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### INSURER EQUITABLY OBLIGATED TO CONTRIBUTE TO THE DEFENSE OF A COMMON INSURED

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October 16, 2014

A federal court in Colorado recently held in *Continental Western Insurance Company v. Colony Insurance Company*[1] that where multiple insurers each have a duty to defend a common insured, an insurer that refuses to defend or otherwise share in the cost of defense must provide equitable contribution to the defending insurer.

#### Background

The underlying litigation involved claims arising from a September 2011 multi-state listeria outbreak that originated at a Colorado cantaloupe farm. As part of the farm's subsequent bankruptcy proceedings, the bankruptcy court created a process by which claimants and responsible parties could settle the numerous wrongful death and personal injury suits stemming from the outbreak. Pepper Equipment Corporation ("Pepper"), a supplier of processing equipment used at the farm, was identified by federal authorities as a "likely contribut[or]" to the outbreak and invited to participate in the claims resolution process.

Pepper was insured under commercial general liability policies issued by Continental Western Insurance Company ("Continental") for the period September 2010 to September 2011, and by Colony Insurance Company ("Colony") for the period September 2011 to September 2012. Colony declined to participate in the claims resolution process, contending that none of the suits alleging injury from the outbreak occurred during the Colony policy period. Consequently, Continental undertook the defense of the bodily injury and wrongful death claims against Pepper in the claims resolution process, including those that occurred beyond Continental's policy period (and during Colony's). Continental settled many of the claims, including some that occurred during the Colony policy period. Colony refused to contribute to the settlements.

Continental sued for declaratory judgment as well as contribution and/or reimbursement from Colony for the costs incurred in the claims resolution process. The parties cross-moved for summary judgment.

Continental argued that the claims resolution process amounted to a covered "suit," as defined by the Colony policy, thereby triggering Colony's duty to defend. Continental further argued that Colony waived any requirement that Colony consent to any alternative dispute resolution or to any settlement by failing to object to Pepper's participation in the proceedings and by failing to reserve its rights under its insurance policy. Finally, Continental argued that it mitigated Colony's exposure by settling the claims and that, equitably, it was due half of the settlement and defense costs paid through that process.

Colony argued that Continental lacked standing to seek reimbursement from Colony and was not entitled to contribution because none of the losses were concurrently covered by the insurers' policies, which covered consecutive policy periods. Colony also argued that the claims were settled in violation of Colony's policy's "consent to settle clause"; Colony did not consent to settlement because Colony intended to defend against any suit that triggered its policy. Colony also denied that it had a "duty to defend" Pepper's voluntary participation in the cantaloupe farm's bankruptcy settlement, especially given that no covered claims had been tendered at the time of that disputed settlement. Finally, Colony argued that Continental's proposed 50/50 allocation improperly required Colony to pay for injuries that occurred within the Continental policy.

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## Holding

The court held that the allegations set forth in the “proofs of claim” forms completed by listeria claimants during the bankruptcy court’s claim resolution process triggered Colony’s duty to defend. According to the court, a number of those forms identified dates of illness onset within the Colony policy period. The court held further that Colony breached its duty to defend by failing to participate in the claims resolution process when it knew that its policy was or potentially could be implicated. Finally, the court disagreed with Continental’s proposed 50/50 cost allocation, and ordered Colony to contribute to those settlements secured by Continental that fell within Colony’s period of coverage, and pay its same proportional share of administrative costs and attorney’s fees, as well as prejudgment interest.

## Implications

The *Continental* decision stands as a reminder that, in many jurisdictions, an insurer’s duty to defend may be triggered even in the absence of a formal complaint for damages. As the decision demonstrates, any civil proceeding or alternative dispute resolution may be enough to implicate the insurer’s active defense participation so long as the process creates the possibility that the insurer may have to indemnify for covered losses. In *Continental*, the possibility that claimants’ illnesses were contracted during one or both of the consecutive policy periods was sufficient to give rise to each insurer’s duty to defend.

## Note

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[1] D. Colo. Sept. 19, 2014.

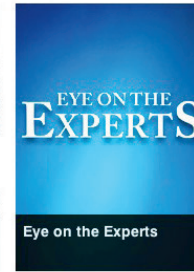
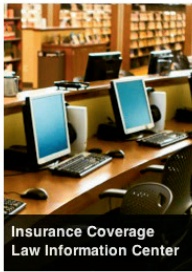
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