The Duty to Defend in California

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All primary liability insurance policies require the insurer to defend against claims where potential liability under the policy exists. California has long been a leader in requiring a broad interpretation of potential liability, appropriately so because liability insurance has been a mainstay of our industrialized society, where accidents are common and the costs of defense and liability can be vast. Accidents are universal, and volitional conduct is of course insured, so long as harm is unintended, but willful conduct is not insured.

The California Supreme Court has famously stated that [t]o prevail [on the duty to defend], the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal. 4th290, 300).

Even where the likelihood of an unintentional accident is small as compared to the insured's intentional conduct or where only one of several claims falls within the policy's indemnity coverage, the insurer must defend as long as there is any potential of liability on the covered claim. That, and the duty of the insurer to settle within policy limits if there is a risk of an excess verdict, have greatly contributed to financial stability in our society, which could otherwise encounter much random economic uncertainty.

But their duty to defend and thus to settle is often challenged by insurers if an element of intention appears regarding some of the conduct that led to the insurance claim. The balance between insurer and insured is not as stable as it could be.

For instance, an automobile driver may make a left turn and misjudge the speed of oncoming traffic, and a collision may result. That is an intentional act, but no auto insurer would deny it was an accident. What if the driver ran off the road to avoid a collision? The insurer may argue that intentional conduct was the key event and relieves the insurer from its duty to defend the claim. From that model, the reader can see that the rule that the insurer must defend any claim which potentially falls within the liability obligation, and try to settle it

if the claim exceeds the policy's liability limit, is a great force for social stability.

That duty to defend is currently under attack in two cases before the Supreme Court of California, one of which has been argued and may be decided at any time. In that case, *Liberty Surplus Insurance Co. v. Ledesma & Meyer Construction Co., Inc.*, a plaintiff claimed to have been a victim of a sexual assault and sued (among others) the alleged assailant's employer for negligent hiring of that person, claiming that if the aggressor had been properly screened he would not have been hired and would not have had the opportunity to attack her at the job site.

The sexual attack is clearly an intentional act. No one sought insurance coverage for that action. The employer tendered the negligent hiring claim to its insurer, which rejected coverage arguing that the hiring was too remote from the assault to constitute an occurrence, which would have triggered the duty to defend. The lower court agreed and ruled for the insurer. But the Supreme Court has held that actions collateral to sexual misconduct may require an insurer to provide a defense (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal. 4th 1076, 1078), and that if an insurer has to defend one of several claims in a single complaint, it must defend the entire suit (*Hogan v. Midland National Ins. Co.* (1970) 3 Cal. 3d 553). But it has also held that allegations of intentional conduct by the insured remove any duty for its insurer to defend the claim.

In *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal. 4th 302, the court denied a duty to defend when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor, and because there the conduct which gave rise to the suit was done with the intent to cause injury – a decision the court reached because there is no allegation in the complaint that the acts themselves were merely shielding or the result of a reflex action. Therefore, the injuries were not as a matter of law accidental, and consequently there is no potential for coverage under the policy.

Delgado has become a beacon for insurers seeking to avoid a duty to defend although as Witkin states, any extrinsic facts known from any source can trigger a duty to defend, even where the complaint does not facially indicate a potential for coverage. [Citation.] This includes all facts, both disputed and undisputed, that the insurer knows or becomes aware of from any source... (2 Witkin, Summary of California Law, 11th ed., Insurance, ¶ 390). Thus, in California, unlike in some other states, an insurer's duty to defend is not determined only from the four corners of the complaint but also involves exploration of other events about the incident.

Thus, California has two divergent rules about insurers' duty to provide a defense even where a valid indemnity claim may be hard to discern because the complaint may have concentrated on (or may be limited to) charging intentional actions; or the coverage-seeking event may be just one in a chain of events leading up to the final injury-causing action. The *Montrose* line of cases requires a defense even where indemnity coverage may be very remote or improbable, while the *Delgado* line looks skeptically at what a complaint may actually allege. The *Ledesma & Myer* decision should end this duality. Let's hope that it will restore California's leadership in requiring a defense even where the covered conduct is a peripheral or remote part of the claim against the insured.