# INSURANCE LAW

## *How Do You Trigger the Insurance Company's Duty to Defend?*

**By**
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Over the past ten years as column editor for Insurance Law, I have written articles discussing California law regarding an insurance company's duty to defend its insured against lawsuits, both generally and with specific reference to different types of claims or lawsuits. A consistent theme in these cases is the peace of mind policyholders have in knowing their insurance company will defend them against any lawsuit, whether meritorious or not. It has often been said that the duty to defend is more important to the average policyholder than indemnification against a judgment.

The duty to defend remains one area in insurance law which is almost universally supported by the courts and rarely, if ever, comes under attack. The standard for when an insurer must defend against a lawsuit is very clear: any lawsuit "which *potentially* seeks damages within the coverage of the policy" must be defended. *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275 (emphasis in original). Stated from the opposite perspective, defense against a lawsuit is excused only when "the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.

While the law on duty to defend is clear, it is sometimes less clear deciding what is required in order to get your insurance company to defend you. Assume you get sued and a process server hand delivers the lawsuit to you one morning as you are about to get into your car. What exactly needs to happen in order to trigger the insurance company's duty to defend? In other words, at what point in time is the insurance company considered "on notice" of the lawsuit such that they must hire attorneys to defend you (or at least investigate the matter to determine whether a defense is owed)?

The method followed by most people, of course, is to send a copy of the lawsuit to the insurance company or agent with a cover letter telling them they have been sued and asking that the company provide a defense. But what if the lawsuit is not "formally" tendered to the insurance company? Or what if the request does not include a cover letter or a specific request for a defense? Is the insurance company still legally responsible to hire attorneys or can they sit back and wait for a formal notification and/or request?

Many cases talk about the duty to defend arising once the lawsuit is "tendered" to the insurance

company. *See e.g., Montrose, supra*, 6 Cal.4th at 295. It is quite clear, however, there is no formal or technical method for bringing the lawsuit to the insurance company's attention in order to trigger their duty. Either formal direct notice or constructive notice will trigger the duty to defend. *Truck Insurance Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 979.

Formal notice is by far the easiest and surest way of triggering the insurance company's duty. There is no specific form required and no magic language to use. Simple notification to your insurance company or agent that you have been sued is enough. You do not even need to request that they defend you against the lawsuit, although that is the best approach. *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 883. Once the insurance company is on actual notice of a covered claim, the duty is triggered. At a minimum, the insurer at that point is obligated to conduct an investigation to determine whether a defense is owed. *American International Bank v. Fidelity & Dep. Co.* (1996) 49 Cal.App.4th 1558, 1571.

Even if you fail to ever tell your insurance company about the lawsuit, their duty to defend is still triggered if they received any form of constructive notice. *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1. In *California Shoppers*, a corporation was sued but when it sent notice to the agent, it mailed the lawsuit in an envelope with a different corporation's name (which was not insured under the policy). The lawsuit was not accompanied by any formal cover letter or other enclosure. Apparently without looking at the complaint, the insurance agent mistakenly advised the insurance company that the lawsuit was against the different (and uninsured) corporation. The carrier denied the claim. The court held that had the insurance company conducted even a minimal investigation, it would have noticed the lawsuit was against the named insured. Thus, the carrier was on constructive notice that the lawsuit was actually against its insured, thereby triggering its duty to defend. Because it failed to conduct the investigation and denied a defense of a covered claim, the insurance company was in breach of contract. The court explained constructive notice as follows:

> **The facts confronting the claims manager ... were such as to put him on notice of the contractual duty to make a further inquiry. If he had made this further inquiry, he would have discovered that it was actually [the insured corporation] who had tendered the summons and complaint for defense... In the aggregate, this represents a classic case of constructive notice which raised the contractual duty to defend.**
> *Id.* at 37.

Although the carrier's duty to defend is triggered with either actual or constructive notice, there is a significant difference in the remedies available if the insurer wrongfully refuses to defend. If the insurance company had actual notice of the lawsuit and wrongfully failed to defend, it will be liable for both a breach of contract and breach of the implied covenant of good faith and fair dealing (bad faith). On the other hand, if the carrier only received constructive notice of the lawsuit but not actual notice, it cannot be held liable for bad faith. It will only be liable for breach of contract. *Id.* at 58.