Does the Duty Ever End?

An Insurer's Continued Duty to Defend After All Covered Claims Are Dismissed

By Frank R. Malpigli

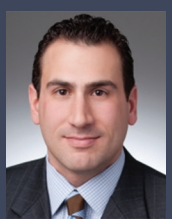
This article offers a multi-state analysis evaluating the different approaches that jurisdictions take regarding a defense withdrawal by an insurer, and whether these findings are in accordance with the language of the insurance policy.

There has been much written and litigated over the duty to defend, its broad applications, and the undertaking by jurisdictions to tackle the confusing and unpredictable nature of this concept.

When a defense is afforded to an insured, the insured expects the defense to continue until the end of the litigation, *i.e.*, settlement or dismissal of the claim. This expectation is simple and straightforward when the lawsuit involves a single-claim. However, in most situations there are multiple claims alleged in a lawsuit where only a few of them are covered by the subject insurance policy. In such a situation, the question this article addresses is what is an insurer's duty in regard to a defense when all covered claims are dismissed, leaving the noncovered claims remaining in a lawsuit? Is an insurer required to continue to fund the insured's defense?

The answer is not straightforward, and frankly, it is surprising. Many jurisdictions hold an insurer has a continuing duty to defend the noncovered claims until there is no possible legal scenario under which the covered claims would be reactivated. Some jurisdictions go even further and hold an insurer's duty to defend essentially never ends as due to the possibility the dismissed, covered claims could be reactivated during trial if a court allows a plaintiff to amend their complaint.

These holdings stray from the principles governing contracts as well as the reasonable expectations of an insured doctrine. This article offers a multi-state analysis evaluating the different approaches that jurisdictions take regarding a defense withdrawal by an insurer, and whether these findings are in accordance with the language of the insurance policy.



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Insurance Policies Are Governed by the Same Principles as Contracts

When construing an insurance contract, a court's primary objective is to ascertain the true intent of the parties as expressed in their written agreement. Accordingly, the court reads the contract as a whole, giving effect to every provision and considering the type of insurance, the nature of the risks undertaken, and the overall purpose of the policy. *See* 43 Am. Jur. 2d, Ins. §269 (2017); *Continental Cas. Co. v. Dontal T. Bertucci, Ltd.*, 926 N.E.2d 833 (Ill. App. Ct. 2010).

Under the doctrine of reasonable expectations, "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."

A seminal case involving contract interpretation and an insurer's continued duty to defend is *Brown v. Lumbermans Mutual Casualty Company*, 326 N.C. 387 (N.C. 1990). The *Lumbermans* action arose out of a personal injury claim against Lumbermans' insured and an automobile accident. *Id.* at 389. Lumbermans, predicting a jury verdict in excess of the policy limits, filed an offer of judgment in the amount of its policy limits. *Id.* The claimant accepted the offer of judgment but only released Lumbermans from the action. *Id.* Lumbermans withdrew its defense of the insured and discharged counsel. *Id.* The claimant obtained a verdict against Lumbermans' insured in excess of the policy limit. *Id.*

Lumbermans' insured commenced a declaratory judgment action, claiming Lumbermans breached its insurance contract by failing to defend him properly. *Id.* at 391. Lumbermans contended the tendering of its policy limits to the claimant satisfied its defense obligations under the automobile policy, and the withdrawal of its appointed defense counsel was proper. *Id.*

Regarding its defense obligations, the Lumbermans policy contained the following provision:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. *Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.*

Id. at 389. (emphasis added). The North Carolina Supreme Court found this language to be ambiguous and held Lumbermans had a continued duty to defend its insured until a settlement or judgment was reached, despite exhausting its policy limits. *Id.* at 391. The *Lumbermans* court found the issue was not the meaning of the word "exhausted" but the "manner by which coverage must be exhausted before the duty to defend terminates." *Id.* 394.

Looking at the policy language in *Lumbermans* one can argue the court stretched its interpretation of the policy language as the policy clearly stated the insurer's defense obligations ended when it has exhausted its policy limits. However, there is precedent from other jurisdictions supporting the *Lumbermans* court interpretation. In *Stanley v. Cobb*, 624 F. Supp. 536, 537 (E.D. Tenn. 1986), the court held the limit of liability may not be exhausted in a manner other than specified by the policy—that is, only by settling or defending. *See also Samply v. Integrity Ins. Co.*, 476 So.2d 79, 83 (Ala. 1985) ("we hold that a better rule of law is that an insurer, when it obligates itself to defend… cannot avoid its duty to defend against an insured's contingent liability by tendering the amount of its policy limits into court without effectuating a settlement or obtaining the consent of the insured."); *Pareti v. Sentry Indem. Co.*, 536 So.2d 417 (La. 1988) ("[w]hen an insurer merely tenders its limits without obtaining a settlement of any claim for its insured, a strong argument can be made that it has neither 'exhausted' its policy limits nor fulfilled its fiduciary duty to discharge its policy obligations to the insured in good faith."); *Simmons v. Jeffords*, 260 F. Supp. 641, 642 (E.D. Pa. 1966) ("'a most significant protection afforded by the policy—that of defense—is rendered a near nullity' if the duty to defend terminates upon unilateral tender of the policy limits.").

What Are the Reasonable Expectations of an Insured?

The dissenting justice in *Lumbermans*, Justice Wichard, argued the only reasonable interpretation of the Lumbermans' policy is "that by paying its full policy limits to the party injured by its insured, defendant 'exhausted' its limits of liability and ended its duty to settle or defend." *Lumberman*, *supra* 326 N.C. at 398. Justice Wichard found the majority's decision inserted additional language into the policy that was not the intent of the parties. *Id.* Justice Wichard's dissenting opinion delves into an important doctrine: the reasonable expectations of the insured.

Under the doctrine of reasonable expectations, "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Keeton Ins. Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 974 (1970). It is primarily a tool of construction in insurance policy coverage disputes. *Mills v. Archchemical Aviation, Inc.*, 250 N.W.2d 663 (N.C. 1977) (finding "The Doctrine of Reasonable Expectations has evolved as an interpretative tool to aid courts in discerning the intention of the parties bound by adhesions contracts.").

In determining the reasonable expectations of an insured, certain courts consider (1) ambiguity in the language of the contract; (2) whether the insured was told of important, but obscure, conditions and exclusions, or whether the placement of major exclusions is misleading; and

(3) whether the relevant provision is one known by the public generally. *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985). *See also Law and Prac. of Ins. Cov. Litig.* §5:8. The reasonable expectations doctrine does not destroy the insured's obligation to read the policy, but it also only holds an insured to a reasonable understanding of that policy. *Hubred v. Control Data Corp.*, 442 N.W.2d 308 (Minn. 1989).

To What Extent Does the Language in a Standard Policy Impose a Duty to Defend Against Noncovered Claims?

The obligation of an insurance company to defend and indemnify an insured comes from the insuring agreement of a liability policy. The policy language in a standard commercial general liability (CGL) policy (CG 00 01 12 04) states as follows:

1. Insuring Agreement

A. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages or "bodily injury" or "property damage to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

Insurance Services Office, CG 00 01 12 04 (2017).

Section 1.a.(2) speaks to an insurers duty to defend when the applicable limits of the policy are exhausted, as was discussed in *Lumbermans*. However, section 1.a. addresses an insurer's duty to defend covered and noncovered claims. This section specifically states there is "no duty to defend the insured against any suit… to which this insurance does not apply." Thus, in a lawsuit that alleges covered and noncovered claims, does an insured have a reasonable expectation its insurer is required to defend it until there is finality to the dismissed covered claims?

The Continuation of an Insurer's Duty to Defend and *Meadowbrook, Inc.*

One of the seminal cases addressing the continuation of an insurer's duty to defend is *Meadowbrook, Inc. et al. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411 (Minn. 1997). In *Meadowbrook*, the trial court concluded Tower could withdraw from a defense once all arguably covered claims had been dismissed. The question posed to the Minnesota Supreme Court in *Meadowbrook, Inc.*, was when does the dismissal of the covered claims become final? *Id.* at 416. Meadowbrook argued the partial summary judgment on the covered claims was not dismissed with sufficient finality to allow the insurer to withdraw its defense. Tower argued the dismissal was final for the purposes of determining its duty to defend. *Id.*

In its discussion, the Minnesota Supreme Court notes that an insurer's duty to defend claims within the policy's coverage "extends until it can be concluded *as a matter of law* that there is no basis on which the insurer may be obligated to indemnify the insured." *Id.* (emphasis in original). As a result, the duty to defend was determined to extend through the appellate process. *Id.* In support of its finding, the court looked to Rule 54.02 of the Minnesota Civil Rules of Procedures: "the dismissal via partial summary judgment of some claims within a multi-claim complaint will not become final until there is 'an express determination that there is no just reason for delay and upon an express direction for the entry of judgment'." *Id* at 417 (quoting Minn. R. 54.02 (1996)).

In reaching this conclusion, the Minnesota Supreme Court adopted the reasoning in *Commerce & Industry Insurance Company v. Bank of Hawaii*, 73 Haw. 332 (Haw. 1992). In *Bank of Hawaii*, Commerce & Industry Insurance Company (CIIC) brought a declaratory judgment action to determine the scope of its duty to defend. *Id.* In the underlying action, the covered claims were dismissed on a motion for judgment on the pleadings. *Id.* The defendant, CIIC, informed its insured, Bank of Hawaii (BOH), that its obligation to defend no longer existed due to the dismissal of the covered claims. *Id.* at 325.

Looking at Hawaii Rule of Civil Procedure 54(b), the *Bank of Hawaii* court noted a dismissal of a claim prior to the issuance of a judgment is only tentative. *Id.* Thus, the *Bank of Hawaii* court concluded the duty to defend continues until the potential for liability is finally resolved. The *Meadowbrook* court adopted this holding and held that "an insurer cannot withdraw from a defense until its duty to defend all arguably covered claims has been completely extinguished—in other words, when no further rights to appeal those arguably covered claims exist." *Meadowbrook*, 559 N.W.2d at 417.

The reasonable expectations doctrine does not destroy the insured's obligation to read the policy, but it also only holds an insured to a reasonable understanding of that policy.

The court in *Wells' Dairy, Inc. v. Travelers Indemnity Co. of Illinois*, 336 F. Supp. 2d 906 (N.D. Iowa 2004), adopted the holdings in *Meadowbrook* and *Bank of Hawaii*. Wells Dairy sought a declaration Travelers had an obligation to defend it against lawsuits brought by two customers, Pillsbury Company and Eskimo Pie Corporation. *Id.*

Wells Dairy argued the summary judgment ruling in the underlying action dismissing the covered claims did not meet the high standards for terminating Travelers' duty to defend because the summary judgment ruling is a tentative, interlocutory appeal. *Id.* at 909. Travelers, taking a different approach than the arguments

presented in *Meadowbrook* and *Bank of Hawaii,* conceded it was obligated to defend the insured for the covered claims through the appellate process, but argued it was not obligated to continue to defend Wells Dairy in the underlying action for the remaining noncovered claims. *Id.*

The U.S. District Court for the Northern District of Iowa dismissed this argument in *Wells' Dairy,* and adopted the holdings in *Meadowbrook* and *Bank of Hawaii,* concluding, "an insurer's duty to defend continues until 'all arguably covered claims has been completely extinguished—in other words, when no further rights to appeal those arguably covered claims exist.'" *Id.* at 911 (internal citation omitted). While the federal district court opined the Iowa Supreme Court would adopt this reasoning, it did not cite any case law in support of its finding.

The interesting and somewhat perplexing approach in these cases is that the courts based the insurers' continued duty to defend on the finality of a claim. They did not delve into discussing whether the language within the policy supported such liberal interpretation.

In *Klamatch Pacifica Corp. v. Reliance Ins. Co.*, 151 Or. App. 405 (Or. Ct. App. 1997), the court considered whether the duty to defend terminated when a claim for intentional infliction of emotional distress was dismissed. *Id.* The court held, "An intermediate order from a trial court dismissing a claim is not a final resolution of that claim and such an order does not relieve an insurer of its duty to defend." *Id. See also City of Medford v. Argonaut Ins. Group*, Nos. 1:06-CV-3098-PA, 1:11-CV-3037-PA, 2012 WL 2367184 (D. Or. Jun. 21, 2012) (holding that "an insurer's duty to defend does not necessarily end with a judgment. The duty to defend includes the duty to appeal in an appropriate case.").

The interesting and somewhat perplexing approach in these cases is that the courts based the insurers' continued duty to defend on the finality of a claim. They did not delve into discussing whether the language within the policy supported such liberal interpretation. In fact, in coming to their conclusions, the courts added language to the policies where none existed.

Several Jurisdictions Take an Even More Liberal Approach to the Duty to Defend

In *Harrington Haley LLP v. Nutmeg Ins. Co.*, 39 F. Supp. 2d 403 (S.D.N.Y. 1999), DeFalco and others sued Dirie and Curtis, town officials, in a land use dispute. The DeFalco complaint alleged three causes of action against Dirie and Curtis: (1) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO); (2) deprivation of the plaintiffs' civil rights in violation of 42 U.S.C. §1983; and (3) a state court-style Article 78 proceeding. *Id.* The DeFalco defendants moved to dismiss, and the court dismissed the Section 1983 claim in its entirety with leave to replead. *Id.*

The town, which was insured under a public entity liability policy issued by Nutmeg, presented the DeFalco complaint to Nutmeg and requested a defense of Dirie, Curtis, and others. *Id.* Nutmeg initially declined to defend on the ground the DeFalco action was based entirely on allegations of a criminal conspiracy. *Id.* at 405. Nutmeg, without changing its coverage position, offered the public official defendants a defense on the condition they abandon claims for prior defense costs and accept legal representation provided by Nutmeg. *Id.* All the public officials but Dirie and Curtis accepted the offer. *Id.*

Dirie and Curtis commenced an action against Nutmeg, alleging breach of the insurance policy and seeking a declaration they were entitled to retain counsel of their own choice at Nutmeg's expense (which will be referred to subsequently as the "coverage case"). *Id.* While the coverage case was in its early stages, the Section 1983 and Article 78-type claims were dismissed against all defendants, leaving only the RICO claim pending against Dirie and Curtis. *Id.*

Nutmeg argued the decision to dismiss all but the RICO claims ended its duty to defend Dirie and Curtis as of the date that that the decision was rendered. *Id.* at 408. The U.S. District Court for the Southern District of New York disagreed with Nutmeg's reasoning and stated, "Although the non-RICO claims were dismissed several times and Nutmeg presumably would have no obligation to indemnify for purely RICO liability, there never has been any assurance the case ultimately could not result in insured liability." *Id.* at 409. The U.S. District Court held that among the possibilities were amendment of the pleadings at trial to permit submission of non-RICO theories to the jury, an appellate reversal of the dismissal of the Section 1983 claim, and an order for a new trial. *Id.* Accordingly, the U.S. District Court for the Southern District of New York found, "nothing has occurred since the [appellate court's] decision that warranted any alteration in its conclusion that Nutmeg was and remains obliged to provide Dirie and Curtis with a defense by counsel of their choosing." *Id.*

The Sixth Circuit, applying Ohio law, also found an ambiguity in an insurer's policy relevant to the termination of a duty to defend in *City of Sandusky, Ohio v. Coregis Ins. Co.*, 192 Fed. Appx. 355 (6th Cir. 2006). Coregis appealed the judgment of the district court, which found that it breached its duty to defend by withdrawing its defense after all claims for money damages had been dismissed on summary judgment, but before a final order was entered on appeal. *Id.* at 361. The insured contended because the insurance contract did not provide a specific point at which Coregis' duty to defend ended, what "the right to defend or be associated with the defense" meant was ambiguous, and these terms must be construed against the insurer to require it to continue to defend the insured until the time to file an appeal expired or through a timely filed appeal process. *Id.*

The Sixth Circuit in *City of Sandusky, Ohio* found the phrase "defend or be associated with the defense" to be ambigu-

ous. *Id.* at 362. The Sixth Circuit noted that Coregis could have easily stated within the policy that it had a right to withdraw its defense before a final judgment was entered or before an appeal was pursued. *Id.* As the Coregis policy did not provide such language, the Sixth Circuit found that Coregis' duty to defend continued. *Id.* Notably, the Sixth Circuit was sympathetic to Coregis' argument that this finding would create a windfall for insureds, but it stated, "Ohio law is clear an insurer must precisely define the scope of its defense if it expects to defend on the ground its duty was extinguished." *Id.* Since it was applying Ohio law, this was a case of first impression for the Sixth Circuit, and it looked to the findings in *Meadowbrook* and *Bank of Hawaii*, *supra* to support its holding. *See also Bruce v. Junghun*, 182 Ohio App. 3d 341 (Ohio Ct. App. 2009).

The Texas Court of Appeals, in *Waffle House, Inc. v. Travelers Indemnity Company of Illinois*, 114 S.W.3d 601 (Tex. App. 2003), found an ambiguity related to Travelers duty to defend. In *Waffle House*, a former Waffle House employee sued Waffle House for defamation, disparagement, and tortious interference with contractual relations. *Id.* Waffle House was covered under a comprehensive general liability insurance policy issued by Travelers and a commercial excess umbrella policy issued by Federal Insurance Company. *Id.* It was agreed by all parties Coverage A did not apply, but Travelers and Federal agreed to defend Waffle House based on the defamation cause of action under a reservation of rights. *Id.*

A federal judge entered a substantial award in favor of the former employee, finding the employee experienced severe sexual harassment. *Id.* Both Travelers and Federal moved for summary judgment, arguing there were no injuries or damages caused by an "occurrence" since the policy excluded coverage for injuries or damages expected or intended from the standpoint of the insured, as well as injuries arising from certain employee-related practices and activities by the insured. *Id.* The Texas Court of Appeals analyzed Travelers' policy language regarding its duty to defend and noted, "Travelers' duty to defend ends when the applicable policy limits are exhausted by qualifying payments," but the court found an ambiguity in that the policy failed to mention when Traveler's duty to defend would end, other than with exhaustion of its policy limits. *Id.* at 611. Due to this ambiguity, the court found Travelers' duty to defend continued through the appellate process until the applicable limits of the policy were exhausted. *Id.*

The holdings by the Second and Sixth Circuit go beyond the traditional interpretation of contracts by extending the duty to defend further than parties intend or the reasonable expectations of the insured doctrine warrants. Essentially, courts within the Second and Sixth Circuits disregard the language of the insuring agreements and take a radical approach to an insurer's duty to defend. Under this interpretation, an insurer's duty to defend never ends until the claims have either been settled or are dismissed completely. This clearly was not the intention of the contracting parties when each policy was issued, and as was recognized by the Sixth Circuit in *City of Sandusky, Ohio, supra* it would create a windfall for the insured.

Which Jurisdictions Would Likely Adopt the *Meadowbrook* and *Bank of Hawaii* Holdings?

Many jurisdictions have not addressed an insurer's continued duty to defend directly, but when viewing decisions in similar circumstances, it seems likely that they would adopt the holdings in *Meadowbrook* and *Bank of Hawaii*.

A Maryland court noted, "an insurer's duty to defend lasts until a stage of the proceedings is reached at which it is clear no element of the subject matter of the suit is within the scope of the policy." *Baltimore Gas and Electric Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540 (Md. Ct. Spec. App. 1997). In Michigan, a court held, "Once triggered, the duty to defend continues until that stage of the proceedings is reached where there is no longer any uncertainty as to the possibility of coverage." *Aetna Casualty & Surety Co. v. Dow Chemical Co.*, 44 F. Supp. 2d 847, 853 (E.D. Mich. 1997). *See also American Bumper and Mfg. Co. v. Hartford Fire Ins. Co.*, 452 Mich. 440, 450–51 (Mich. 1996). In Utah, a court held there were certain circumstances in which a duty to defend encompasses the appeal process, but unfortunately, the court did not provide examples of the circumstances to which it was referring. *Crist v. Ins. Co. of North America*, 529 F. Supp. 601, 606 (D. Utah 1982). *See Acuity v. Reed & Associates of TN, LLC*, 124 F. Supp. 3d 787 (W.D. Tenn. 2015) (noting the duty to defend continues "until the facts and the law establish that the claimed loss is not covered."); *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287 (Cal. 1993) ("The duty to defend is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded, or until it has been shown there is *no* potential for coverage.") (internal citations omitted); *Gibson v. Preferred Risk Mut. Ins. Co.*, 216 Ga. App. 871 (Ga. Ct. App. 1995) (an insurer may not "abandon the defense of the claim in midcourse to the prejudice of the insured."); *Blue Cross of Idaho Health Service Inc. v. Atlantic Mut. Ins. Co.*, 734 F. Supp.2d 1107 (D. Idaho 2010) (an insurer "must defend, and its defense obligations will continue until such time as the claim against the insured is confined to a recovery that the policy does not cover.").

Essentially courts within the Second and Sixth Circuits disregard the language of the insuring agreements and take a radical approach to an insurer's duty to defend. Under this interpretation, an insurer's duty to defend never ends until the claims have either been settled or are dismissed completely.

Illinois holds an insurer's duty to defend arises as soon as damages are sought and

continues as long as any questions remain concerning whether the underlying claims were covered by the policy. *Steadfast Ins. Co. v. Caremark Rx, Inc.*, 373 Ill. App. 3d 895 (Ill. App. Ct. 2007). However, when a declaratory judgment action is commenced, an insurer's duty to defend in Illinois is suspended. *Those Certain Underwriters of Lloyd's v. Professional Underwriters Agency, Inc.*, 364 Ill. App. 3d 975 (Ill. App. Ct. 2006); *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991) ("The duty to defend continues to the point of establishing that liability upon which plaintiff was relying was in fact not covered by the policy and not merely that it might not be."); *Employers Reinsurance Corp. v. Martin, Gordan & Jones, Inc.*, 767 F. Supp. 1355 (D. Miss. 1991) ("an insurer who has undertaken to defend a case for its insured may withdraw from the litigation only if it can do so without prejudicing its insured."); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970) (applying Nebraska law) ("[b]efore an insurer may be permitted to step out of a suit in which it has accepted the defense, it must be clearly and unequivocally demonstrated that the plaintiff's claim against the insured no longer potentially falls within the policy's coverage.").

The precedent set in *Bank of Hawaii* and *Meadowbrook* was not based on the interpretation of the policy language and the intent of the parties; it was based on a procedural technicality—the finality of a dismissed claim.

Under New Jersey law, if a complaint includes multiple or alternative causes of action, the duty to defend will attach if any of them would be a covered claim, and it will continue until all the covered claims have been resolved. *Flomerfelt v. Cardiello*, 202 N.J. 432 (N.J. 2010). Similarly, New Mexico courts hold an insurer's duty to defend continues until the conclusion of the underlying lawsuit, or until it has been shown there is no potential for coverage, and when there are multiple causes of action, the duty continues until every covered claim is eliminated. *Hartford Fire Inc. Co. v. Gandy Dancer, LLC*, 981 F. Supp. 2d 981 (D. N.M. 2013). In North Dakota, "whether or not an insurer may withdraw from the defense of the case depends upon whether there was a prior disclaimer of liability, notice of intent to withdraw given to the insured, and whether any prejudice will result thereby." *Allied Mut. Ins. Co. v. Hingst*, 360 F. Supp. 1204 (D. N.D. 1973).

A recent decision of a U.S District Court, sitting in diversity and applying Pennsylvania law, held an insurance company is required to defend its insured "until it becomes absolutely clear there is no longer a possibility the insurer owes its insured a defense." *Zurich American Ins. Co. v. Indian Harbor Ins. Co.*, No. 15-2344, 2017 WL 697050 (E.D. Penn. 2017) (internal citation omitted). *See also QBE Ins. Corp. v. Walters*, 148 A.3d 785 (Pa. Super. Ct. 2016) ("the duty 'persists until an insurer can limit the claims such that coverage is impossible.'"); *Travelers Cas. and Sur. Co. v. Providence Washington Ins. Co., Inc.*, 685 F.3d 22 (1st Cir. 2012) ("[o]nce triggered, an insurers duty to defend continues until the coverage question is resolved either by the establishment of facts showing no potential for coverage or by the conclusion of the underlying lawsuit.").

Which Jurisdictions Have Found the Duty to Defend Is Extinguished Once the Covered Claims Have Been Dismissed?

In *Southern Snow Mfg. Co., Inc. v. SnoWizard Holdings, Inc.*, 921 F. Supp. 2d 548 (E.D. La. 2013), Southern Snow filed a cause of action against SnoWizard, alleging trademark infringement, false assertion of trademark rights, and disparagement. Hanover, SnoWizard's insurer, denied coverage. *Id.* Hanover filed motions for summary judgment, arguing the undisputed facts unearthed by discovery demonstrated that the Hanover policy did not provide coverage for the claims asserted, and Hanover had no indemnity obligations or any further duty to provide a defense for SnoWizard. The trial court granted Hanover's motion for summary judgment on the indemnity, but it denied Hanover's motions insofar as it sought prospectively to terminate its defense obligations. *Id.*

On appeal, the court agreed once the trial court ruled the undisputed facts established there was no "personal and advertising injury," Hanover was no longer required to defend SnoWizard. *Id.* at 569. However, the court was forced to look at the settlement agreement executed between SnoWizard and Hanover. *Id.* at 571. The U.S. District Court for the Eastern District of Louisiana noted the settlement agreement and the reservation of rights letters clearly stated Hanover's position, but the court found that the reservation of rights letters did not "explicitly address the termination of the duty to defend should a determination coverage is excluded be made prior to trial." *Id.* at 572. As such, the court denied Hanover's motion for summary judgment and ordered the parties to brief the issue of whether the parties intended the settlement agreement and reservation of rights letters to require Hanover to continue its defense of SnoWizard if a determination that coverage was excluded was made prior to trial. *Id.* This matter is still ongoing, and the court has yet to rule on this issue.

If Hanover and its insured had not entered into this settlement agreement and reservation of rights, the court would have found Hanover's duty to defend was extinguished at the time that all covered claims had been removed from the underlying action. However, since Hanover agreed to the settlement and reservation of rights, the court's hands were tied over Hanover's continued duty to defend.

The Southern District of Florida took a similar approach in *Wackenhut Services, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 15 F. Supp. 2d 1314 (S.D. Fla. 1998). National Union insured Wackenhut through a CGL policy. The Essex Corporation sued Wackenhut, alleging (1) intentional and improper interference with continuing and prospective contractual relations, (2) unfair competition, (3) civil conspiracy, (4) restitution, and (5) unfair trade practices. *Id.* at 1318. National Union

initially defended Wackenhut for the claims in the Essex lawsuit, but once the court dismissed the counts of unfair competition, restitution, and unfair trade practices, National Union withdrew its defense. *Id.*

Wackenhut contended that National Union was not entitled to withdraw its defense after the dismissal of certain claims because the order of dismissal was not a final order. *Id.* at 1319. Applying Florida law, the district court noted, "a liability insurer's duty to defend continues until the claims giving rise to coverage have been eliminated from the suit." *Id.* at 1324. The district court stated if it were to adopt Wackenhut's reasoning, an insurer's duty to defend would never come to an end during a federal litigation because none of the orders are final until the court issues a final judgment. *Id.* The district court held that once the only covered claim was dismissed from the Essex action, National Union's obligation to defend ended at that time. *Id.*

In *Society Ins. v. Bodart*, 343 Wis.2d 418 (Wis. Ct. App. 2012), the court held an insurer does not have a continuing duty to defend after all the covered claims were either settled or dismissed, leaving only noncovered claims. While not addressing this issue directly, the Supreme Court of Washington has held an insurer must defend its insured until it is clear the claim is not covered. *See American Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d 693 (Wash. 2010); *Hawkeye-Security Ins. Co. v. Clifford*, 366 N.W.2d 489 (S.D. 1985) ("[t]he insurers duty to defend, once imposed, continues until the Court finds that the insurer is relieved of liability under the noncoverage provision of the policy.").

In *Hackman v. Western Agr. Ins. Co.*, 251 P.3d 113 (Kan. Ct. App. 2011), Western undertook the defense of its insured, Hackman, under a reservation of rights. A jury found Hackman liable, based on negligent misrepresentation, breach of contract, fraud by silence, and violation of the Kansas Consumer Protection Act. *Id.* Western sought a declaration that since it had no duty to indemnify Hackman, based on the jury verdict, it no longer had a duty to defend on the appeal. *Id.* The trial court granted Western's declaration, and the Kansas Court of Appeals affirmed, even though the potential covered claims were on appeal after the jury verdict. *Id.*

In Massachusetts, an insurer must undertake a defense and continue such a defense until it obtains a declaratory judgment of no coverage. *Deutsche Bank Nat'l Assn. v. First American Title Ins. Co.*, 465 Mass. 741 (Mass. 2013); *See also Metropolitan Property and Casualty Ins. Co. v. Morrison*, 460 Mass. 352 (Mass. 2011) ("a declaratory judgment of no coverage, either by summary judgment or after trial, does not retroactively relieve the primary insurer of the duty to defend; it only relieves the insurer of the obligation to continue to defend after the declaration."). *See also Tapscott v. Allstate Ins. Co.*, 526 So.2d 570 (Ala. 1988) ("if the complaint initially alleged an unintentional tort, but was later amended to include an intentional tort, then the insurer, if it had reserved its right to withdraw, could discontinue its defense and would not be required to indemnify for the intentional acts.") (internal citations omitted); *Couch v. Farmers Ins. Group*, 374 F. Supp. 306 (W.D. Ark. 1974) ("[a]n insurer has the right, if its conduct does not prejudice the insured, to withdraw from the defense upon determining that there was no coverage under the policy."); *Nationwide Mut. Ins. Co. v. Mortensen*, 222 F. Supp. 2d 173 (D. Conn. 2002) ("[w]here a complaint contains covered claims, the insurer is under a contractual duty to provide a defense. When those claims are dropped, the contractual duty also expires and the insurer is no longer obligated to provide a defense."); *City of Bozeman v. AIU Ins. Co.*, 262 Mont. 370 (Mont. 1993) (holding that the insurer did not have a contractual obligation under the terms of its insurance policy to represent an insured on appeal).

An Insurer Has a Continuing Duty to Defend Until the Policy Language Is Altered

The precedent set in *Bank of Hawaii* and *Meadowbrook* was not based on the interpretation of the policy language and the intent of the parties; it was based on a procedural technicality—the finality of a dismissed claim. While an insurance policy is referred to an adhesion contract, and an insured is always afforded a favorable interpretation, simple contract interpretation laws require courts to follow the language that is written within the policy and not stray from the agreed-to coverage.

Jurisdictions that have concluded an insurer's duty to defend continues beyond what a reasonable insured would expect set dangerous precedent for future coverage litigation. The findings in both *Snow Bird* and *Wackenhut Services* correctly interpret an insured's reasonable expectations in that these courts closely followed the intent of the parties. As the U.S. District Court for the Southern District of Florida noted in *Wackenhut Services*, if it were to adopt the reasoning that an insurer's duty to defend continues until a dismissal is final, an insurer's duty to defend would never end. *Wakenhut Services*, *supra* 15 F. Supp. 2d at 1324.

To mitigate the possibility that courts will accept this broad interpretation, insurers and their counsel should consider changing the language of insuring agreements to address when an insurer may properly withdraw its defense counsel.

To mitigate the possibility that courts will accept this broad interpretation, insurers and their counsel should consider changing the language of insuring agreements to address when an insurer may properly withdraw its defense counsel. This was noted by the Sixth Circuit in *City of Sandusky, Ohio*, which stated if an insurer wanted to withdraw its defense prior to a final judgment or an appeal, the policy should have so stated. 192 Fed. Appx. at 362. Until the policy language is changed to state affirmatively when an insurer can withdraw its defense, courts will continue to broaden an insurer's duty when it comes to defending its insured. FD