SUPREME COURT OF LOUISIANA

DOCKET NO. 2015-C-588

DANIEL ARCENEAUX, LOUIS DAVEREDE, JR., VIVES LEMMON AND JULES MENESSES, ET AL.
Plaintiffs-Appellees,

vs.

AMSTAR CORP., AMSTAR SUGAR CORP., TATE & LYLE NORTH AMERICAN SUGARS, INC. AND DOMINO SUGAR COMPANY,
Defendant-Appellant.

CONSOLIDATED WITH:

EMETT BARBE, JR., ET AL.

vs.

AMERICAN SUGAR REFINING, INC., AMSTAR CORPORATION, AMSTAR SUGAR CORPORATION, TATE & LYLE NORTH AMERICAN SUGARS, INC., AND DOMINO SUGAR COMPANY

CONSOLIDATED WITH:

JOSEPH WAGUESPACK, ET AL.

vs.

AMERICAN SUGAR REFINING, INC., AMSTAR CORPORATION, AMSTAR SUGAR CORP., TATE & LYLE NORTH AMERICAN SUGARS, INC. AND DOMINO SUGAR COMPANY

APPEAL FROM COURT OF APPEAL, FOURTH CIRCUIT
No. 2014-CA-0271
34th JUDICIAL DISTRICT FOR THE PARISH OF ST. BERNARD
DOCKET NO. 86-959, DIVISION "B"
Honorable Robert J. Klees, Judge Pro Tempore

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE AMERICAN SUGAR REFINING, INC.

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TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Duty to Defend and Duty to Indemnify Are Distinct Duties That Are Applied Differently. 2

A. Continental Has A Broad Duty To Provide A Complete Defense.......................... 2

B. The Breadth Of Continental's Defense Obligation Is Consistent With The Policy Language And Guidance From The Louisiana Department of Insurance. 5

C. The Louisiana Department of Insurance Does Not Permit The Sale Of Insurance Policies That Prorate Defense Costs. 6

D. Continental's Reliance on *Forty-Eight Insulations* Is Misplaced.......................... 7

II. Fairness, Equity and Public Policy All Favor Affirmation Of The Fourth Circuit's Holding. 7

III. Continental Is Not Without Recourse With Respect To The Defense Costs It Will Incur. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

American Home Assurance Company v. Czarniecki,
230 So. 2d 253 (La. 1969) 3

Elliott v. Continental Casualty Co.,
2006-1505 (La. 2/22/07); 949 So. 2d 1247 2

Insurance Company of North America v. Forty-Eight Insulations, *Inc.*
633 F.2d 1212 (6th Cir. 1980) 7

Jensen v. Snellings,
Civ. A. Nos. 81-3729, 89-4700, 1991 WL 28988 (E.D. La. Feb. 25, 1991) 3, 5

Liberty Mut. Fire Ins. Co. v. Fluor Enterprises, Inc.,
Civ. A. No. 08-5166, 2012 WL 255763 (E.D. La. Jan. 27, 2012) 3, 5

Mid-Continent Casualty Company v. Academy Development, Inc.,
476 Fed. Appx. 316, 321 (5th Cir. 2012) 6

Riley Stoker Corp. v. Fidelity and Guaranty Insurance Underwriters, Inc.,
26 F.3d 581 (5th Cir. 1994) 3, 5

Treadway v. Vaughn,
633 So. 2d 626 (La. Ct. App. 1993) 3, 5

Vaughn v. Franklin,
2000-291 (La. App. 1 Cir. 2001); 785 So. 2d 79 ....2, 3, 5

Zurich Insurance Company v. Raymark Industries, Inc.,
514 N.E.2d 150 (ILL. 1987) 7

Other Authorities

Seth D. Lamden, 3-17 Appleman on Insurance Law and Practice § 17.01 (2015) 2

Allan D. Windt, 2 Insurance Claims and Disputes § 6:2 Contract Interpretation
(6th ed.) 5

SUMMARY OF ARGUMENT

United Policyholders agrees with Appellee, American Sugar Refining, Inc. ("American Sugar"), that the Fourth Circuit correctly concluded that Continental Casualty Company's ("Continental") prospective duty to defend American Sugar is not subject to proration. This holding is not only consistent with Continental's insurance policy language and well-settled Louisiana jurisprudence, but also with principles of equity, fairness and public policy.

To succeed in its effort to limit its defense obligations to American Sugar and garner a huge windfall at the expense of Louisiana policyholders, Continental and its insurance industry *amicus* Complex Insurance Claims Litigation Association ("CICLA") would have to convince this Court to:

1. Ignore the plain language of the Continental policy, which requires Continental to defend a suit, and convert that duty to defend into a duty to partially reimburse defense costs;
2. Ignore established Louisiana law requiring that insurance companies defend an entire case, both covered and uncovered claims, so long as the duty to defend is triggered;
3. Ignore the Louisiana Insurance Department's requirements for insurance policies covering Louisiana policyholders; and
4. Ignore simple fairness, equity and public policy.

For the reasons set forth herein, *amicus* United Policyholders asks this Court to reject Continental's arguments and affirm the Fourth Circuit's decision that Continental's prospective duty to defend American Sugar is not subject to proration.

ARGUMENT

I. The Duty to Defend and Duty to Indemnify Are Distinct Duties That Are Applied Differently.

> Continental agrees with Appellants that, because of the differences between an insurer's indemnity obligations and defense obligations, the rationale of the *Mid-Continent* rule cannot apply to a claim to recover defense costs.[1]

As is clear from the quote set forth above, the parties agree that the duty to defend and the duty to indemnify are distinct duties to which different standards apply. Despite recognizing these independent and distinct duties to which different rules apply, Continental seeks a ruling that pro rata allocation applies to its defense obligation simply because Louisiana courts have applied proration to an insurance company's duty to indemnify. That rationale is flawed and inconsistent with the broad duty to defend granted in the insurance policies Continental sold to American Sugar.

A. Continental Has A Broad Duty To Provide A Complete Defense

The duty to defend "is not merely ancillary to the duty to indemnify but, rather, is an integral component of the raft of protection afforded by a liability policy. Many insureds purchase liability insurance for the peace of mind that comes with knowing that their insurer will defend them if they are sued in an action that comes within the scope of protection provided by their policy." Seth D. Lamden, 3-17 Appleman on Insurance Law and Practice § 17.01 (2015). Accordingly, the duty to defend is often referred to as "litigation insurance." It is broader in scope than the duty to indemnify. *Elliott v. Continental Cas. Co.*, 2006-1505 (La. 2/22/07); 949 So.2d 1247, 1250.

In Louisiana, the duty to defend is determined using the "eight-corners rule" under which one looks at the four corners of the policy and the four corners of the petition to determine whether the duty exists. *Vaughn v. Franklin*, 2000-291 (La. App. 1 Cir. 3/28/01); 785 So.2d 79, 84. Under this approach, the court considers the factual allegations in the petition, not the conclusions, and construes in favor of coverage. *See Elliott*, 949 So.2d at 1250 (noting that "An insured's duty to defend arises whenever the pleadings against the insured disclose even a

[1] *Amicus Curiae* Brief of Continental Casualty Company in Support of Appellants and Reversal of the District Court's Judgment in *Trinity Universal Insurance Company v. Employers Mutual Casualty Company*, No. 08-20532, 2008 WL 7789587 at *4 (5th Cir. Nov. 17, 2008).

possibility of liability under the policy") (citation omitted); *Am. Home Assurance Co. v. Czarniecki*, 230 So. 2d 253, 269 (La. 1969) (noting that "if, assuming all the allegations of the petition to be true, there would be both (1) coverage under the policy and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit"); *Treadway v. Vaughn*, 633 So. 2d 626, 628 (La. Ct. App. 1993) (explaining that allegations are "liberally interpreted in determining whether they set forth grounds which bring the claims within the scope of the insurer's duty to defend") (citations omitted).

Notably, if any of the claims in the action are potentially covered by the insurance policy, the insurance company must defend the entire action. *See Riley Stoker Corp. v. Fid. and Guar. Ins. Underwriters, Inc.*, 26 F.3d 581, 589 (5th Cir. 1994) (explaining that "Under Louisiana law, when an insurer has a duty to defend any claim asserted, the insurer must defend the entire action brought against its insured") (citation omitted); *Treadway*, 633 So. 2d at 628 (La. Ct. App. 1993) (noting that "Once a complaint states one claim within the policy's coverage, the insurer has a duty to accept defense of the entire lawsuit, even though other claims in the complaint fall outside the policy's coverage") (citations omitted).

Significantly, the existence of multiple insurance companies insuring the same loss does not obviate the duty to defend itself or the scope of that duty. In fact, if multiple insurance companies owe a duty to defend the same suit, <u>each</u> insurance company is solidarily bound to defend the policyholder. *Vaughn,* 785 So. 2d at 89 (noting two insurers "each had an equal duty to defend in this case [and]… they are thus equally liable for the defense costs"); *Liberty Mut. Fire Ins. Co. v. Fluor Enters., Inc.*, Civ. A. No. 08-5166, 2012 WL 255763, at *3, 4 (E.D. La. Jan. 27, 2012) (holding that two insurers were "liable for the whole of Fluor's defense costs" and "[w]hen insurers owe a co-equal duty to defend, they also share the cost of that defense equally, absent a clear agreement to the contrary"); *Jensen v. Snellings,* Civ. A. Nos. 81-3729, 89-4700, 1991 WL 28988 at *3 (E.D. La. Feb. 25, 1991) (explaining that two insurers, with identical policies with respect to defense obligations, are "solidary obligors to their mutual insureds" meaning each is "liable for the whole performance"). <u>Continental admits this fact</u>. It actually relied upon this premise to support its position for reimbursement of defense costs from other insurance companies in the *amicus curiae* brief it submitted to the Fifth Circuit on November 17,

2008 in the matter *Trinity Universal Insurance Company v. Employers Mutual Casualty Company*:

> an insurer's defense obligations, once triggered, exist regardless of whether there is one insurer or several; that is, each insurer owes a duty to provide its insured with a complete, and not a pro rata, defense.
>
> No. 08-20532, 2008 WL 7789587 at *5.

Despite the clearly established and long-standing Louisiana precedent prohibiting proration of defense costs, and Continental's prior acceptance of and reliance on that precedent, Continental now argues that its defense obligation should be prorated and should coincide with its indemnity obligation. Continental's reversal of its own past positions and ignoring of long established Louisiana precedent is just plain wrong. Even its insurance industry *amicus* knows that Continental's argument is wrong, stating that "conflating the duty to defend and the duty to indemnify violates fundamental tenets of contract law." Brief of *Amicus Curiae* Complex Insurance Claims Litigation Association and American Insurance Association in Support of Defendant-Appellant-Respondent in *K2 Inv. Grp., LLC v. Am. Guar. & Liab. Ins. Co.*, 2013 WL 6924836 at *9 (N.Y. Nov. 18, 2013). *See also id*. (noting that "Given the wide acceptance of the fundamental rule that the standard applicable to the duty to defend does not control the duty to indemnify, it is not surprising that authorities nationwide agree that an insurer is not barred from litigating indemnity coverage by virtue of the breach of a duty to defend").

Acceptance by this Court of Continental's flawed view would ignore Louisiana law on the duty to defend, providing policyholders whose liabilities potentially trigger MORE coverage with less of a defense, and, as a practical matter, would render most Louisiana policyholders defenseless unless they could fund their own defense and later chase insurance companies for reimbursement. For example, assume, as is the case here, that the allegations of a petition include bodily injury potentially occurring both before, during, and after Continental's policy period. Further assume that Continental is only required to indemnify American Sugar for its time on the risk. The other years when injury occurred would be directly analogous to, and in fact are, from Continental's perspective, uncovered claims that are part of the same petition. As such, the "uncovered" years would have to be defended by Continental under well-established Louisiana case law holding that once a complaint triggers an insurance company's duty to

defend, that insurance company must defend the entire case – both covered and uncovered causes of action. *Riley Stoker Corp.*, 26 F.3d at 589; *Treadway*, 633 So. 2d at 628; *Vaughn,* 785 So.2d at 89; *Fluor Enterprises, Inc.*, 2012 WL 255763, at *3, 4; *Jensen*, 1991 WL 28988 at *3. Before it could accept Continental's "proration of defense" argument, this Court would have to overrule these well-settled cases and replace established Louisiana law.

Based on established Louisiana law, Continental has a duty to provide a complete defense to American Sugar, not reimburse a percentage of the defense expenses. Accordingly, the Fourth Circuit's decision should be affirmed.

B. The Breadth Of Continental's Defense Obligation Is Consistent With The Policy Language And Guidance From The Louisiana Department of Insurance.

Under Continental's suggested approach, the express language of its duty to defend contractual obligation would be nullified and converted into a duty to reimburse part of the defense costs. As a result, the insurance company would not have an indivisible duty to defend as contracted. The policy language drafted by Continental would be rendered meaningless. Such a result should not be condoned by this Court since it is inconsistent with the fundamental principle of insurance contract construction that the policy is read as a whole, giving meaning to all provisions. *See* Allan D. Windt, 2 Insurance Claims and Disputes § 6:2. Contract Interpretation (6th ed.) (explaining that "all policy provisions should be given effect, and the whole of the contract is to be considered, with each clause being used to help interpret the other").

Despite Continental's argument to the contrary, the Continental policy expressly requires Continental to "defend any suit" whenever a claimant is seeking potentially covered damages:

> The company will pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages because of:
>
> A. bodily injury or
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and **<u>the company shall have the</u>** right and **<u>duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage</u>**, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim

> or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Policy Coverage Part at 1 (emphasis added). This provision does not include proration language. In fact, by this language, Continental agreed to "defend" (not reimburse defense costs) any "suit" (not some prorated part of a suit) seeking "damages on account of such bodily injury…." *See*, *e.g.*, *Mid-Continent Cas. Co. v. Acad. Dev., Inc.*, 476 Fed. Appx. 316, 321 (5th Cir. 2012) ("Texas courts have rejected the *pro rata* method for calculating an insurer's duty to defend when more than one policy is triggered by a claim. The reasoning behind this rule is that, when an insurer's policy is triggered, 'the insurer's duty is to provide its insured with a complete defense. This is because the contract obligates the insurer to *defend* its insured, not to provide a pro rata defense.'") (citations omitted). The language does not limit Continental's duty to defend a suit to those that "solely" seek potentially covered damages. The requirement is to defend the entire suit.

C. The Louisiana Department of Insurance Does Not Permit The Sale Of Insurance Policies That Prorate Defense Costs.

The Louisiana Department of Insurance (the "Department") has a "handout" entitled "Most Common Disapproval Reasons" (a copy of which is attached hereto, in pertinent part, as Exhibit A) which specifically states that an insurance company is obligated to defend the entire action if a single claim is potentially covered:

> Language stating that the insurer has no duty to defend any suit or settle any claim for loss or damage that is not covered under the terms of the policy is not approvable. A provision stating that the company does not have a duty to defend a covered claim if it is combined with an uncovered claim is also not approvable. If an insurer were allowed to refuse to defend claims "not covered by this coverage part," the insured might be forced to defend claims when the extent of coverage is in dispute, or in those instances when a covered claim is coupled with an uncovered claim. LRS 22:2 and LRS 22:1269D

Based on the policy language and instruction from the Department of Insurance, there is no basis to treat the duty to defend like the duty to indemnify in long-latency damage cases. The form itself was approved by the Department presumably based on the belief that it means what it says, and Continental is obligated to defend any case triggering its duty to defend in its entirety.

Imposition of a new "pro rata" defense rule by this Court would directly contradict the Department's understanding of the scope of the defense provided.

D. Continental's Reliance on Forty-Eight Insulations Is Misplaced.

Continental and its *amicus* CICLA rely on *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), to argue that proration of defense is appropriate. Both Continental and CICLA fail to note two important distinguishing facts in *Forty-Eight Insulations.* First, the *Forty-Eight Insulations*' court held that the insurance company's obligations were only triggered by the claimant's exposure to asbestos during the policy period. As a result, the court concluded that the exposure theory was a "reasonable means" of allocating defense and indemnification. *Id.* at 1225. Here, however, coverage is triggered if a claimant sustains bodily injury or sickness or disease during the policy period. *See Zurich Insurance Company v. Raymark Industries, Inc.*, 514 N.E.2d 150, 165 (Ill. 1987) (noting that "unlike *Forty-Eight Insulations,* this court has held that an insurer must afford Raymark coverage of a claim if the claimant suffers bodily injury *or* sickness *or* disease during a policy period. Having rejected the premise underlying the *pro rata* allocation approach adopted in *Forty-Eight Insulations*, we conclude that the appellate court did not err insofar as it declined to order the *pro rata* allocation of defense and indemnity obligations among the triggered policies."). Second, the *Forty-Eight Insulations*' court did not impose a blanket application of pro rata allocation to defense costs. In fact, it noted that "An insurer must bear the <u>entire</u> cost of defense when there is no reasonable means of prorating the costs of defense between the covered and not-covered items." 633 F. 2d. at 1224 (internal quotes and citation omitted) (emphasis added). With hearing loss cases, there is no way to determine what incremental hearing damages took place during Continental's policy periods. Thus, *Forty-Eight Insulations* supports a ruling requiring Continental to pay American Sugar's full defense.

II. Fairness, Equity and Public Policy All Favor Affirmation Of The Fourth Circuit's Holding.

Pro rata allocation of defense costs would, in many long-term latency cases, render policyholders defenseless since they will not be able to afford to hire counsel while various insurance companies squabble over the percentage of defense that each one owes. Further, even assuming counsel could be hired, every case would require a negotiation over which insurance

company has the right to appoint counsel to defend its policyholder in the underlying litigation. Finally, once defense counsel is selected, that counsel would not know which insurance company is paying its fees during the life of the litigation. Neither counsel nor policyholders should be burdened with the uncertainty of who will pay defense fees when, as here, an insurance company has contractually bound itself to "defend the suit," <u>not</u> contribute a percentage to the defense. Such a result is clearly what the Department was seeking to avoid when it adopted its rule against approval of policies providing for partial defense.

III. Continental Is Not Without Recourse With Respect To The Defense Costs It Will Incur.

As noted, where the same risk is covered by multiple insurance companies, each insurance company is fully liable for the defense costs incurred. Each insurance company may, however, seek contribution from the other triggered insurance companies. Continental, to the extent it claims to have paid more than its fair share, has the right to seek contribution from the other insurance companies, and it knows that it possesses that right. In fact, in support of its *amicus curiae* submission in *Trinity Universal Insurance Company v. Employers Mutual Casualty Company*, Continental stated that:

> [l]ike other liability insurers, Continental has operated under the premise that, if necessary, it may seek reimbursement against a coinsurer if the coinsurer fails to pay or underpays its proportionate share of the costs to defend a common insured. Because insurers rely on their ability to seek such reimbursements in negotiating defense arrangements and indemnity sharing, Continental is vitally interested in the legal issues presented in this case [which involve the right to reimbursement of defense costs].

2008 WL 7789587 at *vii. If, as Continental argues, it should not be responsible to provide 100% of defense costs, then it can argue that position when seeking reimbursement from other potentially responsible insurance companies. The Fourth Circuit's holding, which should be affirmed, does not foreclose Continental's ability to seek reimbursement from other insurance companies for defense costs it has been ordered to pay. It merely places the initial burden on the defense squarely on Continental which expressly agreed to accept it, rather than placing the burden on the policyholder which bought insurance specifically to cover and, thereby, avoid this risk.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, United Policyholders, respectfully requests that this Court affirm the Fourth Circuit's holding that Continental's prospective duty to defend American Sugar means what it says and is not subject to proration.

Respectfully submitted:

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EXHIBIT A

The various legal references described in the Most Common Disapproval Reasons have been included for the convenience of the insurance industry.

Every effort has been made to ensure the accuracy of the information contained in the handout. However, it should not be relied upon as an alternative or supplement to the Louisiana Insurance Code, Louisiana Department of Insurance regulations or other applicable laws, by which all dealings with the Louisiana Department of Insurance are governed. All parties are advised to consult with their own legal counsel regarding the extent and nature of their requirements.

This handout is not a rule, regulation or official statement of the Louisiana Department of Insurance or the Commissioner of Insurance. It is being provided to facilitate the expeditious review of form filings.

MOST COMMON DISAPPROVAL REASONS
Edition February 2009

THE FIRST STEP OF THE REVIEW PROCESS IS TO CORRECTLY IDENTIFY THE TYPE OF POLICY, AS THE TYPE OF COVERAGE AFFECTS THE APPLICABILITY OF CERTAIN STANDARDS.

Below is a list of the grounds on which forms are typically disapproved, the reasons for those disapprovals and in some instances suggested language to be used.

1. ACTION AGAINST US

A. **LRS 22:1269B** grants an injured person or his or her legal representative a right of direct action against the insurer under liability coverage. A policy may not limit an injured party's right of direct action by allowing suit only once the amount of liability has been finally determined by trial or settlement. The Department has approved the following language:

> "A person or organization may bring a "suit" against us including, but not limited to a "suit" to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of the Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative."

B. Inland Marine and Boiler and Machinery coverages are primarily first-party property coverage, but when there is coverage for the property of others in the insured's care, this introduces an element of liability into an otherwise property contract. Therefore, when there is coverage for the property of others in the insured's care, the "action against us" provision may not state that compliance with all policy provisions is a prerequisite to an action against the company. **LRS 22:868**

C. It is the position of this Department that all claims should be settled in a single action whenever possible. Provisions that prohibit joining the insurer in an action against the insured are not acceptable. You may not limit an injured person's right of direct action against the insurer to circumstances where the insured has complied fully with all policy provisions, and a judgment has been secured or a settlement has been agreed upon. Louisiana's Direct Action Statute (**LRS 22:1269**) gives injured persons the right of direct action against the insurer of the one responsible for their loss. Also, **LRS 22:868** prohibits the issuing of insurance contracts containing conditions depriving the courts of this state of jurisdiction over actions against insurers. Hence, you cannot disallow legal actions against the insurer, nor can you bar third party claims made by the insured. You may wish to use the following language:

28. DUTY TO DEFEND

A. An insurer's duty to defend ends when the limit of liability has been exhausted by the payment of a judgment or settlement. Accordingly, the duty to settle or defend does not necessarily end when the insurer's limit of liability has been exhausted. Insurers cannot simply tender their limit of liability before a settlement or judgment is reached, and thus, relieve themselves of their duty to defend the insured.

If the insurer falls within one of the exceptions to the "defense within limits" rule, then a provision stating that their duty to defend ends upon the exhaustion of the limits is acceptable. Further, if the insurance provided under the terms of the policy is excess, then the insurer does not have the duty to defend, but only the right to associate in the defense. **LRS 22:2 and LRS 22:1269D**

B. A provision that states that the duty to defend ends upon the payment of judgments, settlements or medical expenses is not approvable. **LRS 22:2 and LRS 22:1269D**

C. Language stating that the insurer has no duty to defend any suit or settle any claim for loss or damage that is not covered under the terms of the policy is not approvable. A provision stating that the company does not have a duty to defend a covered claim if it is combined with an uncovered claim is also not approvable. If an insurer were allowed to refuse to defend claims "not covered by this coverage part," the insured might be forced to defend claims when the extent of coverage is in dispute, or in those instances when a covered claim is coupled with an uncovered claim. **LRS 22:2 and LRS 22:1269D**

D. Umbrella Policies (Drop Down Coverage)

Because umbrella contracts provide coverage in excess of an insured's primary contracts, the duty to defend is exempted from umbrella policies. However, there is an exception when drop down coverage is provided. As regards drop down coverages, the insurer has a duty to defend until a judgment or settlement is reached. The reason for this exception is that at the point a drop down coverage comes into play, the insured is likely to have no underlying coverage for that particular claim, and will require a defense. When an insurer is providing drop down coverage, it is reasonable to anticipate that at the point the drop down coverage is invoked, the insurer may actually be providing primary coverage for that particular claim. Hence, the duty to defend claims under drop down coverages is identical to the duty to defend claims under a primary policy. **LRS 22:2 and LRS 22:1269D**