By Robin Meadow and Lawrence E. Green

Title Defense

Has the California Supreme Court's decision in *Buss* delivered a knockout blow to current title insurance practice?

For months the legal press has been teeming with articles reacting to the decision in *Buss* v. *Superior Court*,[1] the California Supreme Court's long-awaited pronouncement on several previously unsettled questions concerning an insurer's right to reimbursement for the cost of defending against noncovered claims. Largely overlooked in the commentary so far has been the opinion's unusual and questionable treatment of the so-called "in for one, in for all" rule—the rule that "[o]nce the defense duty attaches, the insurer is obligated to defend against all of the claims involved in the action, both covered and noncovered...."[2] While this rule has long been a staple of claims involving comprehensive general liability (CGL) policies, until *Buss* there was little basis for assuming the rule might apply elsewhere.

Now that assumption has changed. In barely two sentences, and with no pretense of the contract-based analysis that has been the centerpiece of recent supreme court insurance jurisprudence (including *Buss* itself), the court has required non-CGL carriers to reexamine issues they thought were long settled.

H&H Sports sued sports magnate Jerry Buss in a complex commercial lawsuit with 27 causes of action that included a claim for defamation—the only claim potentially covered by Buss's CGL policies, which had been issued by Transamerica. Transamerica provided a complete defense, reserving a right to reimbursement for the cost of defending noncovered claims. The defense costs exceeded $1 million, but Transamerica claimed that no more than $56,000 was attributable to the defamation claim. When Buss settled with H&H by paying $8.5 million, Transamerica refused to participate in the settlement and demanded reimbursement of defense costs. In Buss's litigation against Transamerica, the parties filed cross-motions for summary judgment. The trial court denied

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Buss's motion and granted Transamerica's.

Did Transamerica have a duty to defend? Did it have a right to reimbursement and, if so, by what procedure? In particular, who had the burden of proof in a claim for reimbursement, and did the burden require proof by more than a preponderance of the evidence? These were the principal issues before the court of appeal and the supreme court, which both affirmed the lower court's decision.

All but one of the many amicus briefs—as well as those in the companion case[3]—focused on the reimbursement issue. Everyone assumed the "in for one, in for all" rule applied; the question was whether the rule permitted reimbursement. In holding that it did, the court discussed the basis for the rule. Surprisingly, this was the first time any California court had done so. Although the "in for one, in for all" rule had been embedded in California decisional law for many years, no prior opinion explained its basis, much less evaluated it in light of policy language creating the duty to defend. In its most recent prior statement of the rule, the supreme court merely cited the seminal case of *Hogan* v. *Midland National Insurance Company*,[4] which itself contained no analysis of the question. Neither did any of the five decisions *Hogan* cited.[5]

Non-California authority suggested that the duty to defend is grounded in the insurance contract. As one federal court observed:

> The nature of the insurer's duty to defend is purely contractual. There is no common law duty as to which the courts are free to devise rules. The obligation on the court is merely to interpret the language of the insurance contract.[6]

But in *Buss*, the court concluded that policy language is *not* the basis of the rule. To the contrary, the court held:

> We cannot justify the insurer's duty to defend the entire "mixed" action contractually, as an obligation arising out of the policy, and have never even attempted to do so. To purport to make such a justification would be to hold what we cannot—that the duty to defend exists, as it were, in the air, without regard to whether or not the claims are at least potentially covered.[7]

One might have thought that this language presaged an end to the "in for one, in for all" rule, but it didn't. Rather, the court stated:

> [W]e can, and do, justify the insurer's duty to defend the entire "mixed" action prophylactically, as an obligation imposed by law in support of the policy. To defend meaningfully, the insurer must defend immediately. [Citation.] To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not. To do so would be time consuming. It might also be futile: The "plasticity of modern pleading" [citation] allows the transformation of claims that are at least potentially covered into claims that are not, and vice versa.[8]

This is the entire discussion of the subject. The court cites no authority for its conclusion beyond *Montrose Chemical Corporation* v. *Superior Court*.[9] It provides no analysis beyond this unvarnished exercise of ipse dixit.

But so what? Hasn't the "in for one, in for all" rule been well settled for years? Isn't this what every insurer and insured expects, irrespective of the principal issue in *Buss* concerning who pays for the defense of noncovered claims? In a word, no. To the contrary, for decades non-CGL insurers have been drafting policies that explicitly disclaim the "in for one, in for all" rule. The language of title insurance policies, for example, has evolved to a point where its intent is unmistakable:

> [T]he Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but *only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy*. The Company shall have the right to select counsel of its choice (subject to the right of such insured to object for reasonable cause) to represent the insured *as to those stated causes of action* and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay *any fees, costs or expenses* incurred by an insured in the defense of those causes of action which allege matters not insured against by this policy.[10]

Justice Kennard recognized the significance of this language in her dissent in *Buss*, in which she took the majority to task for ignoring the fact that CGL policies broadly require the defense of "any *suit*" in which a claim for covered damages is made, in contrast with limited language like that of title insurance policies. She observed that "[b]y stating their defense obligation in terms of defending particular causes of action, rather than entire suits, title insurers have done what insurers issuing standard CGL policies have not done—limited their contractual defense obligation to the defense of potentially covered claims."[11]

Justice Kennard's point is well taken. Buss's policy obligated his carrier to defend "'any *suit* against [the insured] seeking damages on account of such injury.'"[12] Yet despite the supreme court's close focus in recent years on policy language, in *Buss* the court seems to have gone very far out of its way to avoid using the word "suit." The court uses the words "claim" or "claims" more than 50 times and the word "action" more than 25 times, but the word "suit" never makes an appearance outside of descriptive quotations from Buss's policies.[13] This linguistic reticence seems to be a tacit recognition of the tension between the policy language and the decision's analysis.

(The court has done much the same thing in the recent decision of *Aerojet-General Corporation* v. *Transport Indemnity Company*,[14] in which it applied *Buss* in evaluating the scope of the defense obligation in the context of environmental claims. Once again, claims rather than suits took center stage, and the court held that its *Buss* analysis applies "not only between *claims* but also between *parts* of a single claim."[15] Further, the court found that there is no contractual obligation to pay for "defense costs that can be allocated solely to a claim, *or a part of a claim*"[16]—and there is therefore a right to reimbursement for such costs.)

Why did the court, having meticulously explained that an insured can have no expectation that the insurer will pay for the defense of noncovered claims, turn around and hold—with virtually no authority or analysis, and after years of pointedly holding that policy obligations are defined by policy language—that the insurer is nevertheless subject to the "in for one, in for all" rule? The unusual facts of *Buss* suggest the likely explanation. The court evidently rebelled at the prospect of requiring an insurer to pay more than $1 million in defense costs in a case in which the only covered claim was indisputably a tiny part of the case. At the same time, however, the court was not prepared to overthrow the long-settled "in for one, in for all" rule. The court seems to have concluded that it could only give Transamerica a right to reimbursement by eliminating any contractual obligation to defend noncovered claims. It therefore had to manufacture an extracontractual (in other words, public policy) basis for the "in for one, in for all" rule.

The logical starting point for a public policy analysis is Civil Code Section 2778(4), the statutory authority for defense obligations under indemnity agreements. But the court ignored that statute, possibly because it imposes a lesser obligation than the "in for

one, in for all" rule—it only requires a defense "in respect to the matters embraced by the indemnity," and then only "unless a contrary intention appears."[17] Left with no contractual language, statute, decision, or legal principle supporting its desired conclusion, the court did what it said it couldn't do: it found the "in for one, in for all" rule, to use the court's words, "in the air."[18] It simply created the rule out of nothing. One might have expected further explication in the subsequent *Aerojet-General* case, but it isn't there; *Aerojet-General* simply cites *Buss* as its sole authority on the relevant points.

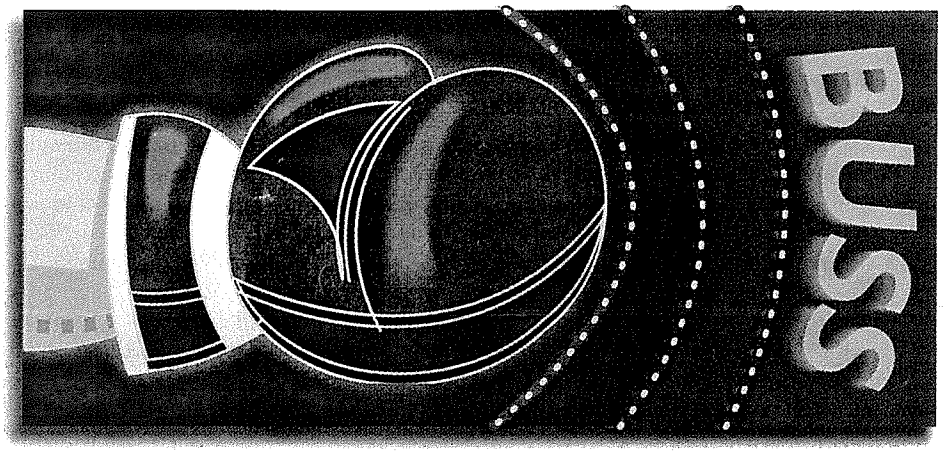
The question remains: how broadly does this new rule apply? Does it undercut the carefully drafted language of title insurance and other non-CGL policies? There is a big world out there—the Insurance Code lists 22 different kinds of insurance.[19] Should this unsupported and unreasoned new rule apply everywhere?

One might argue that *Buss*'s rationale, such as it is, extends to any kind of insurance that includes any kind of defense obligation, regardless of policy language. The court construed CGL policies to impose a contractual defense obligation only for covered and potentially covered claims. That interpretation seems to create an equivalence with the defense clause of the standard title policy, which expressly imposes the same limitation. If the "in for one, in for all" rule applies to a CGL policy despite the absence of any contractual obligation to defend noncovered claims, shouldn't it apply just as well to a title insurance policy, or to any other policy, regardless of express limiting language?

The answer, once again, is no, for a number of reasons.

First, and most obviously, nothing in the opinion suggests that the court intended to reach beyond CGL or other liability policies, which were the entire focus of the case and which have long been subject to the "in for one, in for all" rule. Title policies are not truly liability policies—they are a hybrid. While title policies have a defense component, they are primarily first-party indemnity policies, whose principal coverage obligation is to compensate the insured for title defects. The defense obligation is not only incidental to this principal obligation but is actually optional. Unlike a liability carrier, a title insurer can terminate all coverage—specifically including any defense obligation—by paying the policy limits to the insured.[20] Further, completely independent of whether any litigation is even pending, the insurer "fully perform[s] its obligations" by establishing the insured's title "in a reasonably diligent manner by any method."[21]

Second, *Buss*'s only articulated rationale—that "[t]o defend meaningfully, the insurer must defend immediately [and to] defend immediately, it must defend entirely"[22]—may well play no role in a particular case. True, in a case that presents immediate litigation needs—for instance, a short time to respond to an injunction—a carrier may be in no position to waste time "pars[ing] the claims, dividing those that are at least potentially covered from those that are not."[23] But what if, as often happens in title insurance litigation, the insured does not recognize the potential for coverage until the lawsuit has been underway for many months and the defense has been handled by the insured's independent counsel? The insured's own counsel has already "defend[ed] meaningfully" by "defend[ing] immediately [and] entirely,"[24] without any participation by any insurer. All the title insurer can bring to the case at this point is financial support and perhaps some special expertise. Under these circumstances, *Buss*'s rationale provides no basis for requiring the title insurer to provide anything beyond the express requirements of the policy—the cost of litigating the title claims only.



Third, "'the plasticity of modern pleading'"[25] is rarely as problematic with title claims as it is with general liability claims. Title policies have a feature that no standard liability policy has: an objective and precise measuring stick for determining whether a claim is, in the first instance, covered by the policy's insuring clause. In most cases, one can simply compare the insured's title as described in the policy with the title claim being asserted. If they conflict, the claim is covered; otherwise, it is not.[26] The linguistic gymnastics in which courts regularly engage when determining coverage under liability policies are, by and large, not a feature of title insurance litigation.

Fourth, insureds under title policies do not have the same defense expectations as CGL insureds. Although *Buss* establishes that CGL insureds do not expect their insurers to be ultimately responsible for the cost of defending noncovered claims, it also states that these insureds *do* expect a complete defense in the first instance. Insureds under CGL policies have long had a sound basis for that expectation, dating back more than 40 years to *Ritchie* v. *Anchor Casualty Company*[27] (which itself cited decisions substantially older)[28] and nearly 30 years to the supreme court's approval of the "in for one, in for all" rule in *Hogan*.[29] In sharp contrast, for many years title insurers have been drawing ever more explicit contractual boundaries around their defense obligations.

Almost a quarter-century ago, the standard CLTA policy was narrowed from language similar to the "any suit" language of CGL policies to provide that the insurer would "provide for the defense of an insured in litigation *to the extent* that such litigation involve[d] an alleged defect, lien, encumbrance or other matter insured against by this policy."[30] The current language, which is far more restrictive, has been in effect for nearly a decade.[31] Decisional law does not reflect any uncertainty in the area: no California decision involves even a contention that title insurance is or should be subject to the "in for one, in for all" rule.[32] It is reasonable to infer that insureds under title policies have never expected their insurers to defend nontitle claims under any circumstances.

Fifth, the central theme of *Buss*'s analysis—its focus on what the insured is paying premiums for—highlights the uniqueness of title insurance. As one court observed:

> Title insurance is unlike any other insurance. Insurers in other lines cannot control the risk beyond being careful in the selection of insureds. However, title companies do control the risk; they attempt to eliminate it by the work they do in determining the state of a title.[33]

Generally speaking, a title policy insures

against losses resulting from differences between the title as insured and actual record title as of the date of the policy, and there is no coverage for losses arising from later events.[34] The measure of coverage is also limited: the most the insured can recover (within policy limits) is the loss in value resulting from the difference between record title and title as insured.

For this limited coverage, the insured pays a relatively small, one-time premium for a policy that remains in effect for as long as the insured owns the property. As the quotation suggests, the premiums mainly defray the title insurer's cost of examining title in its effort to locate all existing title defects and list them as exceptions from coverage. Because the risk is based entirely on the state of record title, the insurer has no reason to learn anything about the insured or its business. Indeed, in many transactions—and certainly in most consumer transactions—there is no direct contact between insurer and insured.

This approach to risk avoidance differs from that of CGL insurers on the most fundamental level. CGL insurers insure against losses arising from future events that, in one way or another, usually involve the insured's conduct. Their underwriting practices therefore focus on the insured. CGL applications often request comprehensive information covering not only the insured's prior loss experience and knowledge of potential claims but also every aspect of its business operations and its real and personal property that might conceivably give rise to a claim.[35] The insurer uses this information to decide whether to take on the risk and how much of a premium to charge. Further, since the insurer issues its policy for a limited period, it can mitigate an unfavorable risk experience by increasing the premium, structuring claims-made coverage, or even refusing to renew the policy.

Comparing these two approaches to underwriting in the light of *Buss*'s purpose-of-premium analysis reveals an equally fundamental difference in the anticipated scope of the duty to defend. The CGL insurer expects that claims under its policy will most often arise from its insured's conduct. That is why it examines the insured's history in detail before undertaking the risk, and that is the basis on which it calculates its premiums. The CGL insurer also knows that in any mixed action—one where there is both a noncovered claim and a claim that is at least potentially covered—chances are that all the claims will relate in some way to the kinds of things the insurer has investigated.

In contrast, a title insurer has no such expectation. It has limited its examination to the insured's title; if it examines the actual real property at all, it is only to determine physical features that might affect title, not to evaluate potential dangers to third persons or their property.[36] Subjecting a title insurer to the obligation to defend an entire mixed action therefore not only would carry the defense obligation well beyond explicit policy obligations and the historical expectations of the parties but also would require the insurer to undertake something for which neither its underwriting practices nor premium structure has prepared it.

It is reasonable to assume that the expectations of insureds in these areas are not very different from those of insurers. Even apart from a title policy's explicit language, its extremely narrow focus and attendant low premium eliminate any suggestion to the insured that the title insurer would ever pay litigation costs for noncovered claims, even with a right to reimbursement. The expectations of CGL insureds that led the court in *Buss* to express concern about carriers parsing claims while Rome burns should not govern the fundamentally different relationship that arises under a title insurance policy.

Sixth, there has to be some practical limit to the supreme court's analysis, even as to CGL policies. To pick a somewhat unrealistic example because it highlights the problem, suppose a plaintiff joins two factually separate causes of action in a lawsuit against the insured. One is a personal injury claim against the insured for an injury occurring on property owned by the insured at a time when the insured carried a CGL policy that plainly covered the claim. The other is a personal injury claim arising from an automobile accident with the insured that occurred during an earlier period when the insured carried no liability insurance of any kind. Indisputably, there is no relationship of any kind between the claims, which could just as well have been brought by different plaintiffs in separate lawsuits—and as to the automobile claim, there is no basis under which the insured could ever expect to have any of its defense paid for by any insurer. (A comparable example in the title insurance context would be title claims involving two unrelated properties, only one of which is insured.)

Must the CGL insurer pay for the defense of the automobile claim? True, the need for an immediate defense is the same as if the claims had some legal relationship, and there are obvious practical problems involved in providing only a partial defense. But defending against the automobile claim would go far beyond anything *Buss* says about the insured's expectations and the contractual limitations of the policy. It would, in effect, create an entirely new insurance policy "in the air."[37] From an insurance perspective, these are like two distinct lawsuits. It is difficult to believe that even the *Buss* court would conclude that these circumstances trigger the "in for one, in for all" rule.

Similarly, *Buss*'s rationale for applying the "in for one, in for all" rule evaporates in a case in which the litigation is well advanced and the insured has been fully defended at its own expense. Since the insured's need for an immediate, entire defense has already been met, there is no reason to burden the insurer with any obligation beyond the explicit limitations of its policy. Indeed, this is the essence of one of the holdings in *Barbara B. v. Horace Mann Insurance Company*, a recent post-*Buss* decision.[38]

Title insurers have an advantage because noncovered claims often trigger a defense obligation under another policy, most likely one with an undeniable "in for one, in for all" obligation. If another insurer is involved, the issues raised in *Buss* will ordinarily be addressed between the insurers. They can agree on a permanent or temporary method of allocating ongoing defense costs and can litigate any unresolved issues between themselves after the case is over without affecting the ongoing progress of the defense. But *Buss* suggests no reason why the same approach cannot be followed even without another insurer's involvement, and even if the exigencies of the particular case persuade an insurer to provide an initial defense against noncovered claims. Once a case is under way and the demands of immediacy have been met, the insurer should be able to ask the insured to begin bearing its share of defense costs.

A practical way of addressing these situations is percentage allocation agreements, at least where there is some reasonable basis for assessing the proportion of the case that will be devoted to noncovered claims. The unavoidable imprecision of such an arrangement is outweighed by its utility in heading off disputes about such matters as the characterization of particular costs and the level of detail necessary for defense counsel's bills—areas otherwise fertile not only for conflicts between insurer and insured but also possibly for conflicts of interest for defense counsel. Of course it might be safer, as *Buss* suggests, for the insurer simply to defend the entire action without seeking some interim allocation agreement.[39] But when the safe approach is consonant with neither the basic nature of the policy nor the insured's reasonable expectations, it is unfair to demand that insurers follow it.

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Although *Buss* resolved some thorny issues that have been plaguing insurers and insureds for many years, it may have created a whole new round of problems in areas that the case did not even address. The California Supreme Court's rationale for the "in for one, in for all" rule does not justify applying the rule in every case, under every circumstance, and for every class of insurance. The issues discussed here regarding title insurance will arise with other kinds of policies that do not contain conventional "any suit" defense language. So after waiting so long for *Buss*, it may be many years more before the dust finally settles. ■

[1] Buss v. Superior Court, 16 Cal. 4th 35 (1997). The articles include, among others: Cusack & Stukel, *The Road to 'Buss,'* THE RECORDER, Oct. 1997, at 3; Antognini, *Is the Universe Now Finite?* Buss *v.* Superior Court *and the Duty to Defend in California*, CAL. INS. REP., July 1997, at 149; Levinson & Popik, *Insurance Litigation*, CEB CIV. LITIG. REP., Aug. 1997, at 206; Friedman, *Assault on the Duty to Defend*, ABTL REP., Sept. 1997, at 13; Pasich, *Wayward 'Buss'? High Court Ruling May Not Be a Solid Victory for Insurers*, L. A. DAILY J., Aug. 14, 1997, at 7.

[2] Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993) (citing Hogan v. Midland Nat'l Ins. Co., 3 Cal. 3d 553, 564 (1970)). The term "noncovered" in this article refers to claims for which there is no potential for coverage.

[3] IMCERA Group, Inc. v. Liberty Mut. Ins. Co., No. S052878, *review dismissed*, 65 Cal. Rptr. 2d 346 (1997).

[4] Hogan, 3 Cal. 3d at 564, *cited in* Horace Mann Ins. Co., 4 Cal. 4th at 1081.

[5] Hogan, 3 Cal. 3d at 563-64. Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 254-55 (1955), was the first California case to state the "in for one, in for all" rule ("If the complaint filed against the insured alleges several causes of action some of which are not covered by the policy but one or more being within its terms, the insurer is bound to defend the action."). The Ritchie court did not discuss either the several non-California cases it relied on or the policy language, which obligated the insurer to "defend in [the insured's] name and behalf any suit against the insured alleging such injury...." *Id.* at 249.

[6] All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160, 163 (N.D. Ind. 1971). In McMillin Scripps North Partnership v. Royal Ins. Co., 19 Cal. App. 4th 1215, 1220-21 (1993), the court observed that "'[a]n insurer's duty to defend is a contractual duty arising from the express language of the policy'" (quoting 1A CAL. INSURANCE LAW & PRACTICE §13.08[1], at 13-51 (1993)). However, the court was not analyzing the scope of the duty to defend—it was contrasting liability and casualty policies.

[7] Buss, 16 Cal. 4th at 48. "Mixed action," as used in Buss, means an action that includes both claims that are actually or potentially covered and claims for which there is no potential for coverage.

[8] *Id.* at 48-49 (citing Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 295 (1993), and Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276 (1966).

[9] In Montrose Chem. Corp., 6 Cal. 4th 287, the court stated that the "[i]mposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf."

Id. at 295.

[10] CLTA Standard Coverage Policy pt. II, ¶4(a) (1990), *quoted in* CEB, CAL. TITLE INSURANCE PRACTICE, app. E, at 533 (emphasis added) [hereinafter 1990 CTLA Policy]. Language limiting the duty to defend appears in three other places in the current CLTA policy:

- Insuring clause: Company pays litigation costs "incurred in defense of 'title' but only to the extent provided in the Conditions and Stipulations." *Id.* at 529.
- Exclusions: "[T]he Company will not pay loss or damage, costs, attorneys' fees [or] expenses which arise by reason of" excluded matters. *Id.* at 530.
- Schedule B: "This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of" the excluded items. *Id.* at 531.

In California, title insurance is written almost exclusively on standardized policies of title insurance prepared by the CLTA and its national counterpart, the American Land Title Association (ALTA). The language quoted in the text is virtually identical to the ALTA's forms, such as the ALTA Loan Policy (1992) and the ALTA Owner's Policy (1992). *See* CEB, CAL. TITLE INSURANCE PRACTICE, app. E, at 539, 549.

[11] Buss, 16 Cal. 4th at 64 (Kennard, J., dissenting).

[12] *Id.* at 41. The two policies differed slightly; the other required the defense of "any 'suit,'" meaning a "civil proceeding," brought against Buss "seeking those damages." *Id.*

[13] *Id.*

[14] Aerojet-General Corp. v. Transport Indem. Co., 17 Cal. 4th 38 (1997).

[15] *Id.* at 60.

[16] *Id.* at 68-69.

[17] In the interpretation of a contract of indemnity, the following rules are to be applied, *unless a contrary intention appears*:

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter *in respect to the matters embraced by the indemnity*, but the person indemnified has the right to conduct such defenses, if [the person] chooses to do so.

CIV. CODE §2778(4) (emphasis added).

[18] Buss, 16 Cal. 4th at 48.

[19] INS. CODE §100 divides insurance into the following classes: 1) life, 2) fire, 3) marine, 4) title, 5) surety, 6) disability, 7) plate glass, 8) liability, 9) worker's compensation, 10) common carrier liability, 11) boiler and machinery, 12) burglary, 13) credit, 14) sprinkler, 15) team and vehicle, 16) automobile, 17) mortgage, 18) aircraft, 19) mortgage guaranty, 19.5) insolvency, 19.6) legal insurance, and 20) miscellaneous.

[20] If the insurer "pay[s] or tender[s] payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company," then "all liability and obligations to the insured under this policy" other than the obligation to make the payment "shall terminate, *including any liability or obligation to defend, prosecute, or continue any litigation*...." 1990 CLTA Policy, *supra* note 10, at ¶6(a)(i) (emphasis added). The option is equally explicit with respect to insurance on trust deeds: the insurer terminates its obligations by "purchas[ing] the indebtedness secured by the insured mortgage" and paying certain other costs. *Id.* at ¶6(a)(ii). Further, under ¶6(b), the insurer could pay even less if there is no dispute that the amount of loss is less than policy limits.

[21] 1990 CLTA Policy, *supra* note 10, at ¶8(a).

[22] Buss, 16 Cal. 4th at 49 (citation omitted).

[23] *Id.*

[24] *Id.*

[25] *Id.* (quoting Gray, 65 Cal. 2d at 276).

[26] More complex questions do arise, however, under the policy's exceptions and exclusions, particularly the exclusion for title defects "created, suffered, assumed or agreed to" by the insured. 1990 CLTA Policy, *supra* note 10, at 530.

[27] Ritchie, 135 Cal. App. 2d 245, 254-55.

[28] *See, e.g.*, Christian v. Royal Ins. Co., 185 Minn. 180, 240 N.W. 365, 366 (1932).

[29] Hogan, 3 Cal. 3d at 564.

[30] CLTA Standard Coverage Policy pt. II, ¶3(a) (1973) (emphasis added). Previous versions were broader. For instance, the 1963 policy in Paramount Properties Co. v. Transamerica Title Ins. Co., 1 Cal. 3d 562, 566 n.2 (1970), provided:

> "The Company, at its own cost and without undue delay shall provide (1) for the defense of the Insured in all litigation consisting of actions or proceedings against the Insured...which litigation or action in any such events is founded upon an alleged defect, lien or encumbrance insured against by this policy...."

[31] CLTA Standard Coverage Policy pt. II, ¶4(a) (1988). In her dissent, Justice Kennard suggests that the reason for the contrast between CGL and other carriers is the desire of CGL carriers to control the defense of a case in order to manage their indemnity exposure. Buss, 16 Cal. 4th at 63. Thus, she notes, "CGL carriers have not responded to this changed legal climate by altering the scope of their defense obligation." 16 Cal. 4th at 64 (Kennard, J., dissenting) (referring to limitations on carriers' ability to control the defense).

[32] Enron Corp. v. Lawyers Title Ins. Corp., 940 F. 2d 307 (8th Cir. 1991), may be the only decision in any jurisdiction that addresses the question. It holds that in a mixed action, a title insurer does not have a duty to defend a noncovered claim.

[33] Fidelity Title Co. v. Washington Dep't of Revenue, 49 Wash. App. 662, 664-65, 745 P. 2d 530, 531 (1987). Misunderstandings about title insurance abound. The Second District very recently expressed frustration in noting, "It is apparent...that despite clear authority to the contrary, parties to real estate transactions continue to misunderstand the purpose of preliminary title reports and title insurance policies...." Siegel v. Fidelity Nat'l Title Ins. Co., 46 Cal. App. 4th 1181, 1185 (1996).

[34] *See* Rosen v. Nations Title Ins. Co., 56 Cal. App. 4th 1489, 1499-02 (1997) (title insurance does not cover any losses from events occurring after the date of the policy).

[35] For instance, a current Liberty Mutual Ins. Co. "General Liability Submission" requests detailed responses to such diverse questions as: "Does applicant draw plans, designs, or specifications?" "Products recalled, discontinued, changed?" "Products under label of others?" "Any parking facilities owned/rented?" "Any exposure to radioactive/nuclear materials?" A current "Commercial Insurance Application" from Acord Corp. asks such questions as: "Any past losses or claims relating to sexual abuse or molestation allegations, discrimination or negligent hiring?" "During the last 10 years, has any applicant been convicted of any degree of the crime of arson?" "Any uncorrected fire code violations?"

[36] *See* CEB, CAL. TITLE INSURANCE PRACTICE 130-32.

[37] Buss, 16 Cal. 4th at 48.

[38] Barbara B. v. Horace Mann Ins. Co., 61 Cal. App. 4th 158, 71 Cal. Rprt. 2d 350 (1998). The court stated: "[T]he failure of one insurer to defend is of no consequence to an insured whose representation is provided by another insurer," because the insured does not face an undue financial burden and is not "deprived 'of the expertise and resources available to insurance carriers.'" *Id.*, 61 Cal. App. 4th at ___, 71 Cal Rptr. 2d at 354 (quoting Ceresino v. Fire Ins. Exchange, 215 Cal. App. 3d 814, 823 (1989)).

[39] Buss, 16 Cal. 4th at 58-59.