

# Supreme Court of Wisconsin Imposes Duty to Defend on Excess Insurer Despite Absence of Duty to Defend Provision in Policy

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On June 24, 2010, the Supreme Court of Wisconsin issued a decision in *Johnson Controls, Inc. v. London Market, et al.*, 2010 WI 52 (“*Johnson Controls*”) in which the court held that although an excess insurer’s policy did not contain a duty to defend provision, it did contain a follow form provision which incorporated the duty to defend provision found in the underlying policies. The Court further determined that the excess insurer’s duty to defend was not conditioned upon exhaustion of the underlying policies.

In *Johnson Controls*, London Market issued an excess umbrella policy, which sat atop underlying excess umbrella policies issued by Travelers Indemnity Company (“Travelers”). London Market’s policy contained a “follow form” provision, which provided that the policy follows the same terms, definitions, exclusions and conditions of the Travelers policy except with regard to the premium, limits of liability and “except as otherwise provided herein.”

The Travelers policies promised defense and indemnification. The London Market policy promised indemnification, but was silent regarding defense. London Market contended that by omitting a promise to defend, it “otherwise provided” that there would be no duty to defend. The Court disagreed, holding the phrase “except as otherwise provided” suggests that in order to meet this exception, there must be a specific provision to the contrary. Accordingly, the Court incorporated the Travelers duty to defend provision into the London Market policy.

The Court next considered if and when London Market’s duty to defend was triggered. London Market asserted that a primary insurer generally has the primary duty to defend and, therefore, London Market is not obligated to defend until the primary insurance is exhausted. The Court acknowledged this general rule, but noted that its initial focus should be on the policy language – specifically, Travelers “other insurance” provision.

Travelers “other insurance” provision provided that if another insurer denies primary liability, Travelers will respond as though the other insurance was unavailable. Under London Market’s follow form provision, the Court incorporated the “other insurance” provision into the London Market policy. The Court concluded that London Market was required to assume the defense because Travelers denied primary liability under its policies. Thus, unlike the duty to indemnify, the Court concluded that the duty to defend was not conditioned on exhaustion of the underlying Travelers policies.

Justice Ziegler issued a dissenting opinion. Justice Roggensack and Justice Gableman joined the dissent.

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