

THE DUTY TO DEFEND CLAIMS IN VIRGINIA

For many years the rule in Virginia has been that the allegations in the plaintiff's Complaint and the provisions in the insurance policy are analyzed together to determine whether a duty to defend and/or indemnify exist under the policy. A recent decision by the Supreme Court of Virginia now expands the inquiry so that the insurer may also need to consider defenses raised to the Complaint in deciding whether a defense is owed to an insured.

It is well settled in Virginia that "an insurer's obligation to defend is broader than its obligation to pay." Lerner v. General Ins. Co. of America, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978). (citations omitted). There is, however, "no obligation on the insurer to defend an action against the insured when, under the allegations of the complaint, it would not be liable under its contract for any recovery therein had." *Id.* (citations omitted).

Consequently, in determining whether a duty to defend exists, insurance companies have historically looked at the four

corners of the Complaint and the four corners of the insurance policy – "the eight corners test." The Supreme Court of Virginia has stated that "[w]hen an initial pleading 'alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy,' the insurance company is obliged to defend its insured. Moreover, where the allegations 'leave it in doubt whether the case alleged is covered by the policy,' the insurer's failure to defend is at its own risk. Only when 'it appears clearly (the insurer) would not be liable under its contract for any judgment based upon the allegations,' does the company have no duty to defend." Parker v. Hartford Fire Ins. Co., 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981) (citations omitted).

In Parker, the trial court ruled that the insurer had no duty to defend as the language of the pleadings alleged intentional trespass, which would not be covered under the policy. The Parker Court reversed the trial court's decision, stating that "[w]e cannot say that Turpin's (plaintiff's) pleadings clearly show that any recovery against the Parkers would not have been covered by the insurance policy." *Id.* The Parker Court then held that because the pleadings could have also supported a judgment of unintentional trespass, which

would have been covered under the policy, the duty to defend did exist. *Id.*

An expansion of the "eight corners test" to determine if a duty to defend exists recently occurred in Copp v. Nationwide Mut. Ins. Co., 279 Va. 675, 692 S.E.2d 220 (2010). In that case, a fight broke out among college students after playing a drinking game called "beer pong." The defendant Copp alleged that while he was being pinned to a stairwell by several other college students, he swung his arm in self defense in an effort to free himself. Unfortunately, the swing struck the plaintiff Jacobson in the head, knocking him unconscious and fracturing his orbital socket. Jacobsen then filed suit against Copp for willfully and intentionally hitting him and alleged that the actions were unjustified and malicious. Nationwide refused to defend the personal injury case because the intentional acts that were alleged could not be considered an "accident" under the terms of its policy so as to trigger coverage. In a subsequent declaratory judgment action, the trial court agreed that based on the allegations contained in the Complaint, the claim against Copp was for an intentional act and therefore not covered by the



policy.

On appeal, the Supreme Court of Virginia reversed the trial court and held that Nationwide did have a duty to defend. The Copp Court focused on language in the insurance policy that provided that the exclusion for intentional acts did not apply to bodily injury caused by an insured trying to protect person or property. For its legal analysis, the Copp Court admitted that “[i]n several prior decisions in this type of case, we have applied the rule that only the allegations in the complaint and the provisions of the insurance policy are to be considered in deciding whether there is a duty

on the part of the insurer to defend and indemnify the insured.” *Id.* at 683, 692 S.E.2d at 224. The Copp Court was compelled in this case to consider the defenses asserted by Copp given the policy’s intentional act exclusion’s inapplicability where the insured was trying to protect himself.

The Copp decision may make it even more difficult for insurers to deny a duty to defend as a mere analysis of the eight corners of the Complaint and insurance policy may no longer be sufficient. Instead, the insurer should also review and consider the defenses asserted against the claim by the insured to determine if a defense or coverage

could be owed under the policy. The uncertainty generated by Copp could lead more insurers to defend questionable claims while issuing a reservation of rights letter to protect its ability to later deny the claim.



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