

Third-Party Complaint Triggers Duty to Defend in New York

A New York appellate court, in its recent decision in *All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, 92 N.Y.S.3d 256 (N.Y. App. Div. 2019), held that the allegations in a third-party complaint triggered an insurer's duty to defend an additional insured, even when the third-party complaint was filed by the additional insured.

In *All State*, the underlying action arose out of an injury sustained by an employee of United Interior Renovations, LLC ("United") on a construction project in Manhattan. The construction manager for the project contracted with All State Interior Demolition Inc. ("All State") to perform construction work at the project. All State then entered into a subcontract with United for United to perform demolition work at the project. The subcontract between All State and United required United to name All State as an additional insured on United's commercial general liability ("CGL") policy. After the alleged injury took place, the United employee commenced an action against the premise's owner, lessor, construction manager, and All State sounding in negligence. In response, All State commenced a third-party action against United, seeking common law contribution and indemnification and contractual indemnification.

United was insured by Scottsdale, who issued a CGL policy to United providing additional insured status "when United and such...organization have agreed in writing in a contract or agreement that such...organization be added as an additional insured on your Policy." Scottsdale ultimately denied coverage noting that the underlying complaint failed to establish that United's employee suffered bodily injury caused, in whole or in part, by the acts or omissions of United or anyone working on United's behalf.¹

All State subsequently filed an action seeking a declaration that Scottsdale owed All State a defense in the underlying action. The trial court held in favor of All State finding that "Scottsdale plainly owes plaintiffs a duty to defend them in the [underlying] action. The pleadings in the [underlying] action triggered the duty to defend because they allege that [United's employee's] injury was caused, at least in part, by the acts or omissions of Scottsdale's insured, United, performing demolition operations at the site."²

On appeal, the appellate court affirmed the trial court's ruling, in part,³ and determined that Scottsdale owed All State a defense because the Amended Complaint in the underlying action and the bill of particulars alleged that on the "date of the accident the plaintiff was employed by United."⁴ The court further reasoned that "W-2 payroll records show that United paid the injured employee for all of 2015 including the time that he was working on the subject project... and the plaintiff admitted that he was working for United."⁵ Further, the court noted that "the third-party complaint brought in

¹Additionally, Scottsdale denied additional insured status to the owner of the project, the lessor, and the construction manager claiming there is no privity of contract between them and United.

²*All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, No. 653398/16, 2017 WL 4791168, at *4 (N.Y. Sup. Ct. Oct. 18, 2017).

³Holding "All State Interior Demolition Inc. is the only organization with which United agreed in writing that it be added as an additional insured on the policy." *All State Interior Demolition Inc. v. Scottsdale Ins. Co.*, 92 N.Y.S.3d 256, 257 (N.Y. App. Div. 2019).

the underlying action by plaintiffs herein against United, incorporates the underlying complaint by reference, alleges that United was negligent, and seeks indemnification from United, and is therefore sufficient to trigger Scottsdale's obligation to defend All State."⁶

The trial court's decision in *All State* relied on New York Court of Appeals decisions that held an insurer has a duty to defend when the *allegations* of a complaint, construed liberally, give rise to the reasonable possibility of recovery under the policy.⁷ The appellate court extended "allegations" to include the allegations in a third-party complaint. Although it is not a new development in New York that extrinsic evidence is permitted to trigger an insurer's duty to defend, the development that third-party complaints are permitted to be used as extrinsic evidence is new and additional insureds should consider filing third-party complaints to trigger additional insured coverage in New York. Further, additional insureds filing third-party complaints to trigger additional insured coverage, should tailor the allegations in the third-party complaints to specifically "track" the language of the additional insured endorsements that the additional insureds are looking to trigger.

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⁴Id.

⁵Id.

⁶Id.

⁷*All State Interior Demolition Inc. v Scottsdale Ins. Co.*, No. 653398/16, 2017 WL 4791168, at *3 (N.Y. Sup. Ct. Oct. 18, 2017).