New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
ALM.
DECEMBER 21, 2022

What Does an 'Exceedingly Broad' Duty To Defend Mean in 2022?

By Bruce Strong and Earl A. Kirkland

When policyholders get sued, insurance companies are supposed to step in to help and defend. An insurance company's duty to help and defend its policyholder is "exceedingly broad." That has been the law in New York and in most, if not every, jurisdiction in the United States for decades. But what does "exceedingly broad" mean in 2022? Two recent cases provide a helpful barometer for policyholders.

In a nutshell, the "exceedingly broad" duty to defend requires an insurance company to *resolve all doubts in favor of defending, including*:

1. Whether the lawsuit alleges covered loss or damage
2. Whether an exclusion applies
3. Whether a condition for coverage has been satisfied
4. Whether the defendant is an insured under the policy; and,
5. All of the above—so if there are doubts in multiple respects, an insurance company must separately resolve each doubt in favor of defending.

New York courts recently had occasion to reaffirm these sacrosanct subparts of the exceedingly broad duty to defend.

In the first recent case, *Aspen Specialty Ins. Co. v. NCMIC Risk Retention Grp.*, No. 20-cv-03439, 2022 WL 16837069 (E.D.N.Y. Nov. 9, 2022), a massage went horribly wrong. A massage therapist working for a chiropractor massaged a patient's shoulder and accidentally tore the patient's rotator cuff. The patient sued the chiropractor.

In the underlying case, the chiropractor argued that the massage therapist was not an employee to try to avoid liability. The chiropractor's insurance company then refused to defend. It said: (1) the massage therapist is not an "insured person" under the insurance policy because she is not an employee; (2) massages performed at a chiropractor's office are not covered "professional services" under the chiropractor's policy; and (3) the massage therapist was not "under the supervision" of the chiropractor, so no coverage.

Insurance coverage

The court emphatically found in favor of coverage for the defense.

First, the underlying complaint stated that the massage therapist "worked for" the chiropractor. Since that could include an employer/employee relationship, all doubts must be resolved in favor of providing a defense. Even though the record evidence suggested there was no employee/employer relationship, the insurance company still needed to defend. Even though the chiropractor argued in the underlying case that the massage therapist was NOT an employee to defeat liability, the insurance company still needed to defend.

Second, the court found that a massage therapist massaging a patient

at a chiropractor's office could be a covered "professional service"—so the insurance company must defend. It was "at the very least" not clear to the court that massage fell outside the realm of professional services performed by a chiropractor.

Third, the court found that the massage therapist was "under the supervision" of the chiropractor because the chiropractor had told the therapist to massage the patient.

The court's analysis shows just how "exceedingly broad" is the duty to defend. It applies to determine who is insured, what is insured, and what is excluded, (among other things) and in any combination.

In the second recent case, *Stoncor Grp. v. Peerless Ins. Co*., No. 16-cv-4574, 2022 WL 3701640 (S.D.N.Y. Aug. 26, 2022), a floor installation went horribly wrong. A floor manufacturer contracted with a floor installation company to install a floor at the Grand Hyatt Hotel and at many other locations. A Hyatt kitchen employee walked on the completed floor with a tray full of dishes, slipped, fell, and was injured. He sued the floor manufacturer.

The insurance company for the floor installation company refused to defend the manufacturer. It argued that the manufacturer was not an additional insured under the installation company's policy and that several exclusions applied, including the "ongoing operations" clause and the "completed operations" and "intended use" clauses.

Again, the court emphatically found in favor of coverage for the defense.

First, the court had no trouble finding that the manufacturer was an additional insured under the policy. The policy included as an additional insured anyone the installation company agreed to insure "in writing in a contract, agreement, or permit" with respect to the ongoing operations of the installation company until the project was complete. The insurance company argued that the agreement between the manufacturer and the installation company was never reduced to a writing signed by an authorized representative. The court rejected this "tendentious" argument because there was a written contract that the manufacturer and installation company believed memorialized their agreement even if an authorized representative never signed it.

Second, the insurance company argued that since the Hyatt employee's injury occurred on a completed floor—by the manufacturer's own sworn admission—the liability did not arise out of the floor installer's "ongoing operations," so coverage was excluded. The court found that since the floor manufacturer and installer had a master agreement with many projects ongoing, the manufacturer continued to have liability coverage from the installation company even though some jobs were complete. While the policy was susceptible to the insurance company's interpretation, and even if the insurance company's reading was arguably the better reading, the manufacturer still prevailed here.

Third, the insurance company argued that the floor was "completed" and put to its "intended use" so these other exclusions applied. The court found that the underlying complaint did not clearly state that the floor the Hyatt employee slipped on was complete—even though there was extensive evidence that the floor was complete—so the insurance company could not avoid its defense obligations.

Similarly, the court found that the "intended use" exclusion did not apply. The insurance company argued: Since the underlying complaint said the kitchen employee slipped while walking on the floor, the floor was already put to its "intended use." But the court rejected that reading of the policy because then anyone walking on the floor, even when it was not complete, would trigger the exclusion.

Again, this court's analysis shows just how "exceedingly broad" is the duty to defend. It applies to determine who is insured, what is insured, and what is excluded, and in any combination, even when facts ultimately adduced in the underlying litigation suggest there should not be coverage.

Bruce Strong *is a shareholder in the New York and Philadelphia offices of Anderson Kill P.C.* **Earl A. Kirkland** *in an attorney in the firm's New York and Washington, D.C. offices. Both are members of the insurance recovery practice.*