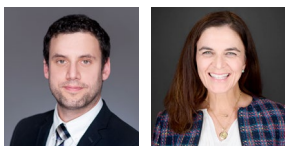


FROM THE DESK OF

Anderson Kill Philadelphia

Pennsylvania Courts Reaffirm Insurance Companies' Broad Obligations to Defend Policyholders



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Key points:

Two federal court decisions in 2022 illustrate forcefully that an insurance company's duty to defend is broad and deep.

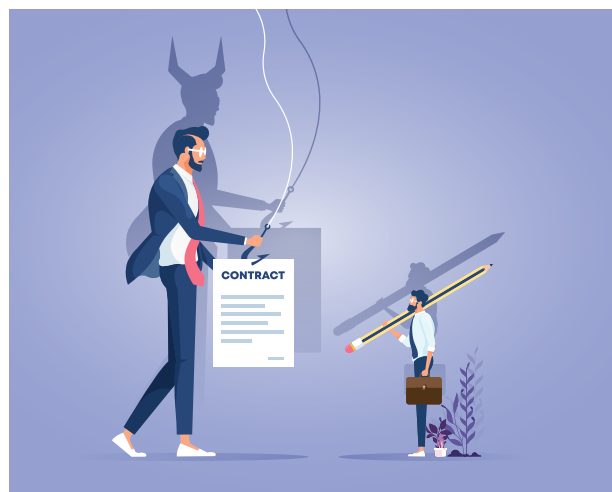
If even one allegation in a suit against the policyholder is potentially covered, the duty to defend kicks in.

Policy exclusions that negate coverage for some or even potentially all allegations in a suit may not negate the duty to defend.

Pennsylvania policyholders should remember: You paid an insurance company substantial premiums not only to indemnify you for covered losses, but also to defend you against lawsuits even *potentially* covered. That is no small bargain.

Two recent Pennsylvania decisions reinforce the broad promise you obtain with your insurance policy. These decisions serve as helpful reminders that policyholders should insist on a defense even if (a) some claims in the lawsuit aren't covered; (b) an insurance company characterizes a lawsuit unfavorably; (c) the lawsuit alleges intentional conduct; or (d) even if facts may eventually come to light that preclude coverage.

In *Vitamin Energy, LLC v. Evanston Ins. Co.*, 22 F.4th 386 (3d Cir. 2022), the Third Circuit held that an insurance company had to defend a policyholder accused of improper advertising. In the underlying lawsuit, the makers of 5-hour Energy alleged that Vitamin Energy committed "false and misleading comparative advertising" and trademark infringement. Vitamin Energy's insurance policy insured against "advertising injury," including injury "arising out of oral or written publication of material that libels or slanders . . . a person's or organization's



products, goods or operations or other defamatory or disparaging material." The insurance company denied coverage, arguing that the advertisements in question only contained false or misleading statements about Vitamin Energy's own product, not 5-hour Energy's.

On appeal, the court found for coverage. It held that two allegations in the underlying complaint are "best read as saying not only that Vitamin Energy's own products" have certain vitamins "but also that 5-hour Energy's products do not." *Id.* at 393. Even though most of the underlying complaint discussed Vitamin Energy's statements about its own products, "the underlying complaint need only contain . . . one allegation" for

the duty to defend to be triggered. *Id.* at 394 (emphasis added).

Next, the insurance company attempted to avoid coverage through application of an intellectual property exclusion, two “knowing” exclusions, and an “incorrect description” exclusion. The IP exclusion barred coverage for certain IP-related claims including unfair competition and trademark infringement; the “knowing” exclusions barred coverage for acts the policyholder knew “violated the rights of others” or for statements the policyholder knew were false; and the incorrect description exclusion applied to misrepresentations about Vitamin Energy’s own products. Again, the court found that these exclusions might apply to the allegations in the underlying complaint or after development of the factual record. But because “at least one allegation” in the complaint is potentially covered, the insurance company must defend.

Similarly, in *AIX Specialty Ins. Co. v. Am. Legion Dep’t of Pennsylvania*, No. CV 21-2338, 2022 WL 767834 (E.D. Pa. Mar. 14, 2022), U.S. District Court for the Eastern District of Pennsylvania found an insurance company was obligated to defend its policyholder in a lawsuit arising out of a serious gunshot injury sustained on the policyholder’s premises. In the case, a man known as “Crazy G,” visiting an American Legion post, allegedly snuck a gun past security, was served far too many drinks and then shot another patron, Shunnye Dunlap, in the premises’ bathroom. Mr. Dunlap sued American Legion, the owner of the premises, for negligently selling Crazy G alcohol despite his obvious intoxication that contributed to the bathroom shooting, and for failing to implement proper security measures. The insurance com-

pany argued that it need not defend American Legion because (1) the underlying plaintiff misspelled American Legion’s name in his complaint, (2) the lawsuit did not allege an “occurrence” and (3) four exclusions purportedly applied: the liquor liability exclusion, the expected or intended exclusion, the vicarious liability exclusion, and the punitive damages exclusion.

The court rejected each of these arguments. First, the court rejected the “misnamed defendant” argument because it found that the plaintiff meant to name American Legion, the named insured in the policy. Second, the complaint alleged the policyholder’s negligence, which is an “occurrence” under the policy. Third, the court found that none of the four exclusions relieved the insurance company from honoring its duty to defend. The liquor liability exclusion did not apply because the complaint also alleged negligent security, not only negligent service of alcohol. The expected and intended exclusion did not apply because American Legion did not expect or intend for Crazy G to shoot Mr. Dunlap (even if Crazy G did). The vicarious liability exclusion did not override the duty to defend because Mr. Dunlap sought to hold American Legion *either* vicariously liable or directly liable. And the punitive damages exclusion did not impact the duty to defend because that exclusion raises an issue of indemnity, not defense.

Taken together, these cases stand as a reminder that an insurance company’s duty to defend its policyholder is sacrosanct, not easily cast aside or ignored. An insurance company must defend even if every single allegation in the complaint, except one, is otherwise excluded; even if facts may eventually come out preclud-

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ing coverage; even if the lawsuit alleges intentional conduct; and even if the insurance company characterizes the lawsuit unfavorably. If there is some potential outside chance of coverage when liberally construing the allegations in the lawsuit, an insurance company must defend its policyholder. ▲

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