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Hindsight Isn't 20/20 When It Comes To An Insurer's Duty To Defend In California

September 26, 2019 | Policyholder Protection,Duty To Defend

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You are a California policyholder and have been sued in a lawsuit. Your insurer denies coverage, claiming that it has no duty to defend the lawsuit. After the lawsuit concludes, you file suit against your insurer, contending that the insurer breached its duty to defend and engaged in bad faith. During discovery in the bad faith and coverage lawsuit, your insurer seeks broad-ranging discovery about what transpired in the underlying lawsuit after the insurer denied coverage with an eye toward finding evidence to bolster its denial of coverage. Is this a permissible practice?

Not in our view. Under California law, the existence of an insurer's duty to defend is based upon those facts known by the insurer at the inception of the underlying lawsuit. This is a question which is not judged on the basis of hindsight but rather from all of the information available to the insurer at the time of tender of the defense. In light of the foregoing temporal relevance rule, insurers have a duty to investigate before denying coverage and cannot rely on after-acquired evidence.

Although the law on these issues has been on the books for years, in our experience insurance companies continue to use the same playbook: denying that they have a duty to defend based upon the allegations in a complaint or demand letter and then seeking everything possible in discovery. Accordingly, when faced with an insurer's effort to conduct an after-the-fact investigation to bolster its denial of coverage, do not assume that it is permissible for your

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