

Bolstering New Jersey's Historically Weak 'Duty To Defend'

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Burd v. Sussex Mutual Insurance Company, 56 N.J. 383 (1970) has flown high over New Jersey insurance law for many years, denying policyholders the defense for which they have contracted. *Burd* curtailed insurance companies' duty to defend policyholders if the underlying complaint had conflicting causes of action. *Cooper Industries v. Employers Insurance of Wausau* (N.J. Super. Ct. Aug. 30, 2016) is the first decision sharply to curtail the application of *Burd* and to find that an insurance company had a present duty to defend a "potentially responsible party" (PRP) letter from the U.S. Environmental Protection Agency. *Cooper* relied principally on *Flomerfelt v. Cardiello*, 202 N.J. 432 (2010). *Cooper* is a path-breaking decision that could ultimately find itself before the New Jersey Supreme Court.



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What is a Suit?

The preliminary question in *Cooper* was whether a "suit" existed that raised the issue of the insurance company's duty to defend. *Cooper* concerned comprehensive general liability policies written before 1986. Those policies obligated the insurance company to defend the policyholder against a "suit," which the policy did not define. (Current policies usually define "suit.") Thus, the court in *Cooper* needed to address whether a PRP letter constitutes a "suit." Courts have debated this issue for over 30 years. While many jurisdictions have resolved this issue, curiously, no New Jersey court has ever addressed it. (In practice, while reserving their rights on the issue, many insurance companies in New Jersey have treated "PRP" letters as "suits.")



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Cooper began by noting that the majority of jurisdictions that have reached this issue ruled in favor of the policyholder. The court then analyzed the negative consequences that would befall the policyholder if it failed to respond to the PRP letter; the PRP process was the only forum available to the policyholder to contest its liability. The court therefore concluded that the PRP letter was sufficiently coercive to constitute a suit. Since the EPA and the New Jersey Department of Environmental Protection normally proceed by directives or PRP letters, this ruling substantially broadens insurance companies' duty to defend in New Jersey.

The Burd Doctrine

In 49 states, an insurance company must defend its policyholder when a suit is filed against it. New Jersey has been the sole exception, based on *Burd*. In *Burd*, an individual who had fired a shotgun was sued for both negligent and intentional conduct. The New Jersey Supreme Court found that under such

circumstances of conflicting theories of recovery, one of which was potentially covered and the other not, the duty to defend became a duty to reimburse. Notably, the chief reason for this holding was the Supreme Court's concern that counsel appointed by the insurance company may find itself in a conflict, insofar as the way the insurance company conducted the defense could determine whether the policyholder, if found liable, was liable for negligent conduct, which was covered by the homeowners' insurance policy, or intentional conduct, which was not. The Supreme Court was concerned that an insurance company would steer the defense of the case to "noncoverage."

Although Burd was intended to protect policyholders, for decades insurance companies have seized on Burd to argue that whenever the issue of the insurance company's duty to indemnify will not be decided in the underlying suit, the duty to indemnify becomes a duty to reimburse. This has made the "duty to defend" in New Jersey the weakest in the nation, and provides policyholders with limited protection from the very lawsuits for which they bought insurance. This has proven particularly injurious to policyholders in environmental actions, where the insured is sued in strict liability and the underlying court will not reach the issue of whether the insured intentionally caused injury. In such cases, the underlying proceeding will not reach the issue of whether the policyholder acted intentionally, such that the insurance policy's exclusion for intentional damages applied. Three reported appellate division decisions have refused a defense to the insured in environmental actions, based on Burd.

Cooper and Flomerfelt

In Cooper, OneBeacon Insurance Group argued that pursuant to Burd, it did not need to defend Cooper until the declaratory judgment was concluded and the court decided the issue of intent. The trial court, relying on Flomerfelt, disagreed. In Flomerfelt, a girl at a party became sick because of a combination of drugs and alcohol. The homeowners' insurance policy in issue excluded injury caused by drugs but not by alcohol. The Supreme Court did not follow Burd and find that this conflict converted the duty to defend into a duty to reimburse. Rather, it stated that it would employ the traditional means of deciding the duty to defend — lay the complaint alongside of the insurance policy to see if a covered cause of action existed. Since alcohol was not excluded, the Supreme Court held that the insurance company must defend.

The Cooper court found that Flomerfelt severely narrowed Burd. The court reasoned that as a result, it need not follow those contrary appellate cases that preceded Flomerfelt. The court found there was no conflict with respect to the defense, particularly since the underlying complaint did not even allege intentional conduct, and because environmental liability is "strict liability" in any event. As a result, the court held that OneBeacon had a present duty to defend.

Conclusion

When non-New Jersey attorneys bring suit in New Jersey, usually the first thing they want to do is to bring a summary judgment motion on the duty to defend. New Jersey counsel must then explain Burd, and why a motion on the duty to defend may not be possible. This has a major impact on the policyholder's strategy. As noted, in most environmental cases, the underlying action will not reach the issue of whether the policyholder acted intentionally, and the policyholder must commence a declaratory judgment action to resolve the issue. Many policyholders will not want to litigate in an insurance coverage case, during the pendency of the environmental action, whether or not they are intentional polluters. Discovery on that issue in the declaratory judgment action could reveal facts that could damage the policyholder in the underlying proceeding.

Securing the duty to defend early on is also important strategically to the policyholder. A policyholder that secures that duty is not only freed of the burden of substantial attorneys' fees, but also has transferred that burden to its insurance company. An insurance company involved in the underlying proceeding and paying the fees is more likely to look favorably upon settlement.

Burd has bedeviled policyholders for decades. It represented a uniquely New Jersey legal aberration that greatly limited the value of the insurance coverage policyholders thought they had purchased. When a policyholder is sued, the first thing it needs is the assistance of its insurance company, financial and otherwise. Many policyholders simply cannot bear upfront the cost of litigation; defending against suits was a benefit that the insurance companies promised to the policyholder. It should not be removed by judicial fiat. Policyholders can only hope that Cooper is right, and that Flomerfelt represents a lasting narrowing or elimination of Burd.

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