Risk managers have long recognized the value of liability insurance as “litigation insurance.” Even savvy insurance professionals, however, may not know just how broad the duty to defend may be: not only are insurance companies compelled to defend policyholders when the allegations of an underlying complaint suggest the possibility of coverage, but even when facts outside the “four corners” of the underlying complaint suggest that the claim may be covered.

While most courts agree as to the broad scope of the duty to defend, courts are split on one important issue: are insurance companies also under a duty to investigate a claim to see if the facts of the underlying case suggest the possibility of coverage, or can insurance companies rely solely upon the allegations of the underlying complaint to determine whether they have a duty to defend?

The Duty to Defend

The duty to defend in liability insurance policies is broadly construed because such policies provide coverage for the two most significant exposures facing the policyholder named in a third party action: (1) exposure to pay costs for the loss suffered by the third party; and (2) exposure to the costs of defending against the claim. New York’s highest court, for example, has held that the duty to defend is a form of “litigation insurance,” for which the policyholder specifically pays a premium when it buys an insurance policy. Accordingly, the policyholder’s goal should be to obtain a defense immediately.

Three points may be made about the existence of the insurance company’s duty to defend. First, all courts generally begin their inquiry by comparing the allegations in the complaint with the language of the insurance policy. This is referred to as the “four corners” or “eight corners” rule. Second, the majority of courts will consider facts outside the complaint that suggest a potential for coverage. Third, of those jurisdictions that permit examination, only a minority of courts will relieve an insurance company of its duty to defend based solely upon facts outside the complaint showing that there was no potential for coverage.

Activating the Duty to Defend

In most jurisdictions, a policyholder must show that the underlying complaint raises a duty to defend based upon the allegations within the “four corners” of the complaint. The four corners of the complaint must match the four corners of the policy, which has led some courts to characterize the test as the “eight corners” rule. The duty to defend is resolved solely on the allegations of the underlying complaint: if those allegations are potentially within coverage, the duty to defend attaches. Even if ultimately it is determined that a claim is not covered under the policy, the duty to defend is unaffected. Further, the duty to defend extends to all claims in an underlying lawsuit against a policyholder, even where only one claim is potentially covered.

The Duty to Investigate

States differ, however, about an insurance company’s right or duty to consider facts outside the “four corners” of the complaint in deciding whether it has a duty to defend.

In most states, the duty to defend includes a duty—but not a right—to investigate. In New York, for example, an insurance company must consider facts outside the pleadings which trigger
defense coverage, but may not look beyond the face of the complaint to avoid its duty to defend. Thus, if an insurance company has knowledge of unpleaded facts which indicate that a claim may potentially be covered, the insurance company must defend, even if the claim appears on the face of complaint to fall outside of coverage. Fitzpatrick v. American Honda Motor Co., Inc., 571 N.Y.S.2d 672, 675 (N.Y. 1991). On the other hand, if the insurance company has knowledge of unpleaded facts which suggest that the claim may prove outside the policy’s coverage, it nevertheless must defend the claim if the pleadings allege a potentially covered claim. International Paper Co. v. Continental Casualty Co., 35 N.Y.2d 322, 361 N.Y.S.2d 873 (1974).

In contrast, some states do not permit the use of facts outside the “four corners” of the complaint to trigger the duty to defend. In Texas, for example, an insurance company need not conduct any investigation to determine whether the facts of the underlying claim might trigger coverage. Trinity Universal Insurance Co. v. Cowan, 945 S.W.2d 819, 829, (Tex. 1997).

California courts also use extrinsic evidence in analyzing defense obligations. “[F]acts known to the [insurance company] and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy.” Montrose Chem. Corp. v. Superior Court, 861 P.2d 1153, 1157 (Cal. 1993). California also allows courts to consider extrinsic evidence against the policyholder:

neither logic, common sense, nor fair play supports a rule allowing only the insured to rely on extrinsic facts to determine the potential for coverage. It would be pointless, for example, to require an insurer to defend an action where undisputed facts developed early in the investigation conclusively showed, despite a contrary allegation in the complaint, that [there was no possibility of coverage].


Some states occupy a middle ground. They do not impose a duty to investigate, yet they require an insurance company to take notice of additional facts that establish coverage. For example, Minnesota does not require an insurance company to investigate beyond the four corners of a complaint, but does not permit the insurance company to ignore such facts if it is aware of them. Garvis v. Employers Mutual Cas. Co., 497 N.W. 254, 258 (Minn. 1993) North Dakota similarly has construed the duty to defend as encompassing facts of which the insurance company may become aware independent of the pleadings. Pennzoil Co. v. United States Fidelity and Guaranty Co., 50 F.3d 580, 583 (8th Cir. 1995).

This middle ground position has serious advantages over adherence to the “eight corners rule.” As explained by New Jersey’s Supreme Court:

insureds expect their coverage and defense benefits to be determined by the nature of the claim against them, not by how the fortuity of how the plaintiff, a third party, chooses to phrase the complaint against the insured.


The jurisdictional split regarding the use of extrinsic evidence in analyzing the duty to defend can have a dramatic impact on the scope of a policyholder’s coverage. While all jurisdictions are pro-policyholder in their analysis of the existence of the duty, the better-reasoned approach is one which permits a policyholder to bring important facts to the attention of its insurance company, rather than having coverage determined potentially by the fortuitous presence or absence of a key turn of phrase included by the third party plaintiff’s attorney in their complaint against the policyholder.

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