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April 19, 2010

Virginia Supreme Court: Duty to Self Defend

State For Lovers Becomes 35th To Base Duty To Defend on Extrinsic Evidence

Picture this -- A couple of Virginia Tech roommates are sitting in their apartment playing a friendly game of Beer Pong to celebrate the end of final exams. Their apartment door is open a crack and two other guys – complete strangers -- walk in. They see the game in progress and join in. In an instant the room is oozing with *esprit de corps*. It is a scene right out of a Norman Rockwell painting.

Now consider the very same scene – but this time as facts in a coverage case. In the coverage context, you know that this little get-together is not going to end with the four guys giving each other man-hugs and expressing a hope to do it again real soon.

Not at all. In insurance coverage, Beer Pong can only mean one thing – that it isn't long before someone gets the short rate kicked out of them, followed by the victim filing an assault and battery complaint, followed by coverage litigation over the applicability of the Expected or Intended exclusion. In the coverage world, just as surely as day follows night, Expected or Intended litigation follows Beer Pong. So it was no surprise that these were the circumstances before the Supreme Court of Virginia in last week's decision in *Copp v. Nationwide Mutual Insurance Company*.

Binding Authority doesn't follow Expected or Intended cases (other than for entertainment value in some cases). Such decisions are usually very factual and policy language specific. Therefore, Expected or Intended cases, no matter how seemingly important, most of the time do not offer much in the way of impacting the coverage landscape nationally. And, for that matter, sometimes Expected or Intended cases do not even impact claims within their own state.

On its face, *Copp* is an Expected or Intended case. But the real issue before the court was duty to defend – and whether the determination of the insurer's duty was tied to the four corners of the complaint or included consideration of extrinsic evidence.

Putting aside all of the specifics of the melee and litigation that followed the Beer Pong gone awry, the coverage case came down to Copp, the aggressor (who was charged with assault and battery and pleaded no contest), seeking coverage under a Homeowner's and Umbrella policy issued to his parents. The lower court – limiting its consideration to the pleadings -- concluded that no duty to defend was owed.

The Supreme Court of Virginia reversed. The court observed that the Expected or Intended exclusion in the Umbrella policy contained an exception for bodily injury "caused by an insured trying to protect persons or property." *Copp* at 6-7. In other words, the Expected or Intended exclusion contained a self-defense exception.

The Insurer argued that the four corners of the complaint only alleged intentional conduct and there were no facts or circumstances alleged in the complaint that would fall within the risks covered by the policy. As such, the insurer maintained that the court could not consider Copp's claim that he acted in self-defense "because matters raised by the insured in the defense of the claim are not to be considered in evaluating whether there is a duty to defend." *Id.* at 9.

To be sure, the insurer's argument, that consideration of the duty to defend is limited to the allegations in the complaint, was hardly a novelty. The Supreme Court of Virginia stated: "In 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." The *Copp* court then cited five prior decisions in support of its "four corners" rule. *Id.* at 9-10.

Nonetheless, despite these prior decisions, and without much analysis, the *Copp* Court held that the insurer had a duty to defend -- based on the insured's argument that he acted in self-defense, notwithstanding that nothing to the effect appeared in the complaint:

> We agree with Copp that the umbrella policy contains an exception to the exclusion relating to "bodily injury or property damage intended or expected by the insured." The exception is found in one of the four corners of the insurance contract and stands on an equal footing with other provisions thereof. It cannot be ignored or explained away on specious grounds. And it requires consideration of an insured's claim that he or she caused bodily injury or property damage trying to protect person or property in evaluating whether there is a duty to defend in a given case.

Id. at 12.

The court may have been persuaded by Copp's argument that, if the lower court's decision were permitted to stand, it "would have the effect of denying coverage in the only circumstance in which the exception to the intentional acts exclusion could ever apply." *Id.* at 11.

As I see it, there are two general take-aways from the Supreme Court of Virginia's decision in *Copp* (in addition to the disputes that are now likely to arise, in future duty to defend cases in Virginia, over the breadth of the decision).

First, it is hardly unusual for the defendant, in an assault and battery case, to assert self-defense. And the plaintiff's complaint would never assert that the defendant acted in self-defense. Thus, *Copp* provides policyholders with an argument that an Expected or

Intended exclusion (with a self defense exception – which includes ISO's) should not serve as a basis to preclude a defense in an assault and battery case.

Second, by my count, Virginia is now the 35th state to allow extrinsic evidence, in one form or another, to be a factor in the determination of an insurer's duty to defend. *Copp* demonstrates that states that allow the use of extrinsic evidence do not make the insurer's critical duty to defend determination an easy one.

"Four corners" states make it easy – the determination of the insurer's duty to defend is based solely on the allegations in the complaint. That's the rule. Done.

But "extrinsic evidence" states do not offer such black and white rules and they often fail to provide clarity concerning the circumstances under which extrinsic evidence can used, the type of extrinsic evidence that is permissible and the extent of the insurer's obligation to investigate the existence of extrinsic evidence. Duty to defend determinations in "extrinsic evidence" states are challenging. They must be undertaken with due consideration of these factors, not to mention that the insurer is often-times required to make the decision with a clock ticking over its head on the deadline for the insured to respond to the complaint.

A copy of the Supreme Court of Virginia's April 15, 2010 decision in *Copp v. Nationwide Mutual Insurance Company* can be accessed here:

http://www.courts.state.va.us/opinions/opnscvwp/1090345.pdf

If you have any questions, please let me know.

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