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Check Your Policy When An Insurer Says A Self-Insured Retention Applies To Its Duty To Defend

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Has your insurer informed you that, notwithstanding its duty to defend you under a third-party liability policy, it won't start defending until and unless you satisfy a self-insured retention of a specified amount? Don't necessarily believe it. In fact, California law is clear that absent an expressly written policy provision stating that no duty to defend arises until and unless an insured meets a self-insured retention, satisfaction of such retention is not a condition precedent to an insurer's duty to defend. Indeed, as California courts have said, "in the absence of clear policy language so providing, to require the exhaustion of a self-insured retention before an insurer will have a duty to defend would be contrary to the reasonable expectations of the insured to be provided an immediate defense in connection with its primary coverage…. If, under the terms of the policy, the insured would have a reasonable expectation that the insurer would provide a defense, any limitation on the insurer's defense obligation must be conspicuous, plain and clear." Accordingly, insureds should consider checking their policies when an insurer states that a self-insured retention applies to the insurer's duty to defend. In the absence of express language stating that a self-insured retention applies, insurers should not be allowed, based on California law, to shift the cost of defense to their insureds. This is more than fair, since the insurer wrote the policy – which oftentimes constitutes a contract of adhesion on insureds – and could have included language conditioning the duty to defend upon satisfaction of a self-insured retention, if so desired. If it did not, the insurer should defend immediately and entirely as required by California law.

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