California

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What triggers an insurer's duty to defend?

To trigger an insurer's duty to defend, "the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 300, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (1993) ("*Montrose I*") (emphasis in original).

An insurer's duty to defend is separate from its duty to indemnify. *Aetna Cas. & Sur. Co. v. Certain Underwriters*, 56 Cal. App. 3d 791, 804, 129 Cal. Rptr. 47 (1976). The duty to defend is broader than the duty to indemnify, and is measured by the reasonable expectations of the insured. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 272–75, 54 Cal. Rptr. 104, 419 P.2d 168 (1966). An insurer must defend a suit which *potentially* seeks damages within the coverage of the policy. *Id.* at 276 ("Since the instant action presented the potentiality of a judgment based upon nonintentional conduct, and since liability for such conduct would fall within the indemnification coverage, the duty to defend became manifest at the outset."). Finally, any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. *Haskel, Inc. v. Super. Ct.*, 33 Cal. App. 4th 963, 974, 39 Cal. Rptr. 2d 520 (1995).

In addition, trigger of the duty to defend requires notice to the insurer. There is no duty to defend a lawsuit until the insured notifies the insurer of the suit. *Fiorito v. Super. Ct.*, 226 Cal. App. 3d 433, 439, 277 Cal. Rptr. 27 (1990). However, an insurer's duty to defend may arise before the insured demands a defense if the insurer has independent knowledge of the potential for coverage. *Samson v. Transamerica Ins. Co.*, 30 Cal. 3d 220, 239, 178 Cal. Rptr. 343, 636 P.2d 32 (1981). Similarly, an insurer's duty to defend may arise upon receiving constructive notice of the insured's need for defense. *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App. 3d 1, 221 Cal. Rptr. 171 (1985).

Regarding who may tender a claim to an insurer, *Bachman v. Independence Indem. Co.*, 112 Cal. App. 465, 297 P. 110 (1931) stands for the proposition that a permissive user under an auto policy may be permitted to tender a claim to the insurer, despite a clause requiring that the named insured provide notice. Further, a notice given by the claimant will inure to the benefit of an additional insured. *Security Ins. Co. v. Snyder-Lynch Motors*, 183 Cal. App. 2d 574, 7 Cal. Rptr. 28 (1960), *disapproved on other grounds by Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 307, 32 Cal. Rptr. 827, 384 P.2d 155 (1963). In fact, notice of a claim from an insurance agent with no cover letter as to the identity of the named insured can constitute constructive notice of a claim. *See California Shoppers*, 175 Cal. App. 3d at 37 ("In the aggregate, this represents a classic case of constructive notice which raised the contractual duty to defend. In other words, given the appropriate circumstances, the law will charge a party with notice of all those facts which he might have ascertained had he diligently pursued the requisite inquiry."). A tender by other insurers may similarly trigger insurance coverage. *See Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996).

What type of proceedings must an insurer defend?

Where a liability policy states it has only the duty to defend "suits," this pertains to lawsuits only, and not pre-litigation claims.

The duty to defend is triggered upon the filing of a civil complaint. In *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 18 Cal. 4th 857, 77 Cal.

Rptr. 2d 107, 959 P.2d 265 (1998), the California Supreme Court addressed whether a remediation order issued by an environmental agency prior to filing a complaint is a "suit" which triggers a liability insurer's duty to defend. In holding that a "claim" is not a "suit" for purposes of an insurer's defense duty, the *Foster-Gardner* court held that "a reasonable construction of the word 'suit' is a lawsuit." *Id.* at 879. "Rather, by specifying that only a 'suit,' and not a 'claim' triggers the duty to defend, insurers have drawn an unambiguous line to define and limit their contractual obligation." *Id.* at 882, *see also Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 70 P.3d 351 (2003).

However, adjudicatory administrative hearings that involve multiple days of hearings before an administrative law judge and numerous witnesses are also "suits" within the meaning of a liability policy. The California Supreme Court in *Ameron International Corp. v. Insurance Co. of State of Pennsylvania*, 50 Cal. 4th 1370, 118 Cal. Rptr. 3d 95, 242 P.3d 1020 (2010) slightly altered the "bright line" rule outlined in *Foster-Gardner* by holding that an insurer was obligated to defend construction defect claims in adjudicative administrative proceedings before the United States Department of Interior Board of Contract Appeals.

The "legally obligated to pay" language of a liability policy refers to the fact that the policy applies to injuries to a third party caused by an insured, and not to damage to an insured's own property, rights or interests. *See San Diego Housing Comm'n v. Indus. Indem. Co.*, 68 Cal. App. 4th 526, 542–544, 80 Cal. Rptr. 2d 393 (1998) (in response to tenant complaints, housing agency repaired property, made claim against builder for cost and sought recovery from builder's insurer; court concluded that builder had never been held liable for an injury to tenant, thus builder's liability coverage was not implicated). The "legally obligated to pay" language thus specifically refers to a final judgment for damages in a civil action. *See Certain Underwriters at Lloyd's of London v. Super. Ct. (Powerine Oil Co., Inc.)*, 24 Cal. 4th 945, 961, 103 Cal. Rptr. 2d 672, 174 P.3d 192 (2001); *see also Rosen*, 30 Cal. 4th at 1070 (characterizing holding as limiting indemnity obligation to "money ordered by a court.").

When is extrinsic evidence used to determine whether an insurer has a duty to defend?

In California, an insurer is required to look to extrinsic evidence where it creates a possibility of coverage. *See Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 298, 172 Cal. Rptr. 3d 653, 326 P.3d 253 (2014) (insured's "new product catalog was produced by [third-party claimant] in the underlying action and referenced in his complaint. Thus, the contents of the catalog were reasonably known to Hartford and should be considered in determining whether the [underlying] action set forth a possible claim of disparagement.").

Moreover, "[i]n determining whether a duty to defend exists, courts look to all the facts available to the insurer at the time the insured tenders its claim for defense." *Vann v. Travelers Cos.*, 39 Cal. App. 4th 1610, 1614, 46 Cal. Rptr. 2d 617, 619 (1995). In fact, an insurer cannot deny a defense without investigation, and then later resort to a lack of the duty to indemnify as the justification. *Mullen v. Glen Falls Ins. Co.*, 73 Cal. App. 3d 163, 174–174, 140 Cal. Rptr. 605 (1977).

Extrinsic evidence may be used to defeat the duty to defend. *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 296, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (1993) ("*Montrose I*").

What is the scope of an insurer's duty to defend?

Under Cal. Civil Code § 2778(4), the duty to defend is implied in all liability insurance contracts unless the policy clearly and unambiguously excludes such a duty. The duty to defend is broader than the duty to indemnify. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 272–75, 54 Cal. Rptr. 104, 419 P.2d 168 (1966). In order to trigger an insurer's duty to defend, "the insured need only show that the underlying claim *may* fall within policy coverage." *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 300, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (1993) ("*Montrose I*"). (emphasis in original). There is a duty to defend even where a claim is "insubstantial" and would not support an award of damages. *Horace Mann Ins. Co. v. Barbara*

B., 4 Cal. 4th 1076, 1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792 (1993).

An insurer must defend the entire action, even if some of the claims asserted are not covered. *Buss v. Super. Ct.*, 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766 (1997). The California Supreme Court in *Buss* explained that in order to provide a meaningful defense, the insurer must undertake the defense immediately and entirely, and cannot parse the claims. *Buss*, 16 Cal. 4th at 49. However, an insurer may seek reimbursement of the defense of uncovered claims, although it must reserve that right within the reservation of rights letter to the insured. *Buss*, 16 Cal. 4th at 61.

The California Supreme Court subsequently extended *Buss*, holding that where the underlying action was never covered, the insurer may seek recovery from the insured for all amounts paid toward the defense. *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal. 4th 643, 31 Cal. Rptr. 3d 147, 115 P.3d 460 (2005). As with *Buss*, the insurer must reserve *MV* rights.

The duty to provide an adequate defense does not entail the duty to pursue counterclaims. *Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.*, 130 Cal. App. 4th 1078, 31 Cal. Rptr. 3d 43 (2005). An exception exists, however, if the pursuit of the insured's counterclaims is "inextricably intertwined with the defense of [the claims against the insured] and was necessary to the defense of the litigation as a strategic matter." *James 3 Corp. v. Truck Ins. Exch.*, 91 Cal. App. 4th 1093, 1104–05, 111 Cal. Rptr. 2d 181 (2001).

When is an insurer responsible for pre-tender defense costs?

The general rule is that a liability insurer is not responsible for pre-tender defense costs. There are two bases for this rule. First, California has established the equitable rule that "'the insurer [is invested] with the complete control and direction of the defense'" and cannot be expected to pay for that which it does not control. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges, A. G.*, 3 Cal. 3d 434, 449, 91 Cal. Rptr. 6, 476 P.2d 406 (1970).

Second, the standard CGL policy contains a "no voluntary payments provision" which states that "[n]o insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, except for first aid, without our consent." Such clauses bar reimbursement for pre-tender expenses based on the reasoning that until the defense is tendered to the insured, there is no duty to defend. *Tradewinds Escrow, Inc. v. Truck Ins. Exch.*, 97 Cal. App. 4th 704, 118 Cal. Rptr. 2d 561 (2002). An insured is barred from recovery regardless of whether the insured's untimely tender prejudiced the insurer. *Id.*

An insurer's liability for pre-tender defense costs is a question of fact where an issue exists as to whether payments were "voluntary" within the meaning of the voluntary payments provision. *Fiorito v. Super. Ct.*, 226 Cal. App. 3d 433, 277 Cal. Rptr. 27 (1990).

Where the urgency of time pressures requires the insured to expend money pre-tender, the no voluntary payments provision may not apply. *Northern Ins. Co. of N.Y. v. Allied Mut. Ins.*, 955 F.2d 1353, 1360 (9th Cir. 1992) (California and Washington law).

What is the extent of an insurer's obligation to defend when other insurers also have a duty to defend?

An insured may choose one insurer to tender to, and leave it to that insurer to seek contribution from other insurers who owe a coverage obligation to the insured. *Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 52, 52 Cal. Rptr. 2d 690 (1996) ("a policyholder may obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss.").

When multiple insurers are responsible for a loss, defense costs are apportioned on the basis of "equitable considerations" depending on the "particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers." *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 619, 222 Cal. Rptr. 276 (1986) (citing *Signal Cos., Inc. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 369, 612 P.2d 889 (1980)).

California courts have declined to formulate a definitive rule for equitable contribution, choosing instead to give courts broad discretion to allocate coverage among policies applicable to a loss. *See Signal*, 27 Cal. 3d 359, 385–86, 612 P.2d 889 ("The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other…. Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders.") (citing *American Auto Ins. Co. v. Seaboard Sur. Co.*, 155 Cal. App. 2d 192, 195–96, 318 P.2d 84 (1957)).

When is there a right to independent counsel?

The right to independent counsel is determined by whether a conflict exists between the insured and the insurer. *See* Cal. Civil Code §§ 2860(a), (b) (conflict may exist "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim"). Where there is a conflict of interest between insurer and insured, the insurer must forego the ability to control the insured's defense. *U.S. Fid. & Guar. Co. v. Super. Ct.*, 204 Cal. App. 3d 1513, 1524, 252 Cal. Rptr. 320 (1988).

Section 2860(b) provides that no conflict of interest exists simply because the underlying complaint seeks punitive damages or compensatory damages in excess of the insured's policy limits. Section 2860 also makes clear that not every reservation of rights creates a conflict of interest. Instead, a conflict of interest *may* exist when an insurer defends under a reservation of rights. However, an insurer is not required to provide independent counsel until an actual conflict of interest exists. *McGee v. Super. Ct.*, 176 Cal. App. 3d 221, 221 Cal. Rptr. 421 (1985). An unspecified potential conflict of interest is not enough. *Id.* In addition, the fact that an insurer may not have the same incentive to disprove non-covered categories of damage that it has to disprove covered categories of damage does not give rise to an actual conflict of interest between the insurer and the insured. *Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. App. 4th 345, 350, 2 Cal. Rptr. 2d 884 (1991). A conflict of interest may exist where a third party claimant alleges that the insured's conduct constituted either negligence or an intentional tort, and the insurance policy does not provide coverage for intentional torts. *See San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 368–69, 208 Cal. Rptr. 596 (1984) (where insured can be found liable for either negligent or intentional conduct the insurer "may be subject to substantial temptation to shape its defense so as to place the risk of loss entirely on the insured….") (citing *Tomerlin v. Canadian Indem. Co.*, 61 Cal. 2d 638, 394 P.2d 571 (1964)).

Section 2860(c) allows insurers to impose minimum qualifications on independent counsel. These minimum qualifications may include: (1) that the selected counsel have at least five years of civil litigation practice including substantial defense experience in the subject at issue in the litigation; and (2) that the selected counsel have errors and omissions coverage. The code indicates that the insurer may establish additional reasonable standards which are in addition to the enumerated minimum standards. Further, section 2860(a) provides that "the insurance contract may contain a provision which sets forth the method of selecting [independent] counsel consistent with this section."

Section 2860(c) also limits the fees the insurer must pay to independent counsel to those it pays attorneys retained in the ordinary course of business, in the defense of similar actions "in the community where the claim arose or is being defended." Of course, such fees include only those fees reasonably required to defend the insured. *See United Pac. Ins. Co. v. Hall*, 199 Cal. App. 3d 551, 557, 245 Cal. Rptr. 99 (1988) (insurer not required to pay independent counsel's fees for representing its insured in a related proceeding not covered by policy). Where more than one insurer is obligated to provide for independent counsel, section 2860(c) provides for a single attorney fee rate limit applicable collectively to all insurers. *San Gabriel Valley Water Co. v. Hartford Accident & Indem. Co.*, 82 Cal. App. 4th 1230, 98 Cal. Rptr. 2d 807 (2000).

Sections 2860(d) and 2860(f) require the insured's independent counsel and the insured's attorney to cooperate in the insured's defense and to share non-privileged information. Specifically, 2860(f) states that "both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation."

What right of recoupment of defense costs exists for an insurer?

An insurer may seek reimbursement for the cost of defending claims or portions of claims that were not potentially covered under the policy. *Buss v. Super. Ct.*, 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766 (1997). An insurer may not recover defense costs solely on the basis of a judgment entered against the insured. *Id.*; *see also Val's Painting & Drywall, Inc. v. Allstate Ins. Co.*, 53 Cal. App. 3d 576, 126 Cal. Rptr. 267 (1975) (even though insurer ultimately had no duty to indemnify, insurer cannot recover defense costs on claims which were potentially covered).

In order to recover defense costs, an insurer must prove by a preponderance of evidence that the defense costs for which reimbursement is sought can be allocated solely to claims that are not potentially covered. *Buss*, 16 Cal. 4th at 57. The *Buss* court explained that "[d]efense costs which were required in any event or would have been incurred in order to defend actually or potentially covered claims, whether or not joined with noncovered claims, cannot be recovered." *Id.* at 53 n.15.

If an insurer intends to seek reimbursement of defense costs, it must reserve the right to do so. *Buss*, 16 Cal. 4th at 61. Such a reservation does not require the insured's agreement. *Id.* at 61 n.27.

What are the consequences of an insurer's wrongful failure to defend?

There are multiple scenarios in California which determine what damages will be awarded upon an insurer's breach of the duty to defend. The scope of damages is dependent upon whether coverage is ultimately found under the policy (whether there is the duty to indemnify). It is also dependent upon the reasonableness of the insurer's denial of the duty to defend.

First, there is the scenario in which the insurer breaches the duty to defend the insured, but the denial was reasonable and there was ultimately no coverage. Once the insurer has breached the duty to defend, the burden falls on the insurer to prove that there is no coverage under the policy. *See Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 564, 91 Cal. Rptr. 153, 476 P.2d 825 (1970) ("[T]he insurer having breached its contract to defend should be charged with a heavy burden of proof of even partial freedom of liability for harm to the insured which ostensibly flowed from the breach."). Despite this heavy burden, an insurer's breach of the duty to defend does not equate to a waiver of coverage defenses; it may assert arguments that it lacks a duty to indemnify despite breaching the duty to defend. *Id.* Upon breaching the duty to defend, if the insurer proves that there is no coverage, it is liable to its insured for breach of contract damages. *California Shoppers*, 175 Cal. App. 3d 1, 221 Cal. Rptr. 171 (1985).

Breach of contract damages consist of foreseeable damages that are proximately caused by the insurer's breach. *Id.* Thus, consequential economic losses resulting from an insurer's failure to defend are generally not recoverable upon a breach of contract theory. *Id.* Breach of contract damages also generally consist of defense fees and costs, and also the damages proximately caused by the breach. *State Farm Mut. Auto. Ins. Co. v. Allstate*, 9 Cal. App. 3d 508, 527–28, 88 Cal. Rptr. 246 (1970); *see also Amato v. Mercury Cas. Co.*, 18 Cal. App. 4th 1784, 1794, 23 Cal. Rptr. 2d 73 (1993) ("*Amato I*") ("the proper measure of damages is that amount which will compensate the insured for the harm or loss caused by the breach of the duty to defend, i.e., the cost incurred in defense of the underlying suit."). However, where the breach of the duty to defend results in a judgment which would not have occurred but for the breach, it can be argued that the insurer is liable for the resulting judgment. *See Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 61 Cal. Rptr. 2d 909 (1997) ("*Amato II*") (where default judgment is proximate result of insurer's failure to defend is a default judgment, insurer is liable for judgment).

Where there is a reasonable breach of the duty to defend, the attorney fees expended by the insured

in suing the insurer for breach of the duty to defend are not recoverable. *See* Cal. Code Civ. Pro. § 1021; *see also Brandt v. Super. Ct.*, 37 Cal. 3d 813, 210 Cal. Rptr. 211, 693 P.2d 796 (1985) (finding of bad faith required for insured to recover attorneys' fees incurred in prosecuting breach of contract claim; bad faith requires unreasonable conduct by insurer).

Second is the scenario in which the insurer breaches the duty to defend *and* breaches the duty to indemnify. In this circumstance, the facts known to the insurer at the time of the insured's tender gave rise to a potential for coverage, and coverage was ultimately found. In such a case, the measure of damages is breach of contract damages which include the insured's cost of defense and judgment. *State Farm v. Allstate*, 9 Cal. App. 3d at 528. The insurer's liability for the judgment generally cannot exceed the policy limits. *Id.* ("an insurer guilty of no more than a violation of its covenant to defend is liable only up to the policy limit.").

Third, is the scenario is which the insurer breaches the duty to defend unreasonably, giving rise to liability for the insurer's bad faith. Where an insurer's unreasonable breach of the duty to defend is a violation of the implied covenant of good faith and fair dealing, the insurer is liable for all consequential damages regardless of foreseeability. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895 (9th Cir. 2000) (California law). If an insurer's refusal to defend is in bad faith, the insurer is entitled to make a reasonable settlement of the claim, and then bring an action against its insurer to recover the amount of the settlement regardless of the policy limits. *Isaacson v. Cal. Ins. Guar. Ass'n*, 44 Cal. 3d 775, 791, 244 Cal. Rptr. 655, 750 P.2d 297 (1988).

However, denial of the duty to defend is no bar to the insurer raising coverage defenses in a later bad faith action. *Ceresino v. Fire Ins. Exch.*, 215 Cal. App. 3d 814, 264 Cal. Rptr. 30 (1989). In fact, if the insurer proves that there is no coverage under the policy, the insurer *cannot* be liable for bad faith. *Brodkin v. State Farm Fire & Cas. Co.*, 217 Cal. App. 3d 210, 218, 265 Cal. Rptr. 710 (1989). In a bad faith action against an insurer, damages may also include legal fees and costs incurred in compelling the insurer to pay defense costs in the underlying action. *Brandt*, 37 Cal. 3d at 817.

What terminates an insurer's duty to defend?

When it becomes certain that the claim is not covered by the policy, the insurer may turn back the defense to the insured. *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds of London, England*, 56 Cal. App. 3d 791, 801, 129 Cal. Rptr. 47 (1976); *see also Firco, Inc. v. Fireman's Fund Ins. Co.*, 173 Cal. App. 2d 524, 529–30, 343 P.2d 311 (1959) ("the duty to defend the action arose when the action was begun and will continue until in the proceedings in that case it certainly appears that the claim cannot eventuate in a judgment which the insurer is obligated to pay."). However, the insurer's duty to defend may be required to continue despite a legal bar to indemnification. In *Ohio Cas. Ins. Co. v. Hubbard*, 162 Cal. App. 3d 939, 208 Cal. Rptr. 806 (1984), the court held that the insurer had a duty to defend against punitive damage claims, although it was prohibited by law from indemnifying the insured for such damages and although it had already obtained a release of all covered claims.

"To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action." *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 301, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (1993) ("*Montrose I*"). However, where there is no potential conflict between the trial of the coverage dispute and the underlying action, an insurer can pursue an action to resolve its claim that coverage does not exist. *Montrose Chem. Corp. of Cal. v. Super. Ct.*, 25 Cal. App. 4th 902, 910, 31 Cal. Rptr. 2d 38, 43 (1994). The duty to defend continues until an insurer obtains a declaratory judgment of no coverage, at which point the declaration relieves the insurer of the duty to defend. *Hartford Accident & Indem. Co. v. Super. Ct.*, 23 Cal. App. 4th 1774, 1781, 29 Cal. Rptr. 2d 32 (1994). In addition, where the dispute is over the exhaustion of the primary insurer's limits, the primary insurer must defend until it obtains a decla-

ration from the court that it has exhausted its policy limits. *Id.* At that point, it must defend in the interim until the excess insurers pick up the defense. *Id.*

An insured's breach of the cooperation clause which results in substantial prejudice to the insurer may terminate the insurer's duty to defend. *Hall v. Travelers Ins. Cos.*, 15 Cal. App. 3d 304, 93 Cal. Rptr. 159 (1971). In such a case, the insurer may withdraw from the insured's defense without filing a declaratory relief action. *Id.*

An insurer may have a duty to continue to pay an additional insured's defense costs in spite of the fact that the insured tendered the policy limits to settle on behalf of the named insured. *Shell Oil Co. v. Nat'l Union Fire Ins. Co.*, 44 Cal. App. 4th 1633, 1649, 52 Cal. Rptr. 2d 580 (1996) (applying Washington state law but California authority).

An insurer whose policy provides that it is not obligated to defend after exhaustion of the policy limits has no duty to defend where it has paid the policy limits to settle on behalf of the insured, even when another complaint is later filed against the insured in the same claim. *Johnson v. Cont'l Ins. Cos.*, 202 Cal. App. 3d 477, 248 Cal. Rptr. 412 (1988).

Nonetheless, a primary insurer cannot tender its policy limits in order to withdraw from the defense and shift the defense to the excess carriers. *Chubb/ Pacific Indem. Group v. Ins. Co. of N. Am.*, 188 Cal. App. 3d 691, 233 Cal. Rptr. 539 (1987).

If there is no duty to defend, can the insurer have a duty to indemnify?

It is well settled that because the duty to defend is broader than the duty to indemnify, a determination that there is no duty to defend automatically means that there is no duty to indemnify. *Certain Underwriters at Lloyd's of London v. Super. Ct. (Powerine Oil Co., Inc.)*, 24 Cal. 4th 945, 961, 103 Cal. Rptr. 2d 672, 174 P.3d 192 (2001).

Are there any other notable cases or issues regarding the duty to defend that are important to the law of this jurisdiction?

An insurer does not have a continuing duty to investigate whether there is a potential for coverage. If it has made an informed decision on the basis of the third-party complaint and the extrinsic facts known to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the lawsuit. *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 44 Cal. Rptr. 2d 272 (1995).

Consent judgments do not bind an insurer that is providing a defense. *Wright v. Fireman's Fund Ins. Cos.*, 11 Cal. App. 4th 998, 1016–17, 14 Cal. Rptr. 2d 588 (1992). "Collusive assistance in the procurement of a judgment not only constitutes a breach of the cooperation clause but also is a breach of the covenant of good faith and fair dealing." *Span, Inc. v. Associated Int'l Ins. Co.*, 227 Cal. App. 3d 463, 483, 277 Cal. Rptr. 828 (1991). Similarly, an insured may not settle without the insurer's consent, and then seek coverage for the settlement amount. *Finkelstein v. 20th Century Ins. Co.*, 11 Cal. App. 4th 926, 930, 14 Cal. Rptr. 2d 305 (1992).

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