The Duty to Defend Has Its Limits

By Todd Haas and Bridget Moorhead
v. Point: The other side of this argument was featured in the September/October 2016 issue of San Diego Lawyer. Read it online at www.sdcb.org/SepOct16

Insurance policies are not intended to provide a defense for every loss. The duty to defend is triggered by a "suit" demanding damages against an insured for bodily injury, property damage, or personal and advertising injury covered by the CGL policy. If there is no "suit" or "occurrence" of covered damages, there is no duty to defend. If an exclusion applies to negate coverage, there is no duty to defend. Although the potential for coverage standard is alive, it is subject to several limitations and evolving case law.

1. The Duty to Defend Does Not Begin Until Tender of a Lawsuit and Ends When the Lawsuit Is Concluded or the Insurer Shows There Is No Coverage.

Insureds often argue an insurer is obligated to defend a "claim" or the insurer must defend even without a tender.

California law is clear that the duty to defend arises upon the insured's tender of a lawsuit, and an insurer generally has no duty to defend until a lawsuit is filed and the insured notifies the insurer of the lawsuit. (Fiorito v. Superior Court (1990) 226 Cal. App.3d 433, 439.) The duty to defend is not triggered by the insurer's learning of a claim against the insured even though the insured never attempted to tender the claim. (Truck Insurance Exchange v. Unigard Insurance Co. (2000) 79 Cal.App.4th 966, 972.)

The duty to defend is "discharged when the action is concluded" or the policy is exhausted, unless it is "extinguished earlier" because the insurer shows "that no claim can in fact be covered." (Aerojet-Gen Corp. (1997) 17 Cal.4th 38, 58.)

An insurer has no obligation to defend before a tender of a lawsuit is made and no duty to defend after the lawsuit is concluded or the insurer shows the allegations are not covered.

2. The Insured Has the Burden to Show the Allegations Fall Within the Insuring Agreement, and the Insurer Can Use Extrinsic Evidence to Defeat a Defense Duty.

Insureds sometimes claim that the insurer has the burden to prove there is no coverage in all instances.

However, the insured bears the burden of proving the allegations fall within the

insuring agreement. (Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183, 1188.) To present a potential for coverage, an insured must be facing a legal obligation to pay sums as covered damages occurring during the policy period and caused by an "occurrence," defined as an "accident."

Although the insurer has the burden to show an exclusion applies, if the exclusion is clear, California courts "will not adopt a strained or absurd interpretation" of exclusions and the language must be interpreted in the context of the policy as a whole and the circumstances of the case. (California Traditions, Inc. v. Claremont Liability Ins. (2011) 197 Cal.App.4th 410.) The insured cannot claim that its "reasonable expectation of coverage" applies, unless there is an ambiguity. (Fire Ins. Exchange v. Superior Court (2004) 116 Cal.App.4th 446, 456-457.)

Therefore, the insured must first show that the allegations fall within the insuring agreement, and exclusions may defeat any duty to defend.

3. Artful Pleading and Legal Disputes Cannot Create Coverage, and Insurers Can Use Extrinsic Evidence to Defeat a Defense Duty.

Insureds often argue that the complaint is "broad enough" to create a potential for coverage.

However, artful pleading cannot create a fortress for the insured whether the duty to defend might exist because courts do not examine only the pleaded work, but also examine the potential liability created by the lawsuit. (Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 275-277.) If the potential liability is not covered, no duty to defend exists.

A potential for coverage can only be based on factual disputes. If the allegations create a purely legal question regarding coverage, and the legal question is decided against coverage, then no duty to defend ever existed. (State Farm Gen. Ins. Co. v. Mintarsih (2009) 175 Cal.App.4th 274, 284.)

Moreover, an insurer can use extrinsic evidence to defeat a defense duty. (Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 291.)

4. Insurers Have No Duty to Defend Complaints Alleging Intentional, Non-Accidental Conduct.

Insureds will sometimes argue intentional conduct is covered, because it was done in an "accidental" manner.
An “accident” is “an unexpected, unforeseen or undersigned happening or consequence from either a known or an unknown cause” and refers to the conduct of the insured for which liability is sought to be imposed on the insured. Purposeful and intentional acts by the insured do not involve an “accident,” even in a situation where the insured’s mistake of law or fact motivated those acts. (Delgado v. Interins. Exchange of the Auto. Club of So. Cal. (2009) 47 Cal.4th 302.) A voluntary and deliberate business decision does not involve an “accident.” (Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal. App.4th 976.) A negligence cause of action does not change this conclusion. California law focuses on the nature of the insured's conduct, and if the conduct could not have been engaged in by “accident” and all of the causes of action arise out of that conduct, the other allegations do not create a duty to defend. (Gonzalez v. Fire Insurance Exchange (2015) 234 Cal.App.4th 1220, 1233-1236.) Therefore, insurers have no duty to defend allegations of intentional conduct regardless of allegations of “accidental” behavior.

5. Insurers Have No Duty to Defend Claims Seeking Purely Economic Damages.

Insureds often try to create coverage for purely economic damages. “Strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy.” (Giddings v. Industrial Indemnity Co. (1980) 112 Cal.App.3rd 213, 219.) Insurers have no duty to defend allegations seeking purely economic damages.


The duty to defend must be tempered by the insurer's right of reimbursement of defense costs incurred to defend uncovered claims. (Buss v. Superior Court (1997) 16 Cal.4th 35 and Scottsdale Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643.) In Buss, plaintiff asserted 27 causes of action, but only one claim for defamation was potentially covered under the policy. The California Supreme Court held that in a “mixed” action, the insurer is entitled to reimbursement of the defense costs incurred to defend causes of action where there is no potential for coverage. In Buss, it was determined that of the $1 million in defense costs, only an amount between $21,000 and $55,000 was the insurer's responsibility.

Although the insured may receive a complete defense on the front-end, the insurer is able to recover defense costs on the back-end in a reimbursement action. While the duty to defend is broad in California, there are limitations within the CGL policy. Insureds should not always assume that the defense of an entire lawsuit will be covered, and insureds should pay close attention to the reservation of rights letters and policy language, which provide guidance to the insurer’s position.

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