

# NJ High Court Ruling Doesn't Negate Insurer Duty To Defend

By **Eric Jesse and Seth Fiur** (September 30, 2022)

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 immediately upon the filing of a complaint that includes allegations that might trigger coverage.[1]

However, a New Jersey Supreme Court opinion from Aug. 10, *Norman International Inc. v. Admiral Insurance Co.*, [2] relied on a narrow exception — first advanced in *Burd v. Sussex Mutual Insurance Co.* [3] — to deny a defense to an insured. Finding that a clearly defined coverage issue could only be resolved from facts outside the complaint and could not be resolved in the underlying case, *Norman* allowed the insurer to rely on extrinsic evidence to avoid a defense obligation.

Though aggressive insurers will undoubtedly try to use *Norman* to avoid providing a defense at the outset of a litigation, it 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.

Ultimately, *Norman* tells policyholders that when faced with a recalcitrant insurer's denial, they may have to commence coverage litigation sooner rather than later to obtain the benefit of the duty to defend at the outset of the underlying action.

## The Norman Decision

In *Norman*, a Home Depot Inc. employee in Nassau County, New York, was injured while using a machine supplied by the insured, Richfield.[4]

Richfield Window Coverings LLC sold window blinds to national retailers, and also provided machines to allow retailers to cut the blinds to consumers' specifications. Although Richfield did not install or operate the machines, it shipped them to the retailers and periodically visited the stores to answer questions and, if necessary, maintain or repair the machines.[5]

The injured employee sued Richfield for damages related to her injury.

Richfield sought coverage from its insurer, Admiral, which 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.[6]

Richfield commenced coverage litigation in New Jersey Superior Court to enforce the duty to defend, but the trial court ruled in the insurer's favor. The Appellate Division reversed,



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holding that the exclusion did not apply because there was no "causal relationship" between Richfield's activities and the underlying causes of action.[7]

The New Jersey Supreme Court agreed with the trial court, ruling in the insurer's favor. The court began its analysis by restating 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.

It then, however, relied on Burd, stating that

when comparing the causes of action in the complaint ... will not provide an answer as to whether there is a potentially covered claim ... 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.[8]

In Norman, the dispositive coverage issue was whether the underlying injury, which was undisputed, was sufficiently connected to Richfield's activities in the excluded New York counties, an issue that had no relevance or bearing to the underlying question of whether Richfield was tortiously liable to the Home Depot employee.[9]

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 and negate the duty to defend.

### **New Jersey's Duty to Defend Law Requires an Immediate Defense**

In *Flomerfelt v. Cardiello* in 2010, the New Jersey Supreme Court reiterated the broad standard for when an insurer is required to provide a defense:

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.[10]

As a result, unartfully pled complaints are not a basis for an insurer to avoid a defense obligation. And if a complaint raises "multiple or alternative causes of action, the duty to defend will attach as long as any of them would be a covered claim and it continues until all of the covered claims have been resolved." [11]

Most important in relation to Norman, *Flomerfelt* interpreted Burd to hold that "in circumstances in which the underlying coverage question cannot be decided from the face of the complaint," as was the issue in Norman, a "day one" duty to defend exists.[12]

The court said:

[T]he insurer is obligated to provide a defense until all potentially covered claims are resolved. ... [The] resolution may be through adjudication of the complaint or in a separate proceeding between the insured and insurer either before or after that decision is reached.[13]

### **Norman Does Not Allow Insurers to Wait on the Sidelines**

In light of *Flomerfelt*'s expansive duty to defend, Norman's holding is narrow. Norman will allow insurers to end their duty to defend only if and when they have concrete evidence

showing the underlying action is not covered, whether that evidence comes from the underlying action or "a separate proceeding between the insured and insurer." But, to also conform with *Flomerfelt*, there must be a day one duty to defend that continues unless and until the concrete evidence is established to negate coverage.

Despite Norman's narrowness, aggressive insurers may try to rely on Norman to abandon their insureds at the outset of an underlying case. Specifically, insurers may sit on the sidelines — while the insured is forced to defend the lawsuit on its own — believing, wrongly, that they can wait and see if any extrinsic evidence to avoid coverage develops. And then, if the policyholder presses coverage later on, the insurer will try to rely on that evidence to avoid a duty to defend entirely.

When policyholders are faced with this dynamic, Norman is a cautionary tale. While many policyholders are loath to fight a so-called two-front war — one to prevail against the plaintiff in the underlying case and another to sue the insurer for defense coverage — Norman suggests they may need to.

The concern is that, even if the insurer later obtains the extrinsic evidence to avoid a defense obligation, the insurer must still defend from the date the complaint was filed until the concrete evidence negating coverage is obtained. But, by prosecuting the coverage action later, courts may allow insurers to escape its defense obligation altogether by failing to consider the existence of defense coverage from the filing of the complaint through uncovering extrinsic evidence — as required by *Flomerfelt*.

Therefore, policyholders may be better served by opening the second front against the insurer immediately upon receiving that denial. This will allow the insured to rely on *Flomerfelt*'s requirement that insurers immediately "provide a defense until all potentially covered claims are resolved."

Thus, the policyholder can obtain the immediate payment of defense costs unless and until the insurer obtains the evidence to negate coverage. And if the insurer does obtain that evidence, the policyholder will have, at least, benefited from having defense coverage up until that point.

## **Conclusion**

Although some insurers will use Norman in their efforts to abandon their insureds, it must be read consistently with *Flomerfelt*'s requirement that a duty to defend ambiguous or potentially covered claims begins with the filing of the complaint and continues unless a court finds there is concrete evidence negating the defense obligation.

Further, to avoid the outcome in Norman, policyholders — faced with baseless coverage denials — need to consider bringing immediate coverage actions to take advantage of *Flomerfelt* and the benefits of an immediate duty to defend.

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[1] See *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010).

[2] *Norman International, Inc. v. Admiral Insurance Co.*, 251 N.J. 538 (2022).

[3] *Burd v. Sussex Mutual Insurance Company*, 56 N.J. 383 (1970).

[4] See *Norman Int'l, Inc. v. Admiral Ins. Co.*, 251 N.J. 538 (2022).

[5] *Id.* at 543-44.

[6] *Id.* at 546-47.

[7] *Id.* at 547.

[8] See 251 N.J. at 550.

[9] See *id.* at 551-52.

[10] *Flomerfelt v. Cardiello*, 202 N.J. 432, 444 (2010).

[11] *Id.*

[12] *Id.* at 447.

[13] *Id.*