PENNSYLVANIA

Evaluating The Additional Insured Tender:

What Information Can Be Considered

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In jurisdictions, like Pennsylvania, that have adopted a "four corners" or "eight corners" rule to determine an insurer's duty to defend, it is generally impermissible to consider evidence beyond the underlying complaint and the policy. Additional material beyond the complaint and policy is referred to as "extrinsic evidence." However, application of this rule becomes less clear when a third party seeks coverage as an additional insured. Often, an entity's status as an "additional insured" is not readily discernable from the face of the underlying complaint or the policy. In some cases, courts have recognized a narrow exception to the four corners rule that permits consideration of extrinsic evidence for the limited purpose of determining the entity's status as an additional insured.

The issue frequently comes up when the named insured is not identified as an original defendant and is later joined in the action. This is common in the context of employee injury lawsuits or when a general contractor joins a subcontractor in an action. Similarly, we routinely see tenders between parties in which one entity claims status as an additional insured under another's policy. In these situations, it is necessary to determine the operative pleading for consideration of the carrier's duty to defend and whether additional extrinsic evidence may be considered.

What complaint should be considered? The four corners rule limits a determination of the duty to defend to the complaint and the policy. In Pennsylvania, it is the underlying complaint and not a subsequent joinder that is the operative complaint in such instance. See Peerless Indem. Ins. Co. v. Cincinnati Ins. Co., 2015 Pa. Super. Unpub. LEXIS 749 (Apr. 6, 2015). In the context of a tender, it is not uncommon for the "joinder complaint" to add additional allegations to bolster the putative additional insured's tender. Under Pennsylvania's four corners rule, "the third party complaint cannot be used to bolster the allegations to the original complaint and thereby trigger" the insurance company's duty to defend. See Dale Corp. v. Cumberland Mut. Fire Ins. Co., 2010 U.S. Dist. LEXIS 127126 at *25 (E.D. Pa. Nov. 30, 2010) (holding that the joinder complaint was extrinsic evidence and did not trigger the duty to defend on its own). See also Cont'l Cas. Co. v. Westfield Ins. Co., No. 16-5299, 2017 U.S. Dist. LEXIS 61889, at *20 (E.D. Pa. Apr. 24, 2017) (recognizing that where the original complaint does not include allegations against the named insured, a third party complaint cannot be used to bolster the allegations in the original complaint and thereby trigger coverage). Thus, even when a joinder complaint is filed, the original complaint is still the operative pleading for the evaluation of an insurer's duty to defend. This is well reasoned - absent consideration of the original complaint, there would be no basis for the joinder complaint. The joinder complaint is a tool used to pass along the claims asserted in the original complaint to a third party. Further, as a matter of public policy, the putative additional insured should not be permitted to "plead" into coverage by artful allegations in its joinder.

What extrinsic evidence can be considered? In the case of tenders for additional insured coverage, courts have recognized a limited exception to the four corners rule. Indeed, it is often necessary to consider extrinsic written agreements. As blanket additional insured endorsements have become more common, such endorsements regularly refer back to a "written agreement" to determine who qualifies as an additional insured. See Liberty Mut. Ins. Co. v. Penn Nat'l Mut. Cas. Ins. Co., Civil Action No. 16-1613, 2018 U.S. Dist. LEXIS 137604, at *20 (W.D. Pa. Aug. 15, 2018) (considering the scope of work under the agreement to determine whether ongoing operations coverage was triggered for the additional insured).
If the entity does qualify as an additional insured, other policies should be reviewed. It may be necessary to review the putative additional insured's own insurance policy and other available policies under which it may qualify as an additional insured to determine priority. Often priority must be determined by an interpretation of the policies along with the applicable contract or agreement.

Beyond any contract, agreement, or other policies, can additional information be considered, such as the carrier's investigation? Courts have limited the consideration of investigative materials for the purpose of determining an entity's "status" as an additional insured. For example, where the additional insured obligations refer to an "owner" or "subsidiaries" it may be permissible to determine whether a putative additional insured qualifies as such. However, it is likely impermissible for a carrier to use its investigation to dispute facts that go to the merits of the claim. See Zurich Am. Ins. Co. v. Markel Ins. Co., 2020 Phila. Ct. Com. Pl. LEXIS 18, *1 (July 16, 2020).
Can causation be considered? The standard additional insured endorsement includes language that the bodily injury or property damage must be "caused by" an act or omission of the named

insured. It may be tempting to deny coverage on the absence of a causal determination, but be wary that Pennsylvania courts are apt to broadly construe allegations in favor of finding coverage. Where the underlying complaint can be interpreted to potentially, even if indirectly, implicate an act or omission of the named insured, the duty to defend may be found. See Ramara, Inc. v. Westfield Ins. Co., 814 F.3d 669 (3d Cir. 2016).

Other jurisdictions that follow a four corners/eight corners application have adopted this exception and permit the consideration of extrinsic evidence if the complaint's allegations provide inadequate information to determine coverage and if the extrinsic evidence relates only to coverage and does not overlap with the merits. See e.g. Roberts, Taylor & Sensabaugh, Inc. v. Lexington Ins. Co., No. H-06-2197, 2007 U.S. Dist. LEXIS 75075, at *20 (S.D. Tex. Oct. 9, 2007) (recognizing an exception to the four-corners rule to allow the use of extrinsic evidence); PIH Beaverton LLC v. Red Shield Ins. Co., 412 P.3d 234, 240 (Or. App. 2018) (recognizing the limited exception to the four corners rule for the use of extrinsic evidence for the limited purpose of determining "whether the party seeking coverage was actually an insured within the meaning of the policy"); Grand Acadian, Inc. v. Fluor Corp., 2009 U.S. Dist. LEXIS 49347, at *10 (W.D. La. May 29, 2009) (same); W. Hills Dev. Co. v. Chartis Claims, Inc., 359 P.3d 339, 341 (Or. App. 2015) (considering extrinsic evidence (general contractor's tender letter to subcontractor) for purposes of identifying the general contractor as an additional insured).

In summary, when responding to an additional insured tender, if the information required to determine an entity's status as an additional insured is not readily discernable from the face of the complaint and policy, extrinsic evidence may potentially be considered. We tend to see different results from the state versus federal courts. However, such evidence may be considered only, if permitted by the court, for the limited purpose of determining an entity's insured status.

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