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Insurer's Duty to Defend Additional Insureds: Navigating Differing Court Standards to Determine When Duty is Triggered

Advocating Coverage From Perspectives of Insurers and Additional Insured Claimants

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**Insurer's Duty to Defend Additional Insureds:
Navigating Difficult Court Standards
to Determine When Duty Is Triggered**

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Insurer's Duty to Defend Additional Insureds

- I. Overview of standards used by courts to determine an insurer's duty to defend**
- II. Determining whether the policy grants the party additional insured status**
- III. Determining whether there are limitations to this additional insured status and scope of coverage**

Overview of Duty To Defend Standards

	NY	NJ	Cal.	Wash.	Tex.	Fla.	Ill.
Four / Eight Corners	Four	Four	Plus Extrinsic Evidence	Eight	Eight	Eight	Eight
Extrinsic Evidence	Facts known to insurer	Facts known to insurer	Always	Limited	Limited	Limited	Facts known to insurer

Insurer's Duty to Defend Additional Insureds

- Courts typically determine an insurer's duty to defend its insured under a liability policy using one of two approaches
 - Limited approach: Four / Eight Corners Rule
 - Broader approach: Extrinsic Evidence
- Different jurisdictions fall at different points on the spectrum.
- Four / Eight Corners Rule: The duty is determined solely based on comparison of allegations in the complaint to the policy language. Extrinsic facts not alleged in complaint are generally irrelevant.
- Extrinsic Evidence: Duty may be triggered based on comparison of allegations to policy language, but court can also consider facts extrinsic to the complaint.

Overview of Duty To Defend Standards

New York: Four Corners.

Frontier Insulation Contractors v. Merchant Mut. Ins. Co., 91 N.Y.2d 169 (1997)

New Jersey: Four Corners.

Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992)

Overview of Duty To Defend Standards

California: Facts from any source.

Montrose Chemical Corp. of Cal. v. Superior Court (Canadian Universal Ins. Co., Inc.) 6 Cal. 4th 287 (1993)

Washington: Eight Corners and extrinsic evidence in limited circumstances.

Expedia, Inc. v. Steadfast Ins. Co., 180 Wash. 2d 793 (2014)

Overview of Duty To Defend Standards

Texas: Eight corners rule and extrinsic evidence in limited circumstances

Lamar Homes, Inc. v. Mid-Continent Cas. Co.,
242 S.W.3d 1 (Tex. 2007)

Florida: Eight Corners and extrinsic evidence in limited circumstances.

Mid-Continent Cas. Co. v. Royal Crane, LLC, 169
So. 3d 174, 182 (Fla. Dist. Ct. App. 2015)

Overview of Duty To Defend Standards

Illinois: Eight corners rule and extrinsic evidence in limited circumstances

Konstant Prods., Inc. v. Liberty Mut. Fire Ins. Co.,
929 N.E.2d 1200, 1203 (Ill. App. Ct. 2010)

Overview of Duty To Defend Standards

Is Extrinsic Evidence Considered?

New York: Yes, to the extent the insurer has knowledge of facts which potentially bring a claim within the coverage, then defense is owed even if not all facts are alleged in the complaint.

Continental Cas. Co. v. Rapid-Am. Corp., 80 N.Y.2d 640 (1993)

New Jersey: Yes, to the extent that there are facts within insurer's knowledge to would create a duty to defend.

SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188 (1992)

Overview of Duty To Defend Standards

Is Extrinsic Evidence Considered?

California: Yes.

*Montrose Chemical Corp. of Cal. v. Superior Court
(Canadian Universal Ins. Co., Inc.), 6 Cal. 4th 287 (1993)*

Illinois: Yes, to the extent that there are facts within insurer's knowledge to would create a duty to defend.

*Assoc. Indem. Co. v. Ins. Co. of N. Am., 386 N.E.2d 529
(Ill. App. 1979)*

Overview of Duty To Defend Standards

Is Extrinsic Evidence Considered?

Texas: Yes, in limited circumstances

Star-Tex Res., L.L.C. v. Granite State Ins. Co., 553 F. App'x 366, 371 (5th Cir. 2014) (Tex. law)

Florida: Yes, in limited circumstances

Composite Structures, Inc. v. Continental Ins. Co., 560 F. App'x. 861 (11th Cir. 2014) (Fla. law)

Overview of Duty To Defend Standards

Is Extrinsic Evidence Considered?

Washington: Yes, in limited circumstances:

- when it is not obvious from the complaint but coverage could exist, the insurer is obligated to investigate and give the benefit of the doubt to the insured and defend;
- when the allegations of the complaint are ambiguous or conflict with facts known to insurer.

Expedia, Inc. v. Steadfast Ins. Co., 180 Wash. 2d 793 (2014)

Overview of Duty To Defend Standards

Other Points re: Standard for Duty to Defend

- Ambiguous complaints are usually construed in favor of coverage.
 - *New Amsterdam Cas. Co. v. Knowles*, 95 So. 2d 413, 415 (Fla. 1957)
 - *Ill. Tool Works Inc. v. Travelers Cas. & Sur. Co.*, 26 N.E.3d 421, 429 (Ill. App. Ct. 2015)

Overview of Duty To Defend Standards

Other Points re: Standard for Duty to Defend

- Even in jurisdictions that consider extrinsic facts, the insurer often cannot rely on unpled facts to deny duty to defend
Woo v. Fireman's Fund Ins. Co., 164 P. 3d 454, 459 (Wash. 2007) (“The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend—it may do so only to trigger the duty.”).
- However, some cases allow insurer to rely on extrinsic fact to prove that insurer-insured relationship does not exist.
Nateman v. Hartford Cas. Ins. Co., 544 So. 2d 1026 (Fla. Dist. Ct. App. 1989) (“The insurer is not obligated to provide a defense for a stranger merely because the plaintiff alleges that the defendant is an insured or alleges facts which, if true, would make the defendant an insured.”).

Granting of Additional Insured Coverage

- “‘Additional insured’ is a recognized term in insurance contracts, and the well-understood meaning of the term is an entity enjoying the *same* protection as the named insured.”

Kassis v. Ohio Cas. Ins. Co., 913 N.E.2d 933, 934 (2009)

- In theory, standards for assessing insurer’s duty to defend additional insureds apply “equally to additional insureds and named insureds.”

Worth Constr. Co., Inc. v. Admiral Ins. Co., 888 N.E.2d 1043, 1045 (N.Y. 2008).

- However, complications can arise with additional insureds.
- One threshold issue is whether the policy grants additional insured status, which usually happens in one of two ways:
 - Explicitly named in endorsement.
 - Blanket additional insured endorsement.

Granting of Additional Insured Coverage

Blanket Additional Insured Endorsement

- Example language: coverage for “any person or organization whom [the named insured is] required to name as an additional insured on this policy under a written contract or agreement.” *Kassis v. Ohio Cas. Ins. Co.*, 913 N.E.2d 933 (N.Y. 2009).
- *E.g.*, *Pekin Ins. Co. v. Pulte Home Corp.*, 935 N.E.2d 1058 (Ill. App. Ct. 2010) (considering subcontract in connection with additional insured endorsement).

Granting of Additional Insured Coverage

California: Endorsement may convey rights of defense and/or indemnity under the policy, subject to the specific policy wording.

Presley Homes, Inc. v. Am. States Ins. Co., 90 Cal. App. 4th 571 (2001)

Certificate of insurance by itself does not create additional insured status.

Pardee Const. Co. v. Insurance Co. of the West, 77 Cal. App. 4th 1340 (2000)

Granting of Additional Insured Coverage

Washington: “Additional insured” under umbrella policy included “[a]ny person or organization for which an insured is required by virtue of a written contract . . . to provide the kind of insurance that is afforded by this policy.” Umbrella insurer had no duty to defend a third party where the named insured had never contracted to purchase umbrella insurance for that third party.

Lewark v. Davis Door Servs. Inc., 180 Wash. App. 239 (2014)

Granting of Additional Insured Coverage

New York: Holding that landlord was additional insured under lessee's policy; additional endorsement was triggered because lease agreement required lessee to maintain insurance covering landlord.

Kassis v. Ohio Cas. Ins. Co., 913 N.E.2d 933 (N.Y. 2009).

Illinois: Holding that general contractor was additional insured under subcontractor's policy.

Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co., 501 N.E.2d 812 (Ill. App. Ct. 1986)

Granting of Additional Insured Coverage

Texas: Holding that property owner was additional insured under contractor's policy.

ATOFINA Petrochemicals, Inc. v. Cont'l Cas. Co., 185 S.W.3d 440 (Tex. 2005)

Limitations on Additional Insured Status

Wording of endorsements may create limitation on available coverage for an additional insured.

1. Vicarious liability v. independent negligence
 - a. Vicarious liability
 - (1) negligence of named insured
 - (2) unlikely to refer to work performed under contract
 - b. Independent negligence of insured
 - (1) interpretation of endorsement's wording (e.g., "arising out of")

Limitations on Additional Insured Status

Wording of endorsements may create limitation on available coverage for an additional insured.

1. “ongoing operations”
2. “caused by”

Limitations on Additional Insured Status

“Arising Out of” Named Insured’s Work

New York: Focus not on the precise cause of accident but “general nature of the operation” in the course of which the injury occurred.

Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Greenwich Ins. Co., 962 N.Y.S.2d 9 (N.Y. App. Div. 2013)

Limitations on Additional Insured Status

“Arising Out of” Named Insured’s Work

New Jersey: Common, ordinary usage to mean a claim “growing out of,” or having its “origin in.”

County of Hudson v. Selective Insurance Co., 752 A.2d 849 (N.Y. Super. Ct. App. Div. 2000)

Limitations on Additional Insured Status

“Arising Out of” Named Insured’s Work

California: “[A]rising out of [named insured’s work]” held to include coverage for both vicarious liability of the additional insured and the additional insured’s sole negligence provided there is a “minimal causal connection or incidental relationship” to named insured’s work.

Acceptance Ins. Co. v. Syufy Enters., Inc., 69 Cal. App. 4th 321, 328 (1999)

Limitations on Additional Insured Status

“Arising Out of”

Washington: “Originating from,” having its origin in,”
“growing out of,” or “flowing from”

The Standard Fire Ins. Co. v. Port of Bellingham,
2015 WL 6395652 (W.D. Wash. Oct. 21, 2015)

Limitations on Additional Insured Status

“Arising Out of”

Texas: Holding that duty to defend additional insured was triggered under policy limiting additional insured coverage to liability “arising out of” named insured’s work for additional insured.

McCarthy Bros. Co. v. Cont'l Lloyds Ins. Co., 7 S.W.3d 725, 730 (Tex. App. 1999)

Limitations on Additional Insured Status

“Arising Out of Ongoing Operations”

New York: Broadly interprets ongoing operations and focuses on whether injury occurs before work has been completed.

Ongoing operations includes when work is not active; contract required an inspection to occur before work considered complete under the contract.

Town of Fort Ann v. Liberty Mut. Ins. Co., 893 N.Y.S.2d 682 (N.Y. App. Div. 2010)

Coverage existed for injuries prior to completion of work even if work is not active at moment of injury.

Liberty Mut. Fire Ins. Co. as subrogee of Tap Elec. Contracting Serv., Inc., v. E.E. Cruz & Co., Inc., 475 F. Supp. 2d 400 (S.D.N.Y. 2007)

Limitations on Additional Insured Status

“Arising Out of Ongoing Operations”

New Jersey: If insured’s operations are not complete, but only interrupted, covered as ongoing operations.

Hartz Mountain Indus., Inc. v. Preserver Ins. Co., 2008 WL 351244 (N.J. Super. Ct. App. Div. Feb. 11, 2008)

Limitations on Additional Insured Status

“Arising Out of Ongoing Operations”

California: Phrase “arising out of . . . your ongoing operations” is ambiguous, so one must look at the insurance contract as a whole together with the construction contract to resolve the ambiguity, and additional insured coverage intended to cover only such liability as might arise from subcontractor’s actual performance of the work called for in the construction contract.

*St. Paul Fire & Marine Ins. Co. v. American Dynasty
Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038 (2002)

Limitations on Additional Insured Status

“Arising Out of Ongoing Operations”

Washington: “Ongoing operations” means only while work is in progress.

Hartford Ins. Co. v. Ohio Cas. Ins. Co., 189 P.3d 195 (Wash. Ct. App. 2008)

Limitations on Additional Insured Status

“Arising Out of Operations ”

Illinois: Holding that duty to defend additional insured was triggered under policy limiting additional insured coverage to “liability arising out of operations performed for the additional insured by the named insured.”

Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co., 501 N.E.2d 812, 814 (Ill. App. Ct. 1986)

Limitations on Additional Insured Status

“Operations by or on Behalf of the Named Insured”

Florida: Holding that coverage existed under policy limiting additional insured coverage to “operations by or on behalf on the Named Insured.”

Florida Power & Light Co. v. Penn Am. Ins. Co.,
654 So. 2d 276, 279 (Fla. Dist. Ct. App. 1995)

Limitations on Additional Insured Status

“Operations by or on Behalf of the Named Insured”

Texas: Holding that duty to defend additional insured was triggered under policy limiting additional insured coverage to liability “arising out of” named insured’s work for additional insured.

McCarthy Bros. Co. v. Cont'l Lloyds Ins. Co., 7 S.W.3d 725, 730 (Tex. App. 1999)

Limitations on Additional Insured Status

“Caused By”

New York: Broadly interpreted and does not differ from “arising out of.”

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Greenwich Ins. Co., 962 N.Y.S.2d 9 (N.Y. App. Div. 2013)

Narrowly interpreted and requires proximate cause.

National Union Fire Ins. Co. of Pittsburgh, Pa. v. XL Ins. Am., Inc., 2013 WL 1944468 (S.D.N.Y. May 7, 2013)

New Jersey: Narrowly interpreted to include only coverage for additional insured’s vicarious liability, not independent negligence.

Schafer v. Paragano Custom Bldg., Inc., 2010 WL 624108 (N.J. Super. Ct. App. Div. Feb. 24, 2010)

Limitations on Scope of Coverage

Other Restrictive Wording

- “[L]iability connected to named insured’s work except any loss caused by additional insured’s sole negligence.”
- “[L]iability with respect to acts or omissions by named insured.”
- “[O]nly to the extent additional insured is held liable for named insured’s negligent acts or omissions.”
- “The insurance afforded to such additional insured only applies to the extent permitted by law.”

Limitations on Scope of Coverage

Other Restrictive Wording – 2013 ISO Revision

“If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.”

Significance:

- Instead of additional insureds being entitled to full breadth of coverage offered by a policy, provision limits the additional insured's coverage to the extent the insured is contractually obligated to provide coverage to the additional insured.
- Example: Insured is contractually obligated to name additional insured on policy providing property damage coverage. In addition to those coverages, the policy also provides personal injury coverage. Limitation prevents additional insured from accessing the personal injury coverage.

Limitations on Scope of Coverage

Other Restrictive Wording – 2013 ISO Revision

“[T]he most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.”

Significance: Amount of coverage now restricted, whereas prior ISO endorsements had no such restriction and courts typically gave additional insureds the benefit of the full policy limit, even if contract only required as lesser amount.

Other Restrictive Wording

“Your Work” Exclusion

“Property damage” to “your work”

- Named Insured’s v. Additional Insured’s Work?

Other Restrictive Wording

“Professional Services” Exclusion

“...any professional services by or on behalf of any insured.”

- Broad v. narrow meaning of “professional services”
- Companies that perform professional and non-professional services

Other Restrictive Wording

“Employers Liability” Exclusion

Other Restrictive Wording

Role of Severability of Insured/Separation of Insured Provision

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