

# Duty to Defend, Additional Insured Insurance Coverage Update

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*The e-POST*

## Duty to Defend – Wisconsin

### *Choinsky v. Employers Ins. Co. of Wausau*

--- N.W.2d ---, 2020 WL 727822 (Wis. Feb. 13, 2020)

The Wisconsin Supreme Court held that two insurers did not breach a duty to defend their insured for a lawsuit alleging wrongful termination of benefits because the insurers properly sought the court's approval of their coverage position.

In 2012, the Germantown School District (District) discontinued long-term care insurance for active employees, which also resulted in the discontinuation of the insurance for retirees. A group of retired teachers filed a class action complaint against the District, alleging this decision was wrongful and constituted "intentional and willful disregard" of the retirees' rights. Employers Insurance Company of Wausau and Wausau Business Insurance Company (collectively, Wausau) initially denied coverage to the District on the basis that the lawsuit alleged intentional conduct. Later, Wausau sought to intervene in the class action lawsuit and asked the court to bifurcate the insurance dispute from the class action and to stay the class action, pending a ruling on the insurance dispute. When the trial court refused to stay the class action, Wausau agreed to reimburse the District for defense costs incurred and fund the District's defense going forward, under a full reservation of rights to continue, challenging their coverage obligations.

A jury found that Wausau had a duty to defend because the class action complaint could be read as alleging that the District's decision was negligent. On a subsequent motion for attorney fees relating to establishing coverage, the trial court issued a decision that Wausau had not breached the duty to defend because it followed a "judicially preferred approach to the coverage dispute" by seeking the court's approval of its coverage position. The appellate court affirmed the trial court's decision.

The Wisconsin Supreme Court affirmed the ruling of the appellate court, holding that Wausau did not breach its duty to defend the District because it followed one of the four "judicially preferred approaches" in intervening in the liability case and asking for a court determination of coverage. The Supreme Court held that Wausau's actions in attempting to "hav[e] coverage decided before liability," and "provid[ing] a full defense, retroactive to the date of tender" when the trial court denied Wausau's motion to stay the class action proceedings were proper, notwithstanding the fact that Wausau initially

denied the District's tender of coverage. In light of this conduct, the Supreme Court held that Wausau "complied with its contractual responsibilities to [the District] and therefore" did not breach its duty to the District. The Supreme Court concluded by stating "this court has repeatedly said that when an insurer follows a judicially preferred procedure to resolve a coverage dispute, it will not risk breaching its duty to defend."

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### **Additional Insured – Tenth Circuit (Wyoming Law)**

#### ***Lexington Ins. Co. v. Precision Drilling Co., L.P.***

--- F.3d ---, 2020 WL 913090 (10th Cir. Feb. 26, 2020)

The U.S. Court of Appeals for the Tenth Circuit held that an insurer had a duty to defend and indemnify a subcontractor with respect to a personal injury suit arising from an oil rig accident. The owner of a Wyoming oil well site, Ultra Resources, Inc. (Ultra), contracted with Upstream International, LLC (Upstream) to manage the well site. Ultra ultimately contracted with Precision Drilling Company, LP (Precision) to operate a drilling rig at the site, and Upstream assigned an independent contractor, Darrell Jent, to supervise operations. During the course of operations, Jent was severely injured as a result of the negligence of Precision employees, and Jent, thereafter, filed suit against Precision. Precision tendered the lawsuit to Lexington Insurance Co. (Lexington), claiming to be an additional insured under primary and umbrella policies of insurance Lexington issued to Upstream. Lexington initially defended Precision under a reservation of rights, but later denied coverage and refused to contribute to a \$3 million settlement between Precision and Jent.

Following the settlement, Lexington filed a declaratory judgment action in federal court, seeking a finding, in part, that it had no duty to defend or indemnify Precision on the basis that Precision did not qualify as an additional insured under its policies. The relevant additional insured provision stated that additional insured coverage was limited to "liability arising out of '[Upstream's] work' or '[Upstream's] product' for [Precision]." The district court found that Precision qualified as an additional insured because Upstream, through Jent, performed work "for" Precision in that Jent was helping to supervise Precision's operations.

On appeal, Lexington argued that the word "for" in the additional insured provision required a right of control, and that because Upstream, rather than Precision, had the right to control Jent's work, Jent was working "for" Upstream rather than Precision. The appellate court rejected Lexington's interpretation, and held that the term "for" did not require the right of control, but rather, meant that the work must be "on behalf of" the additional insured. Accordingly, because Jent, in his supervisory capacity, was working "on behalf of" Precision, Precision qualified as an additional insured under Lexington's policies, and Lexington was responsible for Precision's defense, as well as the \$3 million settlement.

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DUTY TO DEFEND, ADDITIONAL INSURED INSURANCE COVERAGE UPDATE Cont.

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