Construction Coverage - Triggering the Additional Insured Obligation When the Subcontractor Is Immune From Suit

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Construction site owners and contractors can find it difficult to secure bargained-for additional insured coverage when the plaintiff is the subcontractor's employee and subject to the worker's compensation bar. Courts continue to struggle with how to determine if a defense is owed under the subcontractor's policy for a complaint that does not expressly allege that the bodily injury was "caused by" the named insured's "acts or omissions" or other qualifying fault-based conduct. Two recent decisions in New York and Pennsylvania demonstrate varying approaches to the duty to defend designed to circumvent the traditional "four corners" of the pleading analysis.

United Specialty Ins. Co. v. Lux Maint. & Ren. Corp., 2019 U.S. Dist. LEXIS 201805 (S.D.N.Y. Nov. 20, 2019) held that the owners of a construction project could trigger fault-based additional insured coverage by their own self-serving third-party complaint. Although the plaintiff was barred from bringing negligence claims against the employer-subcontractor, the owners pled the requisite acts and omissions in their third-party complaint for indemnification. *United Specialty* held that the third-party allegations were sufficient to establish a legal and factual basis upon which the subcontractor's insurer could have a duty to indemnify and triggered its defense obligation. Other jurisdictions have rejected this approach. *See, e.g., Pekin Ins. Co. v. Ill. Cement Co., Ltd. Liab. Co.*, 51 N.E.3d 812 (Ill. Ct. App. 3d 2016)("self-serving" third-party complaint insufficient to trigger additional insured coverage from employer-subcontractor).

Pennsylvania, a strict "four corners" jurisdiction, did not consider allegations in a declaratory judgment complaint against the subcontractor's insurer and focused on inferences of the subcontractor's negligence to trigger the additional insured coverage. *Precision Underground Pipe Servs. v. Penn Nat'l Mut. Cas. & Verizon Pa., LLC*, 2019 Pa. Super. Unpub. LEXIS 4486 (Dec. 3, 2019). *Precision* carefully reviewed the tort complaint, which alleged that the owner and contractor had a duty to protect the subcontractor's employees "from unreasonably dangerous conditions caused by *its conduct* and/or failure to act." The court reasoned that the phrase "its conduct" referred to the subcontractor's conduct, and therefore implied that the subcontractor was responsible for the dangerous condition that caused plaintiff's injuries. *Precision* rejected the notion that "overt" allegations of negligence were required to implicate the subcontractor's policy.

The Takeaway

Claim professionals pursuing risk transfer in a construction site bodily injury claim should be mindful of the trigger analysis applied by the jurisdiction in which the claim is pending. New York's approach allows counsel for the putative additional insured to craft a third-party pleading that incorporates specific allegations of negligence against the subcontractor to trigger fault-

based additional insured coverage. Pennsylvania's approach leaves the putative additional insured more at the mercy of the plaintiff's pleading. If the employer-subcontractor's negligence cannot be inferred, the claims professional should carefully monitor the development of discovery for factual evidence to support the additional insured claim.