Consider Self-Help To Trigger Additional-Insured Status

By **Allen Wolff and Ethan Middlebrooks** (July 12, 2023)

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General liability insurance that will defend claims made against contractors and owners on a construction project is critical for good risk management.

Among other things, owners and general contractors seek to reduce their risk by requiring subcontractors to name them as additional insureds to the subcontractor's liability policy.

Later, getting that additional-insured coverage can be difficult if the underlying plaintiff does not name the subcontractor as a defendant in their lawsuit, a common scenario after a job site injury.

In that situation, owners and contractors can use self-help by filing a third-party claim for indemnification against the subcontractor, triggering coverage from the subcontractor's insurance by asserting that the employee's injuries resulted from the subcontractor's fault or the injured employee's own negligence.

In a May decision from a federal court in New Jersey, the judge made clear that New Jersey's approach to using third-party claims to trigger the duty to defend is not appreciably different from the approach recently articulated by a federal court across the Hudson River in New York.

New Jersey

In the New Jersey case, American Fire & Casualty Co. v. American Family Home Insurance Co., in the U.S. District Court for the District of New Jersey, a general contractor hired a subcontractor to furnish all plumbing for a project.[1]

The general contractor had purchased a commercial general liability policy from American Fire, and the subcontractor had bought a general liability policy from American Family. By virtue of the subcontract, the general contractor was to be named as an additional insured under the subcontractor's policy.

An employee of the subcontractor claimed that he was injured while working on the job site and sued the general contractor, but not the subcontractor. New Jersey's workers compensation scheme prevents an employee from suing their employer directly for workplace injuries.

In the New Jersey coverage litigation, American Fire, the general contractor's insurer, argued that the subcontractor's insurance had the primary duty to defend the general contractor as an additional insured. The subcontractor's insurer asserted that it had no coverage obligation because the subcontractor had not had a claim made against it in the original underlying complaint.

The court first looked to the subcontractor's policy language and noted the scope of coverage available to the general contractor as an additional insured to the subcontractor's insurance.

The court concluded that if the employee's injuries were "caused, in whole or in part" by the subcontractor's acts or omissions, or by his own acts or omissions while working on behalf of the subcontractor, then the subcontractor's policy would cover the general contractor as an additional insured.

Then, after noting the general rule that courts should look first to the underlying complaint when determining whether the duty to defend has been triggered, the court stated that "not a single case ... holds that a court must look to that complaint and cannot look elsewhere."[2] New Jersey law allows a court to look beyond just the underlying complaint.

The court found it persuasive that in both its underlying answer and its third-party complaint, the general contractor had alleged that the subcontractor caused, at least in part, the employee's injuries.

The court recognized that these allegations would not otherwise have been pled in the case: A New Jersey employee is prohibited from suing their employer directly, and an injured employee would not allege their own contributory negligence in a complaint against others.

The court also found that nothing "in the [Workers Compensation Act] precludes an employer from assuming a contractual duty to indemnify a third party through express agreement."[3] The court therefore held that the general contractor's answer or third-party complaint may furnish sufficient claims against the subcontractor or others to require the subcontractor's insurance to defend the general contractor.

New York

These facts closely resemble the alignment of the parties seen in a 2021 case in the U.S. District Court for the Eastern District of New York, Axis Construction Corp. v. Travelers Indemnity Co. of America,[4] where a general contractor was found to be entitled to defense coverage as an additional insured to a subcontractor's liability insurance, even though the original lawsuit was not even brought against the subcontractor.

Instead, as seen in the American Fire case from New Jersey, coverage for the general contractor in the New York case was triggered by a later third-party claim asserted by the general contractor against the subcontractor.

Like the American Fire case in New Jersey, Axis Construction involved a lawsuit for a job-site injury suffered by an employee of a subcontractor. The employee was prevented from suing his employer due to workers' compensation laws.

Instead, the employee sued the general contractor and others, including the property owner. After being sued by the subcontractor's employee, the general contractor initiated a third-party complaint against the subcontractor alleging that the employee's injuries arose from the acts or omissions of the subcontractor.

Even though the injured employee had not made such allegations in the original complaint, the general contractor's third-party complaint against the subcontractor did make those allegations.

As in the New Jersey American Fire case, the New York federal court in Axis Construction found that the duty of the subcontractor's insurance company to defend the general contractor was triggered by allegations in the general contractor's third-party complaint that established the possibility that the general contractor's liability to the employee, if any, might have been caused, in whole or in part, by the acts or omissions of the subcontractor.

Therefore, the subcontractor itself faced potential liability through that third-party complaint.

Self-Help

It does not matter that the party seeking insurance coverage appears to be engaging in legal self-help.[5] In attempting to disclaim their additional-insured obligations in these situations, insurance companies often assert that the general contractor's third-party complaint against the subcontractor is self-serving or otherwise not credible.

The court in American Fire responded to that argument:
[W]hether or not they are [engaging in self-help] is irrelevant. The law is clear that a duty to defend exists where potentially coverable claims exist against the insured with all doubts and ambiguities favoring the insured, [leaving the possibility that a court or jury could find the subcontractor liable and the general contractor eligible for indemnification]. It does not matter whether this will happen, only that it could happen.

Reality

Both cases reflect the reality of what happens on the job site and how parties account for risk. Risk management seeks to contractually transfer the risk of loss to the party in the best position to manage the risk and control the loss. In these circumstances, the general contractor was not the party training or directing the subcontractor's employee; that responsibility fell to the subcontractor.

This same subcontractor contractually agreed to name the general contractor and project owner as additional insureds, and also contractually agreed to defend and indemnify the general contractor and owner for losses caused in whole or in part by the subcontractor.

The subcontractor's obligation to indemnify the owner and general contractor includes claims that the subcontractor was negligent in training, supervising or directing its employee, even if those claims are asserted by the owner or the general contractor. Further, nothing in the insurance policy prevents that fact pattern from triggering additional-insured coverage for the general contractor or owner.

In cases such as these, the subcontractor's insurance company clearly owes coverage to the general contractor or owner named as an additional insured. Any doubt about the correctness of this approach was put to rest by the New York federal court when it expressly recognized that its decision was consistent with the "realities of New York litigation practice."

The federal court in New Jersey has also now clarified this issue, rendering the same good public service to those litigating these construction issues in New Jersey. Policyholders should consider the availability of third-party complaints as a way to trigger additional-insured status that could protect them.

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[1] No. 21-7668, 2023 WL 3580836 (D.N.J. May 22, 2023)

[2] Am. Fire, 2023 WL 3580836, at *6 (emphasis in original).

[3] Am. Fire, 2023 WL 3580836, at *7 (citations omitted).

[4] 2:20-cv-01125, 2023 WL 3912562 (E.D.N.Y. Sept. 1, 2021).

[5] Am. Fire, 2023 WL 3580836, at *6.