ALERT
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Washington Court Concludes Umbrella Insurer Has a Duty to Defend Suit Against Insured Even Though Underlying Primary Insurer Similarly Has a Duty to Defend

Megan K. Kirk • 206.373.7242 • *mkirk@cozen.com*
Meredith E. Dishaw • 206.224.1261 • *dishaw@cozen.com*

In a surprising unpublished decision, the Washington State Court of Appeals recently ruled that an umbrella insurer had a duty to defend a suit against its insured despite the fact the underlying primary insurer had also previously been found to have a duty to defend the same parties in the same suit. *Nat'l Fire & Marine Ins. v. Liberty Mut. Ins.*, Nos. 66900-1, 66901-1 Division One, Washington Court of Appeals (Jul. 16, 2012) (unpublished). In so ruling, the court rejected the reasoning of prior cases finding a duty to defend under umbrella policies only where the underlying primary insurance policy did not provide defense coverage for the claim.

In *National Fire*, the plaintiff sued the insured, a condominium developer, for construction defects and alleged breaches of fiduciary duty. The insured tendered the suit to its primary insurers for defense and indemnity. Policies in three successive policy periods were potentially implicated; the first two primary policies were issued by Certain Underwriters at Lloyd's, London, and the third was issued by National Fire & Marine Insurance Company. National Fire accepted the defense tender and ultimately paid nearly $1.5 million in defense expenses.

The insured also tendered the suit to Liberty Mutual Insurance Company, which had issued an umbrella policy above the second primary policy. Liberty responded with a reservation of rights that identified possible defenses to indemnity coverage, but did not explicitly address the defense tender.

After the developer settled the underlying suit, Certain Underwriters at Lloyd's, National Fire, and Liberty all contributed to fund the settlement. National Fire then filed suit, seeking contribution under the other policies for the defense expenses. The trial court ruled that the duty to defend was triggered under the first two primary policies. The trial court also granted National Fire's motion for summary judgment regarding Liberty's obligations, concluding that Liberty also had a duty to defend the underlying suit and, therefore, owed contribution to National Fire. The Court of Appeals affirmed the trial court's decision.

In reaching this conclusion, *National Fire* first referenced the broad interpretation of an insurer's duty to defend under Washington law: "the duty to defend is triggered if the insurance policy *conceivably covers* the allegations in the complaint, whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, ¶ 17 (2007). The court also noted that Washington courts will treat an umbrella insurer as a primary insurer, in the context of resolving a question on the duty to defend and indemnify, where the underlying primary policy does not provide coverage. *Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758 (2008).

Against this backdrop, the court then considered the Liberty policy language addressing the duty to defend. The Liberty policy provided, in pertinent part:

> III. DEFENSE
>
> A. We will have the right and duty to investigate any "claim" and defend any "suit" seeking damages covered by the terms and conditions of this policy when
>
> 2. damages are sought for any "occurrence" which is covered by this policy but not covered by any underlying policies listed in the Schedule of Underlying Insurance or any other insurance providing coverage to the "Insured."

Liberty argued that, under this policy language, it only had a duty to defend the insureds where the suit sought damages potentially covered by the umbrella policy if the underlying and other primary policies did not provide defense coverage.

Thus, because the underlying and other primary policies obligated those insurers to defend the claims against the insureds, Liberty argued it had no obligation to defend or to contribute to the defense.

In rejecting Liberty's argument, the court first ruled that "coverage" is distinct from "the duty to defend." In other words, the court concluded that the Liberty policy's reference to whether an occurrence is "covered by any underlying policies" referred only to whether the underlying policies would give rise to a duty to indemnify the insured, and not to whether the underlying policies provided defense coverage.

The court then held that because certain coverage defenses cited by the underlying and other primary insurers in their reservations of rights letters were unavailable under the terms of the Liberty umbrella policy, there were potential gaps in the primary coverage that forced Liberty to "drop down" and act as a primary insurer for purposes of the duty to defend.

The court acknowledged that a different result may have been reached if Liberty's policy language was different. As an example, the court referenced a Travelers' umbrella policy term quoted in a prior case that stated, "We will have no duty to defend any claim or "suit" that any other insurer has a duty to defend." Presumably, then, an umbrella insurer may prevent the anomalous result reached in *National Fire* by including such an explicit limitation on coverage in an umbrella policy.

Although the *National Fire* decision is currently unpublished, its novel holding suggests publication in the future is likely. Accordingly, umbrella insurers should be mindful of the risk that *National Fire* may apply to impose a duty to defend even where a defense is already being provided to an insured, and all insurers will want to consider whether an umbrella insurer may be liable to contribute to the defense jointly owed to an insured by multiple insurers.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

Megan K. Kirk at 206.373.7242 or *mkirk@cozen.com*
Meredith E. Dishaw at 206.224.1261 or *dishaw@cozen.com*