



Workarounds for Workers' Comp Immunity: How to Obtain Additional Insured Coverage when the Named Insured is Immune from Suit

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Construction is an inherently risky business, fraught with the potential for human error. Despite best efforts to ensure safety, accidents involving construction workers are common, with consequences ranging from your run-of-the-mill trip and fall to much more serious and debilitating injuries.

A worker who is injured on the job generally receives workers' compensation benefits through their employer. Most states have enacted statutes stating that this is the exclusive remedy available from the employer, effectively making employers immune against civil lawsuits that might otherwise be brought by their injured employees.

However, workers' compensation benefits do not always fully compensate the employee for their injuries. In the construction industry, this often leads to lawsuits against upstream parties, such as a general contractor or project owner.

From the perspective of the upstream party, it makes sense that the party who was in the best position to control the risk should be the one to bear the financial burden of the loss. This usually includes any downstream parties that were responsible for performing the work that led to the injury, including the injured worker's employer. Upstream parties use risk transfer mechanisms such as contractual indemnity and additional insured requirements to shift the risk to the downstream party.

The cost of defending against bodily injury claims can be astronomical, even where the injury itself is relatively minor. Securing additional insured coverage from the responsible party's insurer is critical, as the insurer is obligated to pay for the additional insured's defense. A typical additional insured endorsement provides coverage for damages "caused, in whole or in part, by" the named insured (i.e., the responsible downstream party). The duty to defend the additional insured is triggered

where the underlying complaint alleges that the named insured was at least partially responsible for the loss. When the named insured is also a direct defendant in the underlying lawsuit, obtaining a defense for the additional insured is usually straightforward. Courts generally view the allegations in the underlying complaint as true and find that any allegation of the named insured's fault satisfies the "caused, in whole or in part, by" standard and triggers a duty to defend the additional insured.

Complications arise when an upstream party seeks additional insured coverage from the injured party's employer. Because the employer is immune from suit and cannot be a direct defendant in the underlying case, the complaint usually does not contain any allegations indicating that the employer caused the accident. In fact, sometimes the complaint does not mention the employer at all. This often leads to a denial of additional insured coverage on the basis that the loss was not "caused by" the named insured. Additional insureds can fight back by using extrinsic evidence and/or a broad reading of the underlying complaint to establish the named insured's fault and trigger a duty to defend.

Use Extrinsic Evidence to Your Advantage

In some states, extrinsic evidence – that is, facts outside the allegations of the underlying complaint – may be used to trigger an insurer's duty to defend. Common sources of extrinsic evidence include statements made in other pleadings, such as an answer, affirmative defense, or stipulation, and deposition testimony. Any extrinsic facts demonstrating that the injuries were caused, in whole or in part, by the employer should be presented to the insurer to support a finding of coverage for the additional insured.

Furthermore, although the employer cannot be sued by the injured employee, they may be brought into litigation by the direct defendant(s) via a third-party complaint. Regardless of the type of claim brought – which may include contributory negligence, breach of contract, or a demand for contractual defense and indemnity, among others – a third-party complaint typically alleges that the employer was at fault, in whole or in part, for the loss.

If the third-party complaint was filed by the additional insured seeking coverage, the court may not permit the use of those allegations to establish a duty to defend.¹ This is especially true where the third-party complaint is filed after the additional insured files a declaratory judgment complaint seeking coverage for the loss.² However, if the third-party complaint was filed by a party not seeking coverage, those allegations may be considered in states that permit the use of extrinsic evidence to establish a duty to defend.³ Moreover, courts in some jurisdictions, such as New York⁴ and New Hampshire⁵, will consider the allegations in a third-party complaint even if it was filed by the additional insured seeking coverage. Because there is no consensus as to how to handle this type of evidence, it is important to check the applicable jurisdiction's law to determine whether allegations in a third-party complaint can be used to trigger a duty to defend.

¹See, e.g., *Nat'l Fire Ins. of Hartford v. Walsh Const. Co.*, 392 Ill. App. 3d 312, 909 N.E.2d 285 (2009).

²See, e.g., *Graphic Arts Mut. Ins. Co. v. DaVita Healthcare Partners, Inc.*, 2019 IL App (3d) 180402-U, appeal denied sub nom. *Graphic Arts Mut. Ins. Co. v. DaVita Healthcare Partners, Inc.*, 132 N.E.3d 353 (Ill. 2019).

³See, e.g., *Am. Econ. Ins. Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 886 N.E.2d 1166 (2008).

⁴See *All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, 168 A.D.3d 612, 92 N.Y.S.3d 256 (N.Y. App. Div. 2019) (holding that third-party complaint brought by multiple parties, including the additional insured, alleged negligence on the part of the named insured and was therefore sufficient to trigger the duty to defend); *Greater New York Mut. Ins. Co. v. State Nat'l Ins. Co., Inc.*, 66 Misc. 3d 1203(A) (N.Y. Sup. Ct. 2019) (same).

⁵See *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. NGM Ins. Co.*, No. 11-CV-303-JD, 2011 WL 6415484 (D. N.H. Dec. 21, 2011) (permitting use of allegations in third-party complaint filed by additional insured, among other extrinsic evidence, to show that injury was caused by the named insured).

Read the Complaint as Broadly as Possible

If the use of extrinsic evidence is either impermissible or impractical, a duty to defend may be triggered by reading the allegations of the underlying complaint in the broadest possible manner. Each word of the underlying complaint should be carefully scrutinized, as even a seemingly insignificant reference to the named insured may be enough to obtain a defense for the additional insured.

Some jurisdictions that either do not permit the use of extrinsic evidence or restrict its use to limited circumstances have held that an analysis of the duty to defend must take into account the effects of workers' compensation immunity. For example, the Third Circuit has held that a lone allegation stating that the injured worker was an employee of the named insured is sufficient to trigger coverage. In Ramara, Inc. v. Westfield Ins. Co.,⁶ Ramara, Inc. ("Ramara") hired Sentry Builders Corporation ("Sentry") as general contractor to perform work at a parking garage, and Sentry hired Fortress Steel Services, Inc. ("Fortress") to perform concrete and steel work. An employee of Fortress was injured on the job and he sued Ramara but not Fortress, as Fortress was entitled to workers' compensation immunity. Ramara sought additional insured coverage under Fortress's commercial general liability policy, which was issued by Westfield Insurance Group ("Westfield"), but Westfield denied coverage on the basis that the underlying complaint did not allege that the injuries were "caused, in whole or in part, by" Fortress.

Pennsylvania is a "four corners" state,⁷ and the underlying complaint contained only a single allegation that the injured worker was an employee of Fortress. However, the District Court found that this "sparse reference to Fortress" was understandable in light of Fortress's workers' compensation immunity. The District Court determined that Westfield's denial of coverage was based on an overly narrow interpretation of the underlying complaint that ignored the realities of the worksite and failed to account for the impact of workers' compensation immunity. On appeal, the Third Circuit upheld the District Court's decision, noting that insurers must factor in the impact of the workers' compensation bar in determining whether the allegations of the complaint trigger coverage.⁸

More recently, in Precision Underground Pipe Servs., Inc. v. Penn Nat'l Mut. Cas.,⁹ the Pennsylvania Superior Court found a duty to defend by broadly interpreting the possessive adjective "its." The case arose out of a real estate development project where Verizon Pennsylvania, LLC ("Verizon") hired Parkside Utility Construction, LLC ("Parkside") to install an underground conduit. Parkside hired Precision Underground Pipe Services, Inc. ("Precision") to perform the labor for this work. A Precision employee was injured when he fell into a trench at the jobsite, and he sued Verizon and Parkside for his injuries, alleging that they failed to protect him from dangerous conditions at the project. Precision was not a direct defendant in the lawsuit, nor could it have been due to worker's compensation immunity.

Verizon and Parkside sought additional insured coverage from Precision's insurer, Penn National Mutual Casualty ("Penn National"). Penn National denied the claim on the basis that the underlying action did not allege that the injuries arose out of Precision's negligence; therefore, the injury was not "caused, in whole or in part, by" Precision's acts or omissions as required by the policy's

⁶814 F.3d 660 (3d Cir. 2016).

⁷See Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 896 (Pa. 2006).

⁸See also Core Constr. Servs. of Illinois, Inc. v. Zurich Am. Ins. Co., 2019 IL App (4th) 180411, 126 N.E.3d 694 (stating that "[s]ilence as to any acts or omissions of the employer must be understood as the possible result of tort immunity for employers under the workers' compensation laws and should not be a basis for refusing to defend an additional insured.") (internal citation and quotation marks omitted).

⁹No. 3663 EDA 2018, 2019 WL 6492951 (Pa. Super. Ct. Dec. 3, 2019).

additional insured endorsement. Insurance coverage litigation followed, and the trial court found that because Precision was not a defendant in the underlying action, nor were there any allegations that implicated Precision's work as a cause of the injuries, Penn National's denial of coverage was justified.

The Pennsylvania Superior Court reversed the decision, applying the widely-recognized principle that the duty to defend is very broad and is triggered if the allegations in the complaint even potentially come within the scope of coverage. One of the allegations in the underlying complaint stated that "Verizon and Parkside had a duty to protect Precision's workers 'from unreasonably dangerous conditions caused by *its* conduct and/or failure to act.'" Placing an emphasis on the possessive adjective "its", the court found that this allegation could be interpreted to mean that Verizon and Parkside had a duty to protect Precision's workers from unreasonably dangerous conditions caused by *Precision's* conduct. That is, reading the complaint in the broadest possible manner, it alleged that the dangerous conditions at the jobsite were caused by Precision, creating the possibility that the plaintiff's injuries were "caused, in whole or in part, by" Precision's acts or omissions and triggering Penn National's duty to defend the additional insureds.

These cases demonstrate the importance of reading every single word of the underlying complaint in the light most favorable to a finding of coverage. By utilizing a broad reading of the complaint, a duty to defend can often be triggered even if there are no overt allegations of the named insured's fault.

Conclusion

An employer's immunity from suit does not also grant the employer's insurer immunity against additional insured claims. The fact that the underlying complaint does not specifically allege that the named insured was at fault for their employee's injuries should not be the end of the analysis. Given the widely recognized principle that the duty to defend is exceedingly broad, additional insureds should use the above strategies to their advantage when faced with a questionable denial of coverage.

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