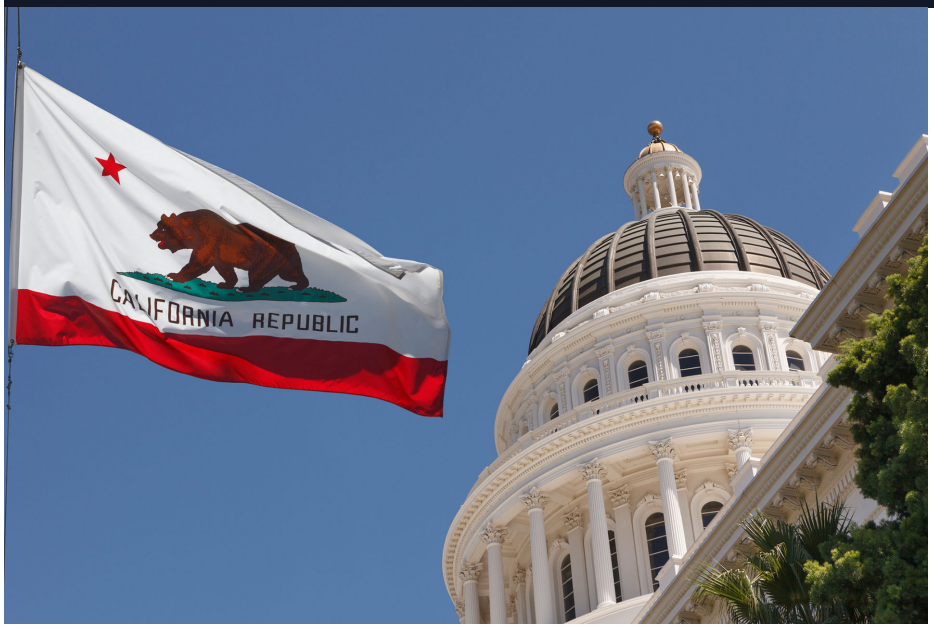

Don't Give Up On Payment Of Non-traditional Defense Costs Under California Law

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With the use of e-discovery managers, experts, and other vendors becoming part of the ordinary course of commercial litigation, should your company's commercial general liability (CGL) policies provide coverage for those costs? Certain insurers have said no, but we believe the answer should be yes under California law.

Let's use a hypothetical scenario to examine why.

The good news: Despite having been sued in a lawsuit, you've already gotten over the initial hurdles of getting your insurer to accept defense under the applicable CGL policy and recognize your right to independent counsel based on the nature of the claims asserted against you.

The bad news: Your insurer has refused to reimburse certain costs you have incurred in the defense of the lawsuit. The insurer contends that they aren't reimbursable "defense costs" under the CGL policy, because they don't constitute traditional attorneys' fees and costs incurred by your defense counsel.

Is your insurer correct that it has no obligation pay? Not in our view.

As a preliminary matter, under California law defense costs payable under a CGL policy aren't limited solely to the attorneys' fees and costs of defense counsel retained by an insured. Appropriate defense costs also include costs

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incurred by third parties which are necessary for an effective defense. For example, the fees of experts, consultants and other outside e-discovery professionals (including those reviewing and organizing document productions) are properly payable by an insurer under a CGL policy. Similarly, case law has determined that certain third party investigation expenses constitute recoverable defense costs as well.

Ultimately, to the extent an insured has a plausible argument as to why any fees or costs incurred benefit the defense, the possibility remains that they may be reasonable and necessary defense costs.

When faced with an insurer's refusal to pay certain defense fees or costs, a best practice is to carefully consider whether the subject fees or costs relate to the defense of the case such that they can be considered reasonable and necessary.