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Just Decided – New Jersey Supreme Court: Insurers Can Look To Extrinsic Evidence To Deny a Defense

No Need for Insurers Dancing in the Dark

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Last week, the New Jersey Supreme Court decided *Norman International, Inc. v. Admiral Insurance Company,* No. 086155 (N.J. Aug. 11, 2022). At issue was coverage for a work-site injury and the interpretation of a policy exclusion for operations or activities performed by an insured in certain counties in New York. The case is significant in terms of addressing causation for purposes of the application of exclusions. But the more wide-reaching issue has nothing to do with the scope of the exclusion.

The real story from *Norman* is the New Jersey high court's pronouncement that an insurer, in certain circumstances, can use extrinsic evidence to deny a defense to its insured. New Jersey duty to defend law has been a jungle land and in need of more supreme court guidance.

Colleen Lorito, an employee of a Home Depot store located in Nassau County, New York, was injured while operating a blind cutting machine provided to Home Depot by Richfield Window Coverings (Richfield), headquartered in Santa Fe Springs, California.

Richfield sells window covering products to national retailers, including Home Depot. Richfield also provides retailers with machines to cut the blinds to meet customer specifications. Richfield's representatives visit the retailers to maintain and repair the machines and replace the cutting blades.

Lorito filed an action in Nassau County against Richfield, which sought coverage from its liability insurer, Admiral. The insurer denied a defense, citing a policy exclusion that provided, in part, as follows:

> This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury", including costs or expenses, actually or allegedly arising out of, related to, caused by, contributed to by, or in any way connected with:
>
> (1) Any operations or activities performed by or on behalf of any insured in the Counties shown in the Schedule above; (These were several counties in New York state, including Nassau.)

Coverage litigation ensued. The New Jersey Appellate Division concluded that the exclusion did not apply, as there was no "causal relationship" between Richfield's activities involving the blind cutting machine and the causes of action raised in the complaint.

Following a lengthy analysis, the New Jersey Supreme Court reversed, concluding that Richfield's activities constituted a sufficient basis to trigger the policy's Designated New York Counties Exclusion. (Again, the court's detailed analysis of causation, for purposes of the application of exclusions, is significant and will play a part in future decisions.)

But the real story in *Norman* is the court's rejection of the manner in which the Appellate Division made its erroneous duty to defend decision.

The supreme court stated that the appeals court "set[] forth the general standard that a 'complaint should be laid alongside the policy' to determine a duty to defend." However, the high court stated: **"Going forward, in similar situations, courts should indicate when an issue requires consideration of facts beyond the complaint."**

This was one such case. However, the appellate division did not do so. The supreme court concluded that the appellate division, in reversing the trial court, noted that the trial court considered "facts from discovery, including that Richfield employees visited the store to change the machine's blades, perform maintenance on the machine, and provide training resources to employees, each of which was not discussed in the complaint."

Understanding what types of extrinsic evidence can be considered by an insurer, in determining its duty to defend, is tied to the glory days of *Burd v. Sussex* (N.J. 1970), which the court noted was not considered by the appellate division in its analysis.

Looking back to *Burd*, the supreme court in *Norman* stated:

> *"There are times, however, when comparing the causes of action in the complaint to the exclusionary clause will not provide an answer as to whether there is a potentially covered claim. That situation occurs 'when coverage, i.e., the duty to pay, depends upon a factual issue which will not be resolved by the trial.' Burd, 56 N.J. at 388. In such cases, 'the duty to defend may depend upon the actual facts and not upon the allegations in the complaint.' Ibid."*

The *Norman* court described the duty to defend rule as follows: "Stated differently, if coverage will not be an issue resolved during trial, it may not be sufficient to look only at the complaint because the duty to defend depends on facts not relevant to the causes of action in the complaint."

For an example, the court set out one provided by the *Burd* court:

> *"[I]f a policy covered a Ford but not a Chevrolet also owned by the insured, the carrier would not be obligated to defend a third party's complaint against the insured which alleged the automobile involved was the Ford when in fact the car involved was the Chevrolet. The identity of the car, upon which coverage depends, would be irrelevant to the trial of the negligence action."*

Thus, as explained by the *Norman* court, if an extrinsic fact is relevant to determining coverage, but not for purposes of determining an issue in the underlying action, then it can be considered by an insurer in deciding if it is obligated to defend.

It could be said that the *Norman* court made no new law, but, rather, simply applied *Burd*. I do not address that question here. However, even if that's the case, with *Burd* being 50 years old, *Norman*'s reaffirmance of the decision will surely give insurers more willingness to consider extrinsic evidence when determining if a defense is owed.

Norman is going to play an important role in many cases where policyholders turn to their insurers and say: cover me.

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