



PBI has been sued in over 1,000 products liability cases stemming from its sale over many years of products that allegedly contain a particular chemical. PBI has now personally paid in excess of \$100,000 in defense costs, but Zurich refuses to begin paying for the defense. Zurich concedes that if PBI had purchased only one policy, then PBI would need to satisfy the self insured retention under only that policy to trigger Zurich's duty to defend. But because PBI purchased multiple policies, Zurich contends PBI must satisfy the self insured retention under *every* Zurich policy before the duty to defend is triggered under *any* Zurich policy.

### **Standard of Review**

Both parties have moved for summary judgment on the same issue. Cross-motions for summary judgment are treated as questions of law. Progressive Direct Insurance Co. v. Groves, 438 S.C. 26, 31, 88 S.E.2d 464, 466 (2022).

### **Law & Analysis**

“A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense of any suit alleging bodily injury or property damage and seeking damages payable under the terms of the policy.” *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). In common legal parlance, the two obligations are known as the duty to indemnify and the duty to defend. “An insurer’s duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured.” *South Carolina Medical Malpractice Liability Insurance JUA v. Ferry*, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987); *see Nationwide Mutual Insurance Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (“We accord with those jurisdictions which distinguish an insurer’s obligation to provide a defense to its insured with its duty to provide coverage.”). “[T]he

duty to defend in South Carolina is broader than the duty to indemnify.” *Liberty Life Insurance Co. v. Commercial Union Insurance Co.*, 857 F.2d 945, 950 (4th Cir. 1988).

“Insurance policies are subject to the general rules of contract construction. The court must give policy language its plain, ordinary, and popular meaning.” *South Carolina Farm Bureau Mutual Insurance Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006) (citation omitted). “[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and the subject matter of the insurance contract.” *Yarborough v. Phoenix Mutual Life Insurance Co.*, 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976). “The terms of an insurance policy must be construed most liberally in favor of the insured, and if the policy, words and language of the policy, when considered as a whole, give rise to a patent ambiguity or are capable of two or more reasonable interpretations, at least one of which favors coverage, that construction most favorable to the insured must be adopted.” *Gaskins v. Blue Cross – Blue Shield of South Carolina*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978).

In this case, Zurich does not dispute that the allegations in the underlying complaints implicate the duty to defend. Instead, Zurich argues that because it issued seven policies rather than just one, the insured must personally pay the self insured retention amount for all seven policies (\$100,000 x 7 = \$700,000) before Zurich must begin paying the defense costs. PBI’s position is that it must personally pay \$100,000 before Zurich must begin paying for the defense.

The Court concludes the policy language and well-established principles of South Carolina law provide better support for Plaintiff’s position than for Defendant’s position. Determination of the issue is controlled by the interpretation of the Self Insured Retention Endorsement.

Section IA states in relevant part:

The Self Insured Retention (SIR) Amount(s) shown in the **SCHEDULE – Self Insured Retention Amounts** of this endorsement apply as follows:

**1. Option 1 Per Incident – You Pay Defense Costs Within SIR**

If **Option 1** is selected, it is a condition precedent to our liability that you make actual payment of “self insured retention” and “defense costs” for each “incident”, until you have paid “self insured retention” and “defense costs” equal to the **Per Incident – You Pay Defense Costs Within SIR** amount, subject to the provisions of Paragraph **A.5.** below.

[Paragraph A.5 is not applicable]

The **Per Incident – You Pay Defense Costs Within SIR** amount is the most you will pay for “self insured retention” and “defense costs” arising out of each “incident”, regardless of:

- a. The number of persons or organizations making claims or bringing “suits” because of the “incident”; or
- b. The number of coverages applicable to the “incident” under this policy, except for any “defense costs” we may elect to pay.

As shown in Exhibit 1 (and 2) to Plaintiff’s Motion, PBI selected Option 1, which had a self insured retention amount of \$100,000 with defense costs included within the self insured retention. In other words, PBI chose to have the defense costs it personally paid to count towards satisfaction of the self insured retention. PBI was required to pay \$100,000 for defense costs before Zurich was required to begin paying for the defense under the policy.

PBI’s position is that regardless of the number of lawsuits because of an “incident”, the *most* PBI is required to pay to satisfy the self insured retention and to trigger Zurich’s obligation to defend is \$100,000. PBI has now paid more than \$100,000 towards defense costs, so PBI contends the self insured retention under a policy has been satisfied and Zurich must begin paying for the defense.

Zurich argues this straightforward interpretation is altered by another provision in the endorsement. Zurich emphasizes a phrase in section I, paragraph D, subpart 1 on page 4 of 8: “The

Self Insured Retention Amount(s) shown in the **SCHEDULE-SELF INSURED RETENTION AMOUNT(S)** of this endorsement *apply separately to each consecutive annual period ...*” Zurich’s emphasis on the isolated phrase ignores the context in which the phrase appears. The language in subpart 1 in paragraph D must be read in conjunction with the language in subpart 3 in paragraph D. *See Yarborough v. Phoenix Mutual Life Insurance Co.*, 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976) (“[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and the subject matter of the insurance contract.”).

The entirety of paragraph D reads:

**D. Other Self Insured Retention Provisions**

1. The Self Insured Retention Amount(s) shown in the **SCHEDULE – SELF INSURED RETENTION AMOUNTS** of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the applicable Self Insured Retention Amount(s).
2. Your obligation to pay the Self Insured Retention Amount(s) is not fulfilled by:
  - a. The payment of “self insured retention” under any other policy; or
  - b. Any payment made by us or another insurance company, even if the payments described under Paragraph **2.a.** or **2.b.** apply to the same “incident” associated with the “self insured retention” amount due under this policy.
3. If more than one policy issued by us provides sums payable because of covered damages sustained from a single continuous covered “incident”, it is a condition precedent to our liability for payment of these covered damages that you first shall pay all applicable “self insured retention” of each policy for which coverage applies to the continuous “incident”.

Subpart 3 provides that in the context of a continuous “incident” implicating multiple policies, the self insured retention must be satisfied for every policy implicated. But this requirement relates to the duty to indemnify, not the duty to defend. The phrase – “If more than one policy issued by us provides sums payable because of covered damages” – speaks the language of indemnity. As to any indemnity obligation for the underlying lawsuits, which involve alleged losses spanning many years, PBI agrees “it is a condition precedent to [Zurich’s] liability for payment of these covered damages that [PBI] first shall pay all applicable ‘self insured retention’ of each policy for which coverage applies to the continuous ‘incident’.” Before Zurich would be required to pay any sums for covered damages (indemnity) under the seven policies, PBI would be required to satisfy the self insured retention under all seven policies.

But not so to trigger Zurich’s obligation under the duty to defend, a separate and distinct duty provided to the insured under each policy purchased. *See South Carolina Medical Malpractice Liability Insurance JUA v. Ferry*, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987) (“An insurer’s duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured.”); *Nationwide Mutual Insurance Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (“We accord with those jurisdictions which distinguish an insurer’s obligation to provide a defense to its insured with its duty to provide coverage.”).

Several principles of South Carolina insurance law exemplify that the duty to indemnify and the duty to defend are distinct. For example, if a lawsuit alleges just one claim that is possibly covered by a liability policy, then all claims included in the lawsuit – even those that clearly are *not* covered by the policy – must be defended under the policy. *See Ellett Brothers, Inc. v. United States Fidelity & Guaranty Co.*, 275 F.3d 384, 388 (4th Cir. 2001) (“If the suit includes any cause of action covered by the policy, the insurer must defend, even if the suit joins other causes of action

beyond the policy's scope.”) (citing *Town of Duncan v. State Budget and Control Board*, 326 S.C. 6, 16, 482 S.E.2d 768, 774 (S.C. 1997)).

In addition, the duty to defend continues to exist even if the duty to indemnify is exhausted. See *Nationwide Mutual Insurance Co. v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993). Similarly, the duty to defend – unlike the duty to indemnify – is not subject to allocation. Compare *Sloan Construction Co. v. Central National Insurance Co.*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) (rejecting attempt by insurer who paid for defense to recover from another insurer who also owed defense but refused to contribute; duty to defend is personal and “insurer is not entitled to divide the duty”) with *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 63, 717 S.E.2d 589, 601 (2011) (*Crossmann II*) (authorizing allocation of covered damages over multiple policy years in progressive property damage case based on an insurer's time on risk).

Zurich concedes it would have to begin paying the defense costs after PBI paid \$100,000 if Zurich had sold only one policy rather than seven. Under Zurich's theory, the more policies purchased, the more money PBI must pay to obtain the benefits of the duty to defend. If Zurich intended to strip away an important benefit provided by the first policy – the right to a defense after PBI paid \$100,000 – then Zurich should have chosen clear language to accomplish that result. Zurich did not do so.

The gist of Zurich's argument is that because the continuous loss may implicate more than one policy, the policies should be considered collectively, not individually. Zurich's argument rings true as to the duty to indemnify, but not as to the duty to defend, because South Carolina law treats the two duties differently. See *South Carolina Medical Malpractice Liability Insurance JUA v. Ferry*, 291 S.C. 460, 463, 354 S.E.2d 378, 380 (1987) (“An insurer's duty to defend is separate

and distinct from its obligation to pay a judgment rendered against an insured.”). If this were the intent the Court finds the policy language could have, and would have clearly provided for this. And it does not.

At bottom, although Zurich’s interpretation of the policy is not unreasonable, the Court finds that PBI’s interpretation is more consistent with the plain language of the policy and with South Carolina’s laws and public policy. *See Gaskins v. Blue Cross – Blue Shield of South Carolina*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978) (“The terms of an insurance policy must be construed most liberally in favor of the insured, and if the policy, words and language of the policy, when considered as a whole, give rise to a patent ambiguity or *are capable of two or more reasonable interpretations*, at least one of which favors coverage, that construction most favorable to the insured must be adopted.”) (emphasis added); *Beaufort County School District v. United National Insurance Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct App. 2011) (“[A]n insurance contract which is ‘in any respect ambiguous or capable of two meanings must be construed in favor of the insured.’”); *Edens v. South Carolina Farm Bureau Mutual Insurance Co.*, 279 S.C. 377, 379, 308 S.E.2d 670, 671 (1983) (“Where language used in an insurance contract is ambiguous, or where it is *capable of two reasonable interpretations*, that construction which is most favorable to the insured will be adopted.”) (emphasis added). PBI’s interpretation is reasonable and thus, even if Zurich’s interpretation is also reasonable, the interpretation most favorable to the insured will be adopted.

Therefore, because there is no dispute that PBI has paid in excess of \$100,000.00 in defending the underlying action, PBI has satisfied the required \$100,000.00 of the self insured retention necessary to trigger a defense, and Zurich’s refusal to provide a defense constitutes a breach of contract.

**Conclusion**

For the reasons stated above, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.<sup>3</sup>

IT IS SO ORDERED.

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<sup>3</sup> The ruling applies only to the cause of action for breach of contract, and only to liability, not damages. PBI did not seek summary judgment on its cause of action for bad faith.



Charleston Common Pleas

**Case Caption:** Pbi Performance Products Inc , plaintiff, et al VS American Zurich Insurance Company  
**Case Number:** 2024CP1003336  
**Type:** Order/Summary Judgment

So Ordered

s/ T.J. Rode (#2792)