

Keeping Insurers In the Game: Navigating New Jersey's Duty to Defend After a Recent Supreme Court Opinion

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Companies purchase insurance for litigation protection in the form of an insurer's duty to defend lawsuits. Under New Jersey law, the duty to defend begins with the filing of a complaint that includes allegations that **might** trigger coverage.

However, a recent N.J. Supreme Court opinion, *Norman International, Inc. v. Admiral Insurance Co.*, relied on a narrow exception to that general rule—first advanced in *Burd v. Sussex Mutual Insurance Co.*—to deny a defense to an insured. Finding that a clearly defined coverage issue could only be resolved from facts outside the complaint and would not be resolved in the underlying case, *Norman* allowed the insurer to rely on extrinsic evidence to negate a defense obligation.

Though aggressive insurers will, unfortunately, try to use *Norman* to abandon their insureds at the outset of a litigation, *Norman* is not a free pass for insurers to sit on the sidelines when their insureds most need access to insurance. Indeed, *Norman* left untouched two key tenets of New Jersey's duty to defend. *First*, if a plaintiff files an unartfully pled complaint and the allegations are ambiguous to trigger coverage, insurers must still provide an immediate defense. *Second*, that immediate defense continues unless and until concrete evidence is uncovered that definitively takes the underlying case outside of coverage. See *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010).

The *Norman* Decision

In *Norman*, a Home Depot employee in Nassau County, New York was injured while using a machine that the insured, Richfield, supplied. The employee sued Richfield, which, in turn, sought coverage under its general liability policy. The insurer denied coverage based on an exclusion that barred claims "actually or allegedly arising out of, related to, caused by, contributed to by, or in any way connected with" Richfield's activities or operations in Nassau County.

The Court underscored the foundational rule that the duty to defend is analyzed by laying the complaint alongside the policy to determine whether a potentially covered claim exists. Relying on *Burd*, however, *Norman* stated that "if coverage will not be an issue resolved during trial, it may not be sufficient to only look at the complaint because the duty to defend depends on facts not relevant to the causes of action in the complaint." In applying that rule, the Court found no ambiguity in either the concrete facts developed or the exclusion's language. Therefore, the Court found Richfield's activities—later established through discovery—were sufficient to trigger the exclusion.

Flomerfelt Requires an Immediate Defense

Although *Norman* permitted insurers' use of extrinsic evidence in the limited situations where coverage issues would not be determined in the underlying action, it did nothing to disturb established duty-to-defend law that requires an insurer to defend unless and until the concrete evidence negating coverage is discovered.

"In evaluating the complaint . . . doubts are resolved in favor of the insured and, therefore, in favor of reading claims that are **ambiguously pleaded**, but potentially covered, in a manner that obligates the insurer to provide a defense." *Flomerfelt*, 202 N.J. at 444 (emphasis added). In fact, to ensure that the exception of *Burd/Norman* does not swallow the rule, the Court (applying *Burd*) held that "in circumstances in which the underlying coverage question cannot be decided from the face of the complaint, the insurer is obligated to **provide a defense until all potentially covered claims are resolved**, but the resolution may be through adjudication of the complaint or in a separate proceeding between insured and insurer either before or after that decision is reached." *Id.* at 447 (emphasis added).

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