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# THE DUTY TO DEFEND AND CONSTRUCTION DEFECT LITIGATION: A DISCUSSION OF INSURANCE CARRIER OBLIGATIONS IN SOUTH CAROLINA

Building professionals are beginning to become more knowledgeable with regard to insurance coverage issues. Believe it or not, as late as 1995 there were many subcontractors choosing not to pay premiums in South Carolina, opting to take their chances. Contractors are carrying CGL policies at a much greater rate today due to certain government and vendor specific requirements that make it a pre-requisite that a subcontractor maintain insurance coverage. As far as residential general contractors are concerned, construction lenders, neighborhood building guilds and organizations such as the Associated General Contractors of America (AGC) and the ASA provide educational resources which strongly encourage members to purchase and maintain insurance.

Lawyers have become quite busy over the last fifteen years as Commercial General Liability (CGL) policies have become more restrictive in scope. I have covered this issue in the South Carolina Construction Defect blog in other posts over the past year. Today's topic deals with the duty to defend a policyholder when he is either sued, or threatened with litigation. I find this to be a very important topic for insurance companies as well as builders as insurance coverage is state specific, and tends to vary from jurisdiction to jurisdiction.

## THE FOUR CORNER RULE AND ITS EVOLUTION

The obligation of the insurer to defend is determined by the allegations in the complaint. This is sometimes referred to as the "4 Corner Rule", as coverage is based on the allegations made within the four corners of the Complaint. South Carolina Medical Practical JUA v. Ferry, 291 S.C. 460, 354 S.E.2d 378 (1987) and R.A. Earnhardt Textile Manufacturing Division, Inc. v. South Carolina Ins. Co., 282 S.E.2d 856 (S.C. 1981). If the allegations set forth in the complaint do not create a potential for coverage, there is no duty to defend. See also Snakenburg v. Hartford Casualty Ins. Co., 383 S.E.2d 2 (S.C. App. 1989).

The four corner rule is not absolute, however, and it has been held that the mere mention of "negligence" in a Complaint is subject to scrutiny when the facts surrounding an event might be impossible to produce negligence. USAA Property & Cas. Co. v. Rowland, 435 S.E.2d 879 (S.C. App. 1993).

A 2008 case further restricted the rule, stating as follows: [A]n insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer. See USAA Property and Casualty Insurance Company v. Clegg (2008). The Clegg case involved an automobile accident, yet is applicable to any liability policy.

The new twist has caused some problems at the trial court level, as fact finding missions are now the norm for insurance companies, while counsel for contractors are encouraged to be as creative as possible. Special interrogatories, declaratory judgments, and other ancillary proceedings have served to further clog up cases which are already cumbersome.