

NOT FOR PUBLICATION

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 24-13530

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AUTO-OWNERS INSURANCE COMPANY,  
OWNERS INSURANCE COMPANY,

*Plaintiffs-Appellees,*

*versus*

BENJAMIN HUGH JOHNSON,  
MARGARET LILES JOHNSON,

*Defendants-Appellants,*

ROLAND T. DISINGER, et al.,

*Defendants.*

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Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. Docket No. 3:23-cv-00179-TCB

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Before BRANCH, GRANT, Circuit Judges, and DAMIAN,\* District Judge.

PER CURIAM:

Benjamin and Margaret Johnson (the “Johnsons”) are Roland and Nancy Disinger’s (the “Disingers”) neighbors. The Johnsons allegedly left a pile of branches and other natural detritus on the Disingers’ property following some yard work along the neighbors’ shared property line. The presence of the pile led to an acrimonious dispute between the two families, including lengthy arguments, complaints to the city, and a lawyers’ letter from the Disingers threatening to sue the Johnsons if the pile was not dealt with to their satisfaction. Ultimately, the Disingers followed through on their threats and sued the Johnsons in state court.

All this transpired unbeknownst to the Johnsons’ home insurer, Auto-Owners Insurance Company (“Auto-Owners”). The Johnsons never notified Auto-Owners of their litigious dispute with the Disingers. Instead, Auto-Owners learned of it from the Disingers at the end of March 2023: three months after the Disingers had sued the Johnsons, and four months after the Disingers had formally threatened to sue.

While providing the Johnsons with a contingent defense in state court subject to a reservation of rights, Auto-Owners sued the Johnsons in diversity in the district court below. It sought a

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\* Honorable Melissa J. Damian, United States District Judge for the Southern District of Florida, sitting by designation.

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declaratory judgment that it had no duty to defend or indemnify the Johnsons for any liability connected to their underlying dispute with the Disingers. The district court ultimately agreed and granted Auto-Owners summary judgment because the Johnsons' failure to comply with the prompt notice provisions of the insurance contracts—which were mandatory conditions precedent to coverage—meant the Johnsons were not entitled to any coverage.

The Johnsons now appeal, but not on the merits of the district court's ruling—which they did not contest below. Instead, they argue that the district court erred in determining that it had subject matter jurisdiction for two reasons: the case was unripe and it did not satisfy the amount in controversy required for diversity jurisdiction. We decline the Johnsons' invitation to reverse the district court. A live controversy persisted at all stages of the case below, and Auto-Owners's allegations handily met the amount in controversy threshold. Accordingly, we affirm.

## **I. BACKGROUND**

The Johnsons and the Disingers live next door to each other in Carrollton, GA. Auto-Owners insures the Johnsons' property under two insurance contracts: a homeowner's policy and an umbrella policy. In relevant part, the homeowner's policy contains the following notice provision: "In the event of bodily injury, property damage, or personal injury, the insured must . . . notify [Auto-Owners] as soon as possible . . . [and] promptly send [Auto-

Owners] any legal papers received relating to any claim or suit.”

The umbrella policy contains a similar notice provision:

When an occurrence likely to involve [Auto-Owners] takes place, the insured shall notify [Auto-Owners] as soon as practicable. . . . If claim is made or suit is brought, we must be advised promptly. All papers in connection with claims or suits must be sent to [Auto-Owners] without delay.

Sometime in late September or early October 2022, the Johnsons began harvesting trees and other vegetation near the boundary between the Johnsons’ and Disingers’ properties. The Disingers allege that the Johnsons, without the Disingers’ consent, left the remains of the harvested trees and vegetation in a large pile (the “pile of branches.”)<sup>1</sup> At some point—the parties dispute whether it was during or after the cutting of the trees and vegetation—the Disingers had the property line surveyed and marked by tape and flags, allegedly revealing that the pile of branches was left in part or in full on their side of the neighbors’ shared property line. The Disingers allege that the location of the pile of branches is also “within [] a flood zone and a sanitary sewer easement.”

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<sup>1</sup> Although the Disingers’ complaint claims that it was one large pile, the quote that the Johnsons obtained for the removal of the detritus discusses “remov[al] [of] 4 piles of vegetation, brush and tree debris.” Ultimately, whether there is one large pile or several smaller piles, the issue of the presence of the debris on the Disingers’ property is, at bottom, the same.

The Johnsons and Disingers began feuding over the pile of branches in October 2022, arguing over whether the pile was on the Disingers' property, and if so, how to properly remove it. Among other things, the Disingers complained to the City of Carrollton, which on October 26, 2022 sent the Johnsons a letter formally instructing them that, "as soon as possible," they "shall . . . dispose[] of [the pile of branches] in a manner satisfactory to the [Disingers]." The cost to remove the pile of branches was quoted as approximately \$2,000. The Johnsons did not inform Auto-Owners of the city's letter.

Eventually, the Disingers hired a lawyer, and on November 11, 2022, they sent a demand letter to the Johnsons concerning the pile of branches, threatening to sue if the Johnsons did not reply to the letter by November 25, 2022. The Johnsons did not promptly notify Auto-Owners of the letter or the looming litigation, but instead had their personal attorney reply to the Disingers' letter.

Ultimately, on December 21, 2022, the Disingers sued the Johnsons in state court, seeking (1) injunctive relief; (2) compensatory and punitive damages for nuisance, negligence, trespass, conversion, and failure to comply with Georgia insurance disclosure law; and (3) attorney's fees (the "State Court Action"). The Disingers sought compensatory damages and attorneys' fees, as well as over \$250,000 in punitive damages. The Johnsons did not notify Auto-Owners of the State Court Action.

On March 31, 2023, Auto-Owners learned of the State Court Action from the Disingers themselves. Under the terms of its

insurance contracts with the Johnsons, Auto-Owners began providing the Johnsons with a defense to the State Court Action, subject to a reservation of rights. On September 19, 2023, Auto-Owners filed this action in the federal district court, based in diversity jurisdiction, seeking a declaration that they had no duty to defend or indemnify the Johnsons against the State Court Action (the “Federal Court Action”). Auto-Owners filed alongside its complaint a sworn certification from its claims adjuster, stating that Auto-Owners expected its cost of defending the Johnsons from the State Court Action would exceed \$82,000.<sup>2</sup>

After limited discovery in the Federal Court Action, the Johnsons moved to dismiss the lawsuit, and Auto-Owners moved for summary judgment. The Johnsons sought dismissal based on Auto-Owners’ alleged failure to satisfy the amount in controversy requirement for diversity jurisdiction. Auto-Owners sought summary judgment because, in relevant part, the Johnsons had failed to give timely notice of the State Court Action and, as timely notice was a condition precedent to coverage, Auto-Owners did not have to provide them either a defense or indemnification. The Johnsons did not oppose Auto-Owners’s motion for summary judgment on the merits, instead simply arguing that an insurer’s declaratory judgment action involving a duty to indemnify and a

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<sup>2</sup> At oral argument before this Court, counsel for Auto-Owners represented that, at the time the district court granted summary judgment, Auto-Owners had incurred over \$90,000 in costs to defend the Johnsons in the State Court Action.

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duty to defend is unripe until the underlying lawsuit has ended. In this case, as the State Court Action was ongoing, the Johnsons argued that the Federal Court Action was unripe.

Before the district court ruled on these motions, on September 10, 2024, the Disingers voluntarily dismissed the State Court Action without prejudice in state court. Pursuant to O.C.G.A §§ 9-2-61 and 9-11-41, the terms of the voluntary dismissal stated that the Disingers had six months from the date the dismissal was filed to recommence the action “as if originally filed as the same day of the Complaint dated December 21, 2022.”

The Johnsons notified the district court of the dismissal of the State Court Action on September 25, 2024. As a result, the Johnsons argued that the Federal Court Action “is now moot and should therefore be dismissed.” The Disingers, however, had refiled the State Court Action in state court the day before, on September 24, 2024. The record does not indicate that the district court was aware that the Disingers had refiled the State Court Action in state court when it ruled on the parties’ competing motions.

On September 27, 2024, the district court denied the Johnsons’ motion to dismiss and granted Auto-Owners’s motion for summary judgment. As to the motion to dismiss, the court concluded that Auto-Owners’s cost of defending the lawsuit, along with a potential loss liability of over \$100,000 (due to the costs the Disingers claimed in their complaint related to the State Court Action), satisfied the amount in controversy requirement.

Addressing Auto-Owners’s motion for summary judgment, the district court held that it could determine whether Auto-Owners had a duty to defend the Johnsons while the underlying lawsuit was pending by comparing the allegations of the complaint to the policy provisions. And, per the district court, “if there is no duty to defend, then there is no duty to indemnify.” As for whether the case had been rendered non-justiciable<sup>3</sup> because of the dismissal of the State Court Action, the district court held that “[b]ecause the dismissal was without prejudice, the ability to refile the case is sufficient to establish a controversy such that this court may still rule on the pending motions.”

Turning to the merits, the district court “interpret[ed] the Johnsons’ silence on the issue [of notice] as a lack of opposition to that argument.”<sup>4</sup> The court nevertheless undertook a full merits analysis, concluding that, because “the Johnsons failed to comply with the notice requirements under both policies, . . . [Auto-

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<sup>3</sup> Although the Johnsons argued in their notice to the district court of the dismissal of the State Court Action that the Federal Court Action had thus been rendered moot, the portion of the district court’s order addressing the effect of the dismissal of the underlying lawsuit does not clarify the specific justiciability doctrine the court was applying.

<sup>4</sup> The Johnsons do not attempt to contest the merits on appeal either. As such, we consider them to have abandoned any argument on the correctness of the district court’s ruling on the notice issue. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (holding that an appellant abandons an issue by failing to raise it on appeal).

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Owners had] no duty to defend or indemnify the Johnsons in the underlying suit.”

The Johnsons timely appealed.

## II. DISCUSSION

### A. Amount in Controversy

The Johnsons argue that the object of the litigation is the removal of the pile of branches, which would cost \$2,000.<sup>5</sup> They argue that this \$2,000 is the amount in controversy; any other damages are indeterminate at best. Auto-Owners responds by arguing that the cost of an insurer to defend their insured must be factored into the calculation of the amount in controversy, and on that basis alone Auto-Owners’s claims in the Federal Court Action satisfy the amount in controversy requirement. The Johnsons’ argument falls short.

A federal court has subject matter jurisdiction based on diversity of citizenship if there is complete diversity among the parties and the amount in controversy exceeds \$75,000.00. 28 U.S.C. § 1332; *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1059 (11th Cir. 2010). When an insurer seeks a declaratory judgment concerning its duty to defend and indemnify an insured, “[t]he pecuniary value of the obligation to defend the separate lawsuit is properly considered in determining the existence of the jurisdictional amount.” *Stonewall Ins. Co. v. Lopez*, 544 F.2d 198, 199

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<sup>5</sup> “We review *de novo* questions concerning our subject matter jurisdiction.” *Lozman v. City of Riviera Beach*, 119 F.4th 913, 916 (11th Cir. 2024).

(5th Cir. 1976).<sup>6</sup> This rule makes sense: unlike in an ordinary case where a party's cost of defense is his own, an insurer's cost of providing its insured a defense is part of its overall cost of coverage. Here, Auto-Owners submitted sworn testimony that its cost to defend the Johnsons would exceed \$82,000. Thus, Auto-Owners satisfied the amount in controversy.

*B. Ripeness*

We break this section into two parts. First, we explain why the Federal Court Action was a ripe controversy when it was filed even though the underlying State Court Action had not yet resolved the issue of liability. Second, we explain why the Federal Court Action continued to be a ripe controversy despite the Disingers' voluntary dismissal without prejudice of the State Court Action.

In the Federal Court Action, Auto-Owners sought a declaratory judgment that it had neither a duty to defend the Johnsons against the State Court Action nor a duty to indemnify the Johnsons for any related loss. As "an insurer's duty to pay and its duty to defend are separate and independent obligations," we treat them separately in this analysis, starting with the duty to defend. *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 565 (1997).

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<sup>6</sup> Decisions of the former Fifth Circuit issued before the close of business on September 30, 1981, are binding precedent on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

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The portion of the Federal Court Action concerning the duty to defend was ripe when it was filed even though the State Court Action remained unresolved. An insurer must provide its insured a defense—thus incurring the cost of doing so—as soon as a lawsuit is filed, rather than after liability for the underlying loss is determined, because “[i]f the facts as alleged in the complaint even arguably bring the occurrence within the policy’s coverage, the insurer has a duty to defend the action.” *Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 408 (2012). As such, once a lawsuit is filed against an insured, the insurer and its insured have “adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (citation omitted); *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 414 (11th Cir. 1995). Thus, once the State Court Action was filed against the Johnsons, Auto-Owners was able to ask the district court to compare the policy against the underlying complaint and determine whether it has a duty to defend its insured, and the district court did not err in doing so.

The question is what effect does a determination that an insurer has no duty to defend have on the separate and generally unripe question of whether there is a duty to indemnify?<sup>7</sup> The answer lies in the rule that “a court’s determination that the insurer

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<sup>7</sup> The duty to indemnify is ordinarily unripe until the underlying lawsuit which gives rise to the insurer’s potential liability for coverage—here, the State Court Action—is resolved. *Allstate Ins. Co. v. Emps. Liab. Assurance Corp.*, 445 F.2d 1278, 1281 (5th Cir. 1971); *Edwards v. Sharkey*, 747 F.2d 684, 686 (11th Cir. 1984) (citing *Allstate Ins. Co.*).

has no duty to defend *requires* a finding that there is no duty to indemnify,” *Trailer Bridge, Inc. v. Ill. Nat’l Ins. Co.*, 657 F.3d 1135, 1146 (11th Cir. 2011) (per curiam) (alteration omitted) (emphasis added) (quotation omitted), because “[t]o excuse the duty to defend the petition must unambiguously exclude coverage under the policy.” *Penn-Am. Ins. Co.*, 268 Ga. at 565.

Put differently, the duty to defend turns on a determination that the allegations in the complaint, true or not, state a claim that arguably would trigger coverage. *Penn-Am. Ins. Co.*, 268 Ga. at 565. The duty to indemnify, in contrast, turns on a determination that the allegations in the complaint are in fact true. *Aetna Cas. & Sur. Co. v. Brooks*, 218 Ga. 593, 597 (1963) (“The insurer’s obligation to pay arises only after liability is established against the insured.”). Thus, if a court determines that there is no duty to defend, then necessarily the underlying complaint does not state a claim which could even arguably trigger the duty to indemnify. At that point, a court need not delay the inevitable: it may at once enter judgment declaring that there is no duty to indemnify. *Trailer Bridge, Inc.*, 657 F.3d at 1146. A determination that an insurer has no duty to defend thus acts as a narrow exception to the rule that declaratory judgment as to the duty to indemnify is unripe until the underlying lawsuit is decided.

Given our analysis above, the district court did not err in adjudicating that portion of Auto-Owners’s motion for summary judgment concerning its duty to indemnify the Johnsons. Once the district court had determined that Auto-Owners had no duty to

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defend the Johnsons, the issue of Auto-Owners's duty to indemnify was ripe.

We turn now to analyzing the effect of the voluntary dismissal of the State Court Action on the ripeness of the Federal Court Action. The Johnsons argue that the dismissal of the State Court Action renders the Federal Court Action unripe because "the insurer's duty cannot be determined when the underlying lawsuit has been dismissed." Auto-Owners responds by arguing that "a justiciable controversy existed at all times relevant because the originally filed lawsuit was only dismissed without prejudice, so the Disingers preserved their right to refile their claims against the Johnsons," and in any event a justiciable controversy over insurance coverage can exist even in the absence of an underlying lawsuit.

We conclude that the district court did not err in determining that a continuing controversy existed between Auto-Owners and the Johnsons even though the State Court Action, upon which the Federal Court Action had initially been premised, had been dismissed without prejudice.

An action for declaratory judgment may be brought preemptively, in anticipation of another's claims. *Fed. Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1246 n.11 (11th Cir. 2000). Thus, the presence or absence of the State Court Action is not decisive here. Our analysis is instead focused on analyzing the underlying controversy that is the subject of the Federal Court Action. In the context of that frame, "the question . . . is whether

the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Cas. Co.*, 312 U.S. at 273; *Atlanta Gas Light Co.*, 68 F.3d at 414.

There is, unambiguously, a sufficiently substantial controversy between Auto-Owners and the Johnsons to ripen the Federal Court Action. While the Disingers had dismissed their first complaint, that dismissal was without prejudice and did not resolve the underlying dispute between the neighbors over the Johnsons’ alleged damage to the Disingers’ property. Nor did it resolve the fundamental infirmity in the Johnsons’ entitlement to a defense (and thus indemnification) from Auto-Owners: the Johnsons’ failure to comply with the notice provisions of the insurance contracts with Auto-Owners, an infirmity which the Johnsons conceded and which equally affects *any* lawsuit that the Disingers may bring concerning the piles of branches they allegedly left on the Disingers’ property.<sup>8</sup> And, finally, the dismissal of the State Court Action expressly stated that the Disingers had six months to refile their lawsuit, which they did two days before the district

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<sup>8</sup> Per the district court, “[a] reasonable and prudent insured would believe the potential for liability arose when the City of Carrollton sent the letter on October 26. If not by then, the Johnsons were certainly aware of more than just the potential for liability when they received the cease-and-desist letter on November 11. Yet [Auto-Owners] did not receive notice until March 31.”

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court issued its judgment in this case below.<sup>9</sup> Thus, judgment in the Federal Court Action would resolve a live issue of real, immediate concern to both parties: whether Auto-Owners had a duty to defend the Johnsons against litigation concerning the damage they had allegedly caused to the Disingers' property. *See Md. Cas. Co.*, 312 U.S. at 273; *Atlanta Gas Light Co.*, 68 F.3d at 414. The district court did not err in determining that the Federal Court Action remained a ripe controversy.<sup>10</sup>

### III. CONCLUSION

For the reasons explained above, the district court's judgment is affirmed.

**AFFIRMED.**

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<sup>9</sup> This appeal only concerns the allegations in the complaint from the State Court Action. As such, we do not opine on the effect that our ruling may have on Auto-Owners' duties to cover the Johnsons in relation to any additional allegations in the Disingers' new state court lawsuit.

<sup>10</sup> As noted above, the Johnsons' notice to the district court of the dismissal of the State Court Action argued that the Federal Court Action had thus been rendered moot. Given our independent obligation to assure ourselves of our own jurisdiction, *Belleri v. United States*, 712 F.3d 543, 547 (11th Cir. 2013), we note here that, for the same reason that this case remained ripe after the dismissal of the State Court Action, it also was not moot: There remained a live, continuing controversy between the parties who had adverse legal interests. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (explaining that a case becomes "moot" when there is no longer a live controversy and the parties lack a legally cognizable interest in the outcome.)