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PERSPECTIVE

Insured plaintiffs may be entitled to defense from their insurers

By Shaun H. Crosner

As the California Supreme Court noted in *Montrose Chemical Corp. of California v. Superior Court*, 6 Cal. 4th 287 (1993), an "insured's desire to secure the right to call on the insurer's superior resources for the defense of third-party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability." But while insured defendants are accustomed to looking to their liability insurers for a defense to potentially covered claims, insured plaintiffs often overlook the possibility that they, too, may be entitled to a "defense" from their insurers. Indeed, given the breadth of an insurer's duty to defend, plaintiffs might be entitled to a defense from their liability insurers in a number of circumstances.

For one, even if an insured initiates a lawsuit, the insured nonetheless should be entitled to a defense if any potentially covered cross-claim or counterclaim subsequently is filed against the insured. *E.g., State v. Pacific Indem. Co.*, 63 Cal. App. 4th 1535, 1542 (1998) (duty to defend insured against cross-claim in lawsuit initiated by insured); *Haskins v. Employers Ins. of Wausau,* 2015 U.S. Dist. LEXIS 21480, *9-11 (N.D. Cal. Feb. 23, 2015) (duty to defend insured against counterclaim).

Furthermore, courts have recognized that a liability insurer's duty to defend can extend to amounts incurred by the insured to prosecute a related — albeit separate — action. For instance, in *Larkin v. ITT Hartford*, 1999 U.S. Dist. LEXIS 9960 (N.D. Cal. June 29, 1999), after initiating a lawsuit arising out of a real estate transaction, the insured was named a defendant in a second lawsuit arising out of the same real estate transaction and involving considerable factual overlap with the issues in the first lawsuit. Although the insurer had agreed to defend the second lawsuit, it argued that expenses incurred in connection with the first lawsuit in which the insured was the plaintiff could not be recovered under the insured's policy. In the ensuing insurance coverage litigation, the court disagreed, recognizing that the expenses incurred in prosecuting the insured's affirmative claims in the original lawsuit could nonetheless be recoverable as defense costs in the second lawsuit. The court reasoned that "some of the actions taken by plaintiffs' counsel in [the original lawsuit] may also have been reasonable and necessary to the defense of the [second lawsuit], and plaintiffs may not have duplicated such actions in [the second lawsuit] precisely because they had already been performed in connection with" the first lawsuit. The court went on to stress that, in such circumstances, the costs associated with litigating affirmative claims may properly be characterized as defense costs covered under the insured's liability insurance policy.

Even if an insured initiates a lawsuit, the insured nonetheless should be entitled to a defense if any potentially covered cross-claim or counterclaim subsequently is filed against the insured.

Similarly, in *Kla-Tencor Corp. v. Travelers Indemnity Co. of Illinois*, 2004 U.S. Dist. LEXIS 15376 (N.D. Cal. Aug. 4, 2004), the insured filed a lawsuit alleging that the defendant had infringed one of its patents. The insured subsequently filed a second lawsuit against the same defendant alleging infringement of another of its patents. In response, the defendant asserted product disparagement counterclaims in the second lawsuit. The insured tendered both lawsuits to its insurer, which denied coverage. In subsequent insurance coverage litigation, the court ruled that the product disparagement counterclaims in the second lawsuit filed by the insured triggered the insurer's duty to defend. The insured also argued that its defense of the product disparagement counterclaims in the second lawsuit depended in part on its ability to prevail on its affirmative patent infringement claims in the first lawsuit. The court agreed that the insured's defense strategy was not unreasonable, noting that establishing the validity of the patent at issue in the first lawsuit would have undercut the counterclaims in the second lawsuit. Accordingly, the court held that the insured was entitled to reimbursement of legal fees incurred prosecuting the first lawsuit, so long as the insured could establish that those expenses were reasonable and necessary to the defense of the counterclaims asserted in the second lawsuit.

California courts also have held that, in certain circumstances, allegations in a defendant's answer and affirmative defenses can trigger a liability insurer's defense obligation. For instance, in *Construction Protective Services Inc. v. TIG Specialty Insurance Co.*, 29 Cal. 4th 189, 198 (2002), the Supreme Court observed that a setoff claim asserted as an affirmative defense can constitute a "suit" for "damages" under a general liability policy — adding that, for purposes of accounting, "the effect [of the setoff defense] was no less a monetary recovery than would be a damages award." The Court held that if the allegations in the setoff defense potentially fell within the policy's coverage, the insurer's duty to defend would be triggered.

Importantly, once an insurer's duty to defend is triggered, the insurer typically must pay *all* reasonable and necessary defense costs — even if those expenses also benefit the prosecution of the insured's affirmative claims. As the California Supreme Court has explained: "If [] expenses must be incurred by the insurer in fulfilling its duty to defend the insured, they must be incurred. The insurer gives, and the insured gets, what they bargained for. Even if the insured may happen to derive some added benefit, the insurer does not shoulder any added burden. The insurer may not be heard to complain." *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 66 (1997); see also *Barratt Am., Inc. v. Transcontinental Ins. Co.*, 102 Cal. App. 4th 848, 860 (2002) (if expenses are "'reasonable and necessary' to mount a defense in a pending lawsuit … [the] insurer must bear these defense costs even if the insured obtains additional benefits from the expenditures [and] even though they may serve more than one objective"); *Larkin*, 1999 U.S. Dist. LEXIS 9960 at *20 (even if litigation expenses did "double duty" and benefited insured's affirmative claims, such amounts are recoverable if reasonable and necessary to insured's defense).

Thus, California law is clear that an insured plaintiff may be entitled to a "defense" from its liability insurer in a variety of contexts — and that defense rightly should include payment of all reasonable and necessary defense costs, even those amounts that also benefit the prosecution of the insured's affirmative claims.

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