

State Supreme Court Finds Duty to Defend in Excess Policy

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In an opinion of interest to any company with excess liability coverage, the Wisconsin Supreme Court recently held in *Johnson Controls, Inc. v. London Market*¹ that an excess insurer has a duty to defend an action against its insured, notwithstanding that the underlying primary insurer (which had denied coverage) had not exhausted its primary policies.

Johnson Controls

The insured (Johnson Controls) was identified as a potentially responsible person (PRP) in connection with environmental claims at various sites across the country. The insured tendered the suits to its primary and excess insurers, seeking a defense and indemnification for these claims. After its insurers denied coverage, Johnson Controls filed suit. In an earlier phase of the case, on the issue of whether these claims were covered under the policies, the Wisconsin Supreme Court held that they were, finding that the costs of remediation are covered damages under the policies, and that PRP letters from environmental agencies are the functional equivalent of a “suit” under the policies, triggering the insurers’ duty to defend.² Following that decision, Johnson Controls settled with several of its insurers, including Travelers Indemnity Company (Travelers), one of its primary carriers.

The London Market insurers, which had issued an excess policy directly above the Travelers primary policies, did not settle with Johnson Controls, and instead continued to litigate, contending that its policy was an “indemnity only” policy without a duty to defend. At issue in this recent phase of the case was whether the London Market had a duty to defend the environmental claims, and if so, whether that duty to defend was immediate, even though the directly underlying Travelers primary policies were not exhausted.

Like many excess policies, the London Market policy stated that it was “subject to the same terms, definitions, exclusions and conditions” as the underlying Travelers policies, except for premium amount, limits of liability, and “as otherwise provided herein.”³ While the Travelers policies contained a duty to defend, London Market argued that the insuring agreement in its policy was silent as to any

¹ 784 N.W.2d 579 (Wis. 2010)

² *Johnson Controls v. Employers Ins. of Wausau*, 665 N.W.2d 257 (Wis. 2003).

³ *Johnson Controls v. London Market*, 784 N.W.2d at 587.

defense obligation, and that by omitting a promise to defend the policy as “otherwise provided,” there was no duty to defend.

The Wisconsin Supreme Court rejected London Market’s argument, holding that the London Market policy’s follow form provision incorporated the duty to defend found in the Travelers policies because the duty was not expressly disclaimed. As the court stated, “Given that Travelers imposes a duty to defend and London Market’s silence regarding that duty, a reasonable person in the position of the insured would interpret London Market’s policy as incorporating the duty to defend found in the Travelers policies.”⁴

As to when its duty to defend began, London Market argued that it did not begin until the Travelers policies were exhausted. Again, the Wisconsin Supreme Court disagreed. The court noted that the language of the Travelers policies, which was also incorporated into the London Market policy, specified that “if the insurer affording other insurance to the named insured denies primary liability under its policy, [Travelers] will respond under this policy as though such other insurance were not available.”⁵

As incorporated into the London Market policy, this provision referred to the Travelers policies as the “other insurance.” Therefore, Travelers’ prior refusal to defend constituted a denial of “primary liability under its policy,” and London Market was obligated to “respond . . . as though such other insurance were not available.”⁶ The court then examined the attachment provision of the London Market policy, which stated that “liability” shall attach only after the underlying insurer has paid, or been held liable to pay, its full limits. The court therefore held that “liability” referred only to the duty to indemnify, and not the duty to defend.⁷ Thus, the Wisconsin Supreme Court held that London Market had an immediate duty to defend, even though the primary Travelers policies were not exhausted.⁸

Implications

Although the immediate impact of *Johnson Controls* will be felt primarily in Wisconsin, it has implications and valuable lessons for insureds. First, *Johnson Controls* illustrates that it is the policy language that governs the rights and obligations under any particular policy, not per se rules borrowed from other cases. Repeatedly, the court focused on the language of the specific Travelers and London Market policies to reach its conclusions, rejecting holdings from other cases based on different contract language.

This highlights the importance of conducting a thorough review of insurance policies as soon as possible after an insured learns of a third-party suit in order to understand the scope of coverage provided by each policy, as well as how one policy can rely on other policies for key language.

Second, the case emphasizes the importance of tendering a dispute early and to both primary and

⁴ *Id.* at 588.

⁵ *Id.* at 592.

⁶ *Id.*

⁷ *Id.* at 593.

⁸ *Id.* at 594.

