

Nevada

By Michael C. Mills

What triggers an insurer's duty to defend?

A primary insurer's right and duty to defend attaches upon notice of a demand and continues through the litigation to final resolution of the claim. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 325 (2009).

An insurer's "duty to defend is broader than the duty to indemnify. In other words, as a general rule, an insurer's duty to defend is triggered whenever the potential for indemnification arises, and it continues until this potential for indemnification ceases." *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620–21 (2011) (internal citation omitted).

If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured. "The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004).

What type of proceedings must an insurer defend?

Nevada has no specific law on this issue. When interpreting insurance policy terms, the Nevada Supreme Court has often looked to persuasive precedent from other jurisdictions, especially California. *Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1234 n.11 (D. Nev. 2010). Consistent with that precedent, Nevada would likely follow California on this issue. An order issued by the Environmental Protection Agency ("EPA") directing an insured to remediate pollution allegedly caused by its fertilizer is not sufficient to cause the insured to face a duty to defend because such a pre-litigation administrative

action does not constitute a "suit" within the meaning of the standard general liability policy. *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal. 4th 857, 878, 959 P.2d 265, 279 (1998).

As to the duty to appeal, Nevada would likely follow California requiring a duty to appeal only in certain circumstances. See *Jenkins v. Ins. Co. of N. America*, 220 Cal. App. 3d 1481, 1489, 272 Cal. Rptr. 7 (App. 1990) (holding that "a duty to defend may include the duty to appeal where reasonable grounds for an appeal exist").

When is extrinsic evidence used to determine whether an insurer has a duty to defend?

The Nevada Supreme Court has never affirmatively said that it follows the "four corners" test. The closest it has come is the statement made in the case of *United National Insurance Co. v. Frontier Insurance Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004), where it said: "Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." However in the context of that opinion, that conclusion may be equivocal.

There have been at least two decisions issued by the U.S. District Court, District of Nevada that have held that a court may look beyond the four corners of the complaint at the extrinsic evidence. *United Nat'l Ins. Co. v. Assurance Co of Am.*, No. 2:10-CV-01086-MMD, 2012 WL 1931521, at *3 n.2 (D. Nev. May 29, 2012), *vacated due to settlement*, No. 10-CV-1086-JAD-NJK, 2015 WL 2448711 (D. Nev. May 21, 2015) and *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039, 1050 (D. Nev. 2006). However, many more decisions from that district have followed the "four corners" test. See, e.g., *OneBeacon Ins. Co. v. ProBuild-*

ers Specialty Ins. Co., No. 3:09-CV-36-ECR-RAM, 2009 WL 2407705, at *8 (D. Nev. Aug. 3, 2009); *Beazley Ins. Co. v. Am. Econ. Ins. Co.*, No. 2:12-CV-01720-JCM, 2013 WL 2245901, at *4 (D. Nev. May 21, 2013); *Liberty Ins. Underwriters Inc. v. Scudier*, 53 F. Supp. 3d 1308, 1315 (D. Nev. 2013); *Discover Prop. & Cas. Ins. Co. v. Scudier*, No. 2:12-CV-836-JCM-CWH, 2013 WL 2153079, at *4 (D. Nev. May 16, 2013). In light of these cases, the U.S. District Court, District of Nevada specifically concluded that if asked, “the Nevada Supreme Court would adopt the four corners rule.” *Andrew v. Century Sur. Co.*, No. 2:12-CV-00978-APG, 2014 WL 1764740, at * 6 (D. Nev. Apr. 29, 2014).

What is the scope of an insurer’s duty to defend?

The duty to defend is broader than the duty to indemnify because it covers not just claims for which the insured is liable, but also claims for which the insured could be found liable. *United Nat’l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004). Where there is no potential for coverage, there is no duty to defend. *Bidart v. Am. Title Ins. Co.*, 103 Nev. 175, 179, 734 P.2d 732, 734 (1987).

When interpreting insurance policy terms, the Nevada Supreme Court has often looked to persuasive precedent from other jurisdictions, especially California. *Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1234 n.11 (D. Nev. 2010). In *Jaynes Corp. v. American Safety Indemnity Co.*, 925 F. Supp. 2d 1095, 1103 (D. Nev., 2012), *vacated due to settlement*, No. 2:10-CV-00764-MMD, 2014 WL 8735102 (D. Nev. Dec. 3, 2014), the U.S. District Court, District of Nevada relied almost exclusively on California precedent, and concluded the following to be Nevada law: “The insurer must defend any action that asserts a claim potentially seeking damages within the coverage of the policy”; however, the duty to defend is dependent on at least potential coverage. *Id.* “The duty to defend may exist even where coverage is in doubt and ultimately does not develop.” *Id.* (citation omitted). “For an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit.” *Id.* (citation omitted).

The duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy. Where there is no potential for coverage, there is no duty to defend. ... Accordingly, in resolving the question of whether a duty to defend exists, the insurer has a higher burden than the insured. The insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot; the insurer, in other words, must present undisputed facts that eliminate any possibility of coverage.

Id. (internal citations and punctuation omitted).

When is an insurer responsible for pre-tender defense costs?

The Nevada Supreme Court has not issued a decision on this topic. However, where Nevada law is silent, Nevada looks to California law for direction. *See Zurich Am. Ins. Co.*, 720 F. Supp. 2d at 1234 n.11; *see also Commercial Standard Ins. Co. v. Tab Constr., Inc.*, 94 Nev. 536, 539, 583 P.2d 449, 451 (1978) (relying on the California Supreme Court’s interpretation of a similar statute).

Assuming Nevada will follow California precedent, an insurer is not liable for pre-tender defense costs. *N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1361 (9th Cir. 1992) (enforcing policy provision precluding reimbursement to insured for defense costs voluntarily incurred before tender, but holding that an insurer may be liable to a co-insurer for pre-tender expenses incurred before the defense was tendered to the insurer); *see also Xebec Dev. Partners, Ltd. v. Nat’l Union Fire Ins. Co.*, 12 Cal. App. 4th 501, 564–5, 15 Cal. Rptr. 2d 726, 762–3 (App. 1993), *disapproved of on other grounds by Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal. 4th 1252, 137 P.3d 192 (2006).

What is the extent of an insurer’s obligation to defend when other insurers also have a duty to defend?

Where Nevada law is silent, Nevada looks to California law for direction. *See Zurich Am. Ins. Co.*, 720 F. Supp. 2d at 1234 n.11; *see also Commercial Standard Ins. Co.*, 94 Nev. at 539, 583 P.2d at 451 (relying upon

the California Supreme Court's interpretation of a similar statute). Assuming that California law would be followed, even if another insurer has already assumed the defense, "a second insurer's failure to honor its separate and independent contractual obligation to defend" is not excused. See *Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.*, 130 Cal. App. 4th 1078, 1088, 31 Cal. Rptr. 3d 43, 52 (App. 2005). An insured, however, may not be entitled to recover damages for the breach of a duty to defend when the insured is fully protected from having to pay any costs of its own defense by other insurers. See *id.* at 1089–90, 31 Cal. Rptr. 43, 52–53; see also *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1187, 96 Cal. Rptr. 136 (App. 2000); *Horace Mann Ins. Co. v. Barbara B.*, 61 Cal. App. 4th 158, 164, 71 Cal. Rptr. 2d 350, 354 (App. 1998).

When is there a right to independent counsel?

In *State Farm Mutual Automobile Insurance Co. v. Hansen*, No. 64484, 131 Nev. Adv. Op. 74 (Nev. 2015), the Nevada Supreme Court adopted the independent counsel model outlined by the California Court of Appeals in *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.*, 208 Cal. Rptr. 494, 506 (Ct. App. 1984), *superseded by statute as stated in United Enters., Inc. v. Superior Court*, 108 Cal. Rptr. 3d 25 (App 2010). In its opinion issued on September 24, 2015, the Nevada Supreme Court said that an insurance company has a duty to pay for independent counsel for its insured when its interests and those of its insured are in actual conflict. The foundation for this obligation rests in the insurance policy's duty to defend and the attorney's professional duty to provide representation without conflict. Nev. R. Prof. Conduct 1.7(a). Many commentators predicted this result after the Nevada Supreme Court adopted the dual representation model in *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007).

What right of recoupment of defense costs exists for an insurer?

The Nevada Supreme Court has not issued a decision on this topic. However, Nevada often looks to Cali-

fornia law for direction. See *Zurich Am. Ins. Co.*, 720 F. Supp. 2d at 1234 n.11; see also *Commercial Standard Ins. Co.*, 94 Nev. at 539, 583 P.2d at 451 (relying upon the California Supreme Court's interpretation of a similar statute). Assuming again that Nevada would follow California, the insurer may not seek reimbursement for defense costs as to the claims that are potentially covered under the policy; however, the insurer would have the right of reimbursement from the insured "[a]s to the claims that are not even potentially covered" under the precedent of *Buss v. Superior Court*, 16 Cal. 4th 35, 49, 939 P.2d 766 (1997).

What are the consequences of an insurer's wrongful failure to defend?

Damages for breach of a duty to defend are the reasonable costs incurred in the defense of the underlying action. *Jaynes Corp. v. Am. Safety Indem. Co.*, 925 F. Supp. 2d 1095, 1111 (D. Nev. 2012), *vacated due to settlement*, No. 2:10-CV-00764-MMD, 2014 WL 8735102 (D. Nev. Dec. 3, 2014); see also *Reyburn Lawn & Landscape Designers Inc. v. Plaster Dev. Co.*, 127 Nev. Adv. Op. 26, 255 P.3d 268, 279 (2011) (citing *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal. 4th 541, 187 P.3d 424 (2008) (holding that when an indemnitor has breached its obligation to defend, an indemnitee who was thereby forced, against its wishes, to defend itself is entitled to reimbursement of the costs of defending those claims that are directly attributable to the indemnitor's negligence).

Assuming Nevada courts would apply California law, an unjustified failure to defend can result in an award of consequential damages. *Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 833, 61 Cal. Rptr. 2d 909, 914 (App. 1997) (holding that "where the insurer tortiously refuses to defend and as a consequence the insured suffers a default judgment, the insurer is liable on the judgment and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage"). Under Nevada law, if the failure pay a legitimate claim was considered tortious or in bad faith, damages could include emotional distress. *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986).

A failure to defend based on an improper cancellation of the policy can be a violation of Nevada's

Unfair Claims Settlement Practices Act. Nev. Rev. Stat. §686A.310 (1991). If the denial of the duty to defend is found to be without a reasonable basis, it may amount to a common law bad faith claim. *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1244 (D. Nev. 1994).

What terminates an insurer's duty to defend?

Once the duty to defend arises, the insurer's duty continues throughout the entire litigation. *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (Nev. 2004). The duty to defend continues until final resolution of the claim. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 325 (2009). An insurance company may not terminate its duty to defend by depositing the insurance proceeds with the court when the policy terms are ambiguous as to whether the policy specifically permits such an action. *Benchmark Ins. Co. v. Sparks*, 127 Nev. Adv. Op. 33, 254 P.3d 617, 623 (2011).

The statute of limitations on a claim against an insurer for breach of its duty to defend commences when a final judgment in the underlying litigation against the insured is entered. *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 565, 854 P.2d 851, 855 (1993) (“[T]he limitation period for an action under a[n]... insurance policy for failure to defend accrues when the insurer refuses the insured's tender of defense, but is tolled until the underlying action is terminated by final judgment”) (citing *Lambert v. Commonwealth Land Title Ins.*, 53 Cal. 3d 1072, 1080, 811 P.2d 737, 741–42 (1991)).

If there is no duty to defend, can the insurer have a duty to indemnify?

Nevada has no specific law on this issue. Assuming Nevada would look to California law on this issue, a

court would likely find that in rare circumstances, there may be a duty to indemnify even when there is no duty to defend. *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 958, 16 P.3d 94, 102 (2001) (holding that the duty to defend and duty to indemnify “differ... in their scope: Whereas the duty to indemnify may indeed be broad, the duty to defend must perforce be broader still. With this result: Where there is a duty to defend, there *may be* a duty to indemnify; but where there is no duty to defend, there *cannot be* a duty to indemnify) (internal citations omitted).

Are there any other notable cases or issues regarding the duty to defend that are important to the law of this jurisdiction?

When an insurer denies coverage of a claim because notice of the claim was late, the insurer must show: (1) that notice was late; and (2) that it was prejudiced by the late notice. *Las Vegas Metropolitan Police Dept. v. Coregis Ins. Co.*, 256 P. 3d 958, 965 (Nev. 2011). Prejudice exists “where the delay materially impairs an insurer's ability to contest its liability to an insured or the liability of the insured to a third party.” *Id.*

Nevada follows the majority rule with regards to the notice-prejudice rule: an insurer who denies coverage of a claim because of an insured's failure to provide timely notice must prove that the notice was late and that the insurer was prejudiced by the late notice. *Id.*

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