

Navigating the Duty to Defend: Insights from the Third Edition of Hinshaw's Fifty-State Survey

Insights for Insurers Alert | 10+ min read

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Hinshaw & Culbertson LLP is pleased to announce the publication of the Third Edition of its [Duty to Defend: A Fifty-State Survey](#). The guide—which is Volume III of the Hinshaw & Culbertson LLP *On The Law Series*—provides an overview of common issues presented with respect to the duty to defend, with chapters covering all 50 US states. The following alert provides a detailed outline and highlights the insights covered in the guide.

An Overview of The Duty to Defend

Many insurance policies issued as primary layer coverage establish two separate principal duties on the part of the insurer: the duty to defend and the duty to indemnify.

1. **The duty to indemnify** is the insurer's obligation to pay for covered judgments or settlements.
2. **The duty to defend** is the insurer's obligation to defend its insured against lawsuits seeking covered (or at least potentially covered) damages.

What is the Duty to Defend?

The duty to defend is a contractual obligation reflected in the insurer's agreement in the insurance policy. Accordingly, in the vast majority of states, if the insurance contract does not specifically provide for a duty to defend, the insurer will be held to have no duty to defend. In a limited number of states and situations, an insurer may have a duty to defend unless the policy expressly disavows a defense obligation.

Insurer Rights

Although most discussions about defense focus on the **duty** to defend, primary general liability contracts generally provide that the insurer has the **right** and the duty to defend the insured. The right to defend is

important because it typically affords the insurer the right to conduct the insured's defense in suits for which the insurance contract potentially provides coverage.

The insurer's right to conduct the insured's defense generally includes the right to select defense counsel, to make strategic decisions concerning the defense of the suit pending against the insured, and to make decisions regarding settlement and disposition. Allowing the insurer to conduct the defense of the insured protects the insurer's financial interests and minimizes unwarranted liability.

As discussed in the *Duty to Defend: A Fifty-State Survey* (the "Survey"), under some circumstances and in some states, where the interests of the insurer and the policyholder are "conflicting," the right and duty to defend may be transformed into an obligation of the insurer to pay defense costs of counsel selected by the insured, sometimes referred to as "independent," "Cumis," or "Peppers" counsel.

Primary Liability Policies

Under many primary liability policies, the duty to defend (or to pay defense costs) is supplementary. In other words, it is in addition to—and does not reduce—the policy's limits of liability.

Over the years and with increasing frequency, primary liability policies are issued on a "wasting limits" basis, meaning that payment of defense expenses reduces the policy's limits of liability. Wasting limits policies are permitted in most states, but as of October 2023, Nevada precludes insurers from issuing or renewing some policies with wasting limits. See NRS 679A 210.

Before embarking upon the issues addressed in the *Survey*, we briefly discuss the following matters not addressed in the *Survey*.

Duty to Indemnify Defense Costs Distinguished

An insurer's obligation to pay an insured's defense costs may sometimes be expressed as a duty to reimburse or indemnify defense costs. The duty to defend and the duty to reimburse (or indemnify) defense costs are distinct obligations.

For example, under policies that obligate the insurer to reimburse defense costs, the insured, rather than the insurer, generally is entitled to select counsel. In most states, the duty to defend is determined under the "potentially covered" standard, and reimbursement of defense costs generally is limited to costs associated with claims actually covered. Nonetheless, courts sometimes conflate the rules governing these distinct obligations.

The *Survey* does not address the duty to indemnify. The duty to defend generally is broader than the duty to indemnify. In most states, if there is no duty to defend, there is no duty to indemnify.

Although Texas subscribes to the near-universal principle that the duty to defend is broader than the duty to indemnify, some courts in Texas have ruled that the duty to indemnify is not dependent on the duty to defend, and an insurer may owe a duty to indemnify even if the duty to defend never arises.

The Role of Litigation Management Guidelines

Most insurers have implemented litigation management and/or billing guidelines that they ask assigned defense counsel to follow. Guidelines set forth many best practices and protocols for ensuring an efficient and cost-effective defense effort, which serve the best interests of the insurer, the defense firm, and the insured.

As expressed in most guidelines, they cannot be enforced by insurers to undermine the defense attorney's professional obligations to the insured. Further, guidelines are not typically contractual, such that they are not binding on the insured (*i.e.*, they are not part of the policy and do not, as a matter of contract law, limit the insured's claims or rights to coverage for defense costs).

Yet, many disputes over the payment of defense counsel's bills (whether insurer-assigned panel counsel or independent counsel) can be eliminated or at least mitigated by adherence to the philosophy of the insurer's guidelines, the insured's own guidelines (many insureds' in-house legal or claim departments have promulgated their own guidelines), or manuscript negotiated guidelines applicable to specific insurer-insured relationships or particular litigation.

Excess Insurance Distinguished

The duty to defend is primarily an issue for primary insurance policies as opposed to excess or umbrella insurance. In contrast to the primary insurer, the excess insurer rarely undertakes to defend the insured.

Although excess insurance contracts ordinarily do not contain a duty to defend, most provide the excess insurer with the right at its "option" to participate or "associate" in the defense of lawsuits pending against the insured. These provisions are intended to allow the excess insurer, if it chooses, to become actively involved in defending lawsuits that could involve its layer of coverage.

The option to associate in the defense, for example, may be exercised by insurers in situations where there is significant exposure in excess of the underlying limits and the insured and the underlying insurer are not mounting a strong defense.

Another instance in which an excess insurer may wish to exercise its right to associate in the defense is where the insured or primary insurers are insolvent and there is a risk of a default judgment impacting the excess insurer's limits. Most courts recognize that the right to associate does not impose a duty to defend the insured.

Some excess insurance contracts expressly exclude coverage for defense costs. Other excess contracts provide that, under certain circumstances, an excess insurer will reimburse the insured for defense costs. Many excess and umbrella insurance contracts expressly require the insured to obtain the insurer's written consent prior to incurring defense costs for them to be reimbursable under the excess insurance contract.

The consent requirement exists for the protection of the insurer, not for the benefit of the insured. It allows the insurer to consent where it believes incurring defense costs will protect its exposure for indemnity losses. Most courts recognize that the excess insurer is free to consent or withhold consent for defense costs in accordance

with its unilateral wishes or interests. Excess contracts providing defense cost reimbursement vary as to whether such payments are within or in addition to the limits of liability.

There may be limited circumstances under which an excess or umbrella contract obligates the insurer to defend lawsuits. For example, umbrella policies often provide that the insurer will defend lawsuits that are covered under the umbrella contract but not under the primary contract.

The broader coverage of an umbrella contract, including the umbrella insurer's defense obligation, may apply to risks that are excluded by or are not within the scope of the underlying coverage or to those risks that fall within the more expansive coverage of the umbrella contract. Overwhelmingly, courts have rejected insured's arguments that the mere exhaustion of a primary layer of coverage by the payment of claims gives rise to an umbrella insurer's defense obligation.

For more detailed treatment of excess insurance issues, see generally S. M. Seaman & J. R. Schulze, "Chapter 17 Excess Insurance Coverage," *Environmental Liability & Insurance Recovery* (ABA 2012); S. M. Seaman & J. R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (13th Ed. Thomson Reuters 2025) at Volume 1, Chapter 12.

The Importance of Considering Specific Policy Forms and Policy Language

Over the years, the scope of the insurer's duty to defend has sometimes been limited through the introduction of specific language and definitions in standard insurance policies, such as the Commercial General Liability (CGL) form, in response to market conditions or judicial decisions.

Sometimes changes have been made through the use of manuscript language and endorsements. Accordingly, it is important to consider the language of the insurance policy involved in the respective decisions addressed in the Survey and to compare or contrast that language to the language appearing in the specific policy under consideration.

In pre-1986 CGL forms, for example, the term "suit" was not defined, leading to extensive litigation, especially in the environmental contamination context, as to whether the term "suit" includes administrative actions or demand letters from government agencies such as Potentially Responsible Party (PRP) letters from the United States Environmental Protection Agency or state equivalents thereby triggering the duty to defend.

Some courts have answered the question in the affirmative, while other courts have held that "suit" is limited to lawsuits filed in court. The CGL form was revised in 1986 to define "suit" as a formal "civil proceeding" (a lawsuit), or specific arbitration or other alternative dispute resolution proceedings to which the insurer consents. This change was aimed at eliminating disputes over the meaning of "suit" and emphasizing that the duty to defend is limited to defending lawsuits.

Policies usually specify that the duty to defend ends when the applicable policy limits have been used up in the payment of judgments or settlements. Absent specific language authorizing the practice, most courts have

prevented insurers from escaping their defense obligation by unilaterally tendering the policy limits into court without the insured's consent or a settlement.

The majority have disapproved the practice of “cutting and running” and have found that the duty to defend continues until the case is fully resolved by settlement or judgment. Some policies expressly provide for terminating the duty to defend by posting or interpleading limits or otherwise.

Historically, most general liability policies did not contain provisions expressly permitting an insurer to recoup defense costs associated with non-covered claims. Cases across the country are divided on whether an insurer may recoup defense costs on non-covered claims by unilateral reservation of rights in the absence of an express contract provision allowing recoupment or reimbursement. In recent years, some insurers have added provisions allowing for recoupment, which have been enforced by courts. See, e.g., *Zurich Am. Ins. Co. v. Century Steel Erectors Co., L.P.*, 2020 WL 2065465 (W.D. Pa. 2020) (applying Pennsylvania law); *Liberty Mut. Fire. Ins. Co. v. Ferrara Candy Co.*, 2019 WL 6830764 (Ill. App. Ct. 1st Dist. 2019); *Liberty Ins. Underwriters, Inc. v. Cocrystal Pharma, Inc.*, 2022 U.S. Dist. LEXIS 91839 (D. Del. 2022) (applying Delaware law).

Other Types of Insurance and Issues Distinguished

This *Survey* does not address “claims-made” policy issues, issues of trigger of coverage, allocation of losses, or priority of coverage under “occurrence-based” contracts, or impact or division of responsibilities concerning the duty to defend arising out of multiple insurers having or potentially having a duty to defend.

For detailed treatment of these issues, see S. M. Seaman & J. R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (13th Ed. Thomson Reuters 2025).

Focus on General Liability Policies

The *Survey* focuses on general liability insurance, not other types of liability insurance. It is important to recognize that the provisions and language contained in other policy types may vary.

Often, professional liability policies and directors' and officers' liability policies, for example, contain provisions requiring the insured's consent to settle and provisions requiring the apportionment of defense costs that may alter the result with respect to some issues addressed in the *Survey*.

Cyber policies often include multiple coverage grants that may contain different provisions applicable to defense obligations or defense cost reimbursement. These policies may provide limited coverage for regulatory proceedings or actions.

Eleven Key Issues Addressed in the *Duty to Defend: Fifty-State Survey*

The Survey focuses on 11 key issues commonly presented in connection with the duty to defend, which is designed as an overview, not a comprehensive treatise.

As with many coverage issues, a threshold determination is required to determine which state's law governs. The *Survey* is not intended to be, and does not constitute, legal advice as to the duty to defend in any particular case or claim. Each claim is unique. The scope of the duty to defend and ramifications of any breach of that duty will depend on the specific language of the insurance contract, the particular facts and circumstances of each claim or case, and the governing substantive law.

Also, the laws of different states continue to evolve. Subsequent decisions may render some statements of the law contained in the *Survey* incomplete or inaccurate. As such, it will be necessary to determine the current state of the law in order to make correct decisions about the duty to defend in a given case.

With respect to laws of each of the fifty states, we examine the following eleven issues:

1. What is the standard for determining whether an insurer has a duty to defend?
2. What constitutes a "suit"?
3. Under what circumstances will information not contained in the policy or underlying complaint be considered in determining whether an insurer has a duty to defend (extrinsic evidence)?
4. When does the duty to defend begin?
5. When does the duty to defend end?
6. Must an insurer defend a lawsuit if only some of the facts alleged or counts included in the underlying complaint are potentially covered (mixed claims)?
7. Under what circumstances may an insured select its own defense counsel to be paid by the insurer (independent counsel)?
8. What are the consequences of a breach of the duty to defend?
9. When an insurer pays for the defense of a matter where only some of the claims alleged in an underlying case are covered by the policy, may the insurer recoup from the insured the costs allocable to claims that are not covered (right of recoupment)?
10. Does an insurer have an obligation to reimburse its insured for defense costs incurred by the insured prior to the time that the insured placed the insurer on notice of the claim or requested that the insurer defend ("pre-tender defense costs")?
11. Does an insured who prevails in coverage litigation recover from the insurer the attorney's fees and/or costs expended by the insured for litigating coverage without establishing common law or statutory bad faith (cost shifting)?

The *Survey*, presented in a question-and-answer format, addresses the following 11 questions for each state, which are significant for insurance claims professionals and lawyers making decisions about properly responding to complaints tendered for a defense.

1. What is the standard for determining whether an insurer has a duty to defend?

The nuances vary considerably from state to state, but in general, most states recognize that the duty to defend is broader than the duty to indemnify and require the insurer to defend when there is a “potential” for coverage.

In most states, the determination is made, at least initially, by comparing the allegations of the underlying complaint against the insurance contract. This is referred to variously as the “complaint” rule, the “four corners” rule, or the “eight corners” rule.

Generally, an insurer is required to defend claims that are groundless, false, or fraudulent, and doubts are resolved in favor of requiring the insurer to provide a defense.

2. Under what circumstances will information not contained in the policy or underlying complaint be considered in determining whether an insurer has a duty to defend (extrinsic evidence)?

There is considerable variance among the states regarding whether and under what circumstances evidence outside of the allegations in the underlying complaint may be or must be considered to implicate the duty to defend or to negate the duty to defend. There are also differences among the states, allowing consideration of extrinsic evidence concerning what information may be considered.

3. What constitutes a “suit”?

Most primary liability insurance contracts provide that the insurer will defend “suits.” In some policies, the term is defined; in other policies, “suit” is not a defined term.

An issue commonly presented is whether the duty to defend is limited to defending “lawsuits” or whether the insurer is required to defend something other than a lawsuit, such as an administrative hearing or a demand letter. A common circumstance in which the issue has arisen is where a “Potentially Responsible Party” (“PRP”) letter from the US Environmental Protection Agency or a state environmental agency constitutes a “suit” under a liability insurance policy.

4. When does the duty to defend begin?

The question as to when the duty to defend begins varies considerably from state to state. In some states, there is no duty to defend until the policyholder tenders the complaint to the insurer to defend.

In other states, something other than tender by the policyholder may implicate the duty to defend, such as notice of the existence of the complaint or tender by a third-party, such as a claimant.

5. When does the duty to defend end?

There is considerable variance among the states as to when the duty to defend terminates. Issues pertaining to the end point of the duty to defend include:

- whether exhaustion of limits by payment of settlements or judgments is required;
- whether obtaining dismissal of the entire action or all claims against the insured is required;
- whether only the resolution of all potentially covered claims is required;
- whether the duty to defend continues through appeal;
- whether and under what circumstances the insurer may withdraw from the defense; and
- whether an insurer must obtain a declaratory judgment to terminate the duty to defend.

6. Must an insurer defend a lawsuit if only some of the facts alleged or counts included in the underlying complaint are potentially covered (mixed claims)?

Most states have held that a primary liability insurer—absent express policy language to the contrary—must defend its insured against a suit or action that states multiple claims, allegations, or bases for recovery, even if only one of those claims or bases is potentially covered under the contract.

Mixed claims can arise in a variety of ways, including where some (but not all) claims fall under an exclusion; both negligent and intentional acts are alleged; potentially covered and non-covered damages or injuries take place partially within and partially outside of the policy period or the coverage territory; or multiple plaintiffs or class members are involved and some allege non-covered injury or damages.

The various rationales offered in support of this general rule requiring the insurer to defend the entire action include:

- the broad language included in the policy regarding the duty to defend;
- the absence of a reasonable means for allocating defense costs between covered and noncovered claims;
- separate representation for covered and non-covered claims may not be reasonable or might produce duplicative and inconsistent results; and
- the failure to provide a complete defense would violate the policyholder’s “reasonable expectations” that the insurer will defend the entire suit.

Even in the majority of jurisdictions that require an insurer to defend the entire action, as with any issue, consideration should be given to whether the language of the policy at issue differs materially from the language in policies involved in decisions upon which a jurisdiction’s pronouncements regarding the scope of the duty to defend and recoupment have been rendered.

Many decisions in ruling on the scope of the duty to defend rely upon language providing that “the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if the allegations of the suit are groundless, false, or fraudulent”

In November 1985, the quoted language was removed from the ISO Commercial General Liability Form. The May 1992 ISO Commercial General Liability Form, for example, provides: “we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.”

The difference in language may not alter the result where a court is reluctant to depart from precedent, or insofar as the precedent is deemed to have a public policy component. Nonetheless, parties should at least consider the impact of differences in policy language when evaluating the duty to defend.

7. Under what circumstances may an insured select its own defense counsel to be paid by the insurer (independent counsel)?

As detailed above, the insurer generally has the right to defend lawsuits, which includes the right to select counsel and control the defense. In the absence of a conflict of interest, generally, the insurer retains the right to select counsel. In some states, where the interests of the insured and the insurer conflict, the insurer may be required to appoint independent counsel, or the insured may be permitted to select independent counsel and have the insurer pay counsel.

A conflict of interest analysis initially depends on who is considered to be the client of the insurer-selected counsel. Courts generally have adopted two divergent approaches regarding who is the client of the insurer-selected defense counsel:

- **One-Client Theory:**
 - Under the one-client theory, the defense counsel appointed by the insurer represents only the policyholder. A conflict analysis does not come into play under the one-client theory. A conflict of interest analysis with respect to the right to independent counsel may come into play, however, in jurisdictions adhering to the “tripartite” relationship theory.
- **Two-Client Theory:**
 - In jurisdictions adhering to the two-client theory or the “tripartite” relationship, defense counsel is considered to be involved in a dual representation of both the insured and the insurer. Unlike the one-client theory, courts that have adopted the two-client theory have found that the defense counsel’s dual duties to both the insured and insurer may create conflicts of interest under certain circumstances where the defense is being provided, subject to a reservation of rights.

The finding of a conflict of interest sometimes is based on the perceived risk that the defense attorney’s representation of the insured somehow will be impaired by his relationship with the insurer. The analysis

employed to determine whether a conflict of interest exists that would warrant shifting control of counsel from the insurer to the insured varies by jurisdiction.

Most courts recognize that the insurer's issuance of a reservation of rights letter on its face does not per se create a conflict of interest that would allow the insured to pick defense counsel at the insurer's expense. A minority of courts, however, have found that the insurer's issuance of a reservation of rights establishes a conflict of interest for purposes of requiring independent counsel.

Courts that have not adopted the per se rule generally hold that a conflict of interest must be actual (not merely potential) for the insured to gain the ability to pick and/or control the defense counsel. Courts have employed various tests to determine whether an actual conflict exists. For example, some courts conclude that an actual conflict of interest exists only where the facts at issue in the underlying litigation are identical to the facts shaping the insurer's coverage determination.

Other courts require the presentation of evidence that the defense counsel's actions put the interests of the insurer over those of the insured for a conflict to exist. Although touched on with respect to some states, a detailed analysis of conflicts of interest is beyond the scope of the Survey.

Although the issue of reservation of rights is not otherwise within the scope of the Survey, it bears mentioning that an insurer is well-served to consider the impact of a reservation of rights not only in terms of avoiding estoppel or waiver of a right or defense, but also in terms of whether its reservation places its right to control the defense at risk.

In many instances, the right to control the defense, drive effective case resolution, and contain costs may be more important and achievable than recouping a meaningful amount of defense costs. It is important to keep in mind that, even where an insured is entitled to independent counsel, the insured is not always allowed to make the selection. In some states, an insurer is entitled to make the selection, but must select truly independent counsel, and in other states, selection must be by mutual agreement.

Even where the insured has selected counsel, the insurer still has certain rights, and its role should not be limited to paying the bills. For example, the *Cumis* Counsel Statute in California provides, among other things, that an insurance contract may contain a provision that sets forth the method of selecting that counsel consistent with the statute. The insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications (which may include at least five years of civil litigation practice, including substantial defense experience in the subject matter at issue in the litigation) and errors and omissions coverage.

The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates that are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended; disputes concerning attorney's fees shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

Further, where independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and to timely inform and consult with the insurer on all matters relating to the action.

Any claim of privilege asserted is subject to in camera review in court. Finally, both the counsel provided by the insurer and the independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation and shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligations to the insured.

8. When an insurer pays for the defense of a matter where only some of the claims alleged in an underlying case are covered by the policy, may the insurer recoup from the insured the costs allocable to claims that are not covered (right of recoupment)?

The right of recoupment may help effectuate fairness or at least ameliorate some unfairness or unjust enrichment. Recoupment involves the reimbursement of sums paid by the insurer on claims that are not potentially covered by the insurance contract.

Recoupment is effectuated after the insurer has not only honored its obligations to the insured, but also has advanced benefits to which the insured arguably is not entitled under the insurance contract. Fundamentally, recoupment is not a matter of contract. It is a matter of *quasi* contract, implied contract, unjust enrichment to the insured, or unjust impoverishment of the insurer. For this reason, courts that deny insurers the right to recoup in the mixed claims context entirely miss the point of recoupment or simply refuse to recognize *quasi*-contractual rights in the context of a relationship that is predicated upon an express contract.

Where the insurance policy expressly provides for recoupment, such provisions generally are enforced. In the absence of an express provision, states are split as to whether an insurer may seek recoupment from its insured of defense costs incurred in defending non-covered claims, with a slight majority allowing recoupment where the insurer timely reserves its right to do so. See S. M. Seaman & J. R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (13th Ed. Thomson Reuters 2025) at Volume 1, Chapter 12.

9. Does an insurer have an obligation to reimburse its insured for defense costs incurred by the insured prior to the time that the insured placed the insurer on notice of the claim (pre-tender defense costs)?

An issue sometimes is presented as to whether an insurer is obligated to reimburse an insured or to pay for defense costs incurred prior to the time the insured places the insurer on notice of the claim or tenders the claim to the insurer for defense. Once again, the law varies from state to state on whether such pre-notice or pre-tender costs are covered.

10. What are the consequences of a breach of the duty to defend?

The consequences for breaching the duty to defend vary considerably from state to state. Generally, an insurer that breaches its duty to defend is responsible for breach of contract damages (e.g., the insured's costs and attorney fees in defending the underlying action).

Additional consequences may include one or more of the following:

- liability for the underlying judgment up to policy limits;
- liability for attorney's fees incurred by the policyholder in securing contract benefits;
- being estopped from asserting some or all coverage defenses;
- loss of ability to enforce some policy conditions; being bound by the underlying litigation results; and
- having the ability to challenge settlements limited (*i.e.*, as fraudulent, collusive, or unreasonable).

The Survey does not address consequences associated with a breach of the duty of good faith and fair dealing.

11. Can an insured who prevails in coverage litigation recover from the insurer the attorneys' fees and/or costs expended for the insured for litigating coverage without establishing common law or statutory bad faith (cost shifting)?

Under the American Rule, each party is required to pay its own attorney fees. Many states apply the American Rule to insurance coverage disputes. In other states, an insured that prevails in coverage litigation may recover attorneys' fees and costs without establishing bad faith either under case law, court rule, or statute. Once again, bad faith is beyond the scope of the Survey.

Download the Full *Duty to Defend: Fifty-State Survey*

Ready to dive into the full 50-state survey? [Download a copy here.](#)

This publication was prepared by attorneys in the global Insurance Services group of Hinshaw & Culbertson LLP. For additional information, please feel free to contact any member of the Insurance Services Practice Group with whom you work.

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