

13-1703A. Existence of duty to defend.

An insurer is under a duty to defend a claim [against its insured] if the facts alleged in the claim [and any other facts known to the insurer about the claim] [and any additional facts that the insurer could have discovered if it conducted a reasonable investigation of the claim] [bring the claim within the coverage terms of the insurance policy] [or] [give rise to a legitimate question about whether coverage exists under the policy terms]. In determining whether the claim potentially falls within the policy coverage, the facts and policy terms are to be considered from the viewpoint of a reasonable insured.

[For an insurer that is under a duty to defend a claim against its insured, the duty arises [when the insured makes a demand for a defense of the claim] [or] [when the insurer obtains actual notice of the claim] [, whichever occurs first]. The duty continues to exist unless or until the insurer receives a determination by a court that the claim against the insured is outside the scope of coverage of the insurance policy.]

[An insurer has no duty to defend if the claim against the insured clearly falls outside the coverage provided by the policy.] [An insurer is under no duty to defend if the insured affirmatively declines a defense.]

USE NOTES

This instruction is to be used in cases involving alleged bad faith conduct by an insurer in refusing to defend against a third-party claim, when the existence of a duty to defend on the insurer's part is disputed and presents questions for resolution by the jury. It should be given in conjunction with UJI 13-1703B NMRA, which describes when a breach of the duty to defend constitutes bad faith.

The bracketed language in the instruction should be used as appropriate, depending on the basis of the claim against the insurer and the issues raised by the evidence. The bracketed second paragraph should be used, in whole or in part, if factual issues are raised by the plaintiff's claim or the insurer's defense and sufficient evidence is offered at trial to give rise to a jury question about when the insurer's duty to defend arose and/or when that duty ceased to exist. The bracketed third paragraph should be used, in whole or in part, if the insurer's defense and the evidence raise a jury issue about whether the claim against the insured clearly falls outside policy coverage or whether the insured "affirmatively declined" a defense by the insurer.

The brackets around the phrase "against its insured" in the first paragraph of the instruction indicate that the phrase ordinarily should be given, but the phrase is intended to refer to the plaintiff claiming benefits under the insurance policy and should be modified, along with other references in the instruction to the "insured," if the use of "insured" would not be appropriate in the circumstances of the case. If the case presents a question whether the plaintiff is an "insured" or is otherwise eligible to claim a defense under the policy, this instruction may require supplementation with instructions framing that issue.

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