

Ninth Circuit Strictly Applies Alea and Woo to Bar Insurer From Making Duty to Defend Determination Based Upon Undisputed Extrinsic Evidence Not Relevant to Underlying Claim

Article By:

Darren A. Feider

Often, whether or not a claim against an insured is covered may depend upon facts that are neither in dispute nor at issue in the underlying lawsuit. A personal injury claim obviously would not be covered if the accident occurred before the inception of a typical general liability policy. But must the insurer defend anyway if the plaintiff's attorney makes an error and alleges that a 2010 accident took place in 2011? Similarly, for claims made policies, must an insurer defend a claim that was obviously first made before policy inception merely because the plaintiff did not include in their complaint any allegation about the demand letters that they had delivered to the insured the prior year?

While no Washington court has directly addressed this issue, commentators have opined that insurers should be able to rely upon undisputed extrinsic evidence that do not implicate the allegations in an underlying complaint:

[A]n insurer should not have a duty to defend an insured when the facts alleged in the complaint ostensibly bring the case within the policy's coverage, but other facts that are not reflected in the complaint and are unrelated to the merits of the plaintiff's action plainly take the case outside the policy coverage. This would encompass the existence of facts showing that the insured forfeited any coverage because of a breach of a policy condition.

A. Windt, *Insurance Claims & Disputes* § 4.4, fn. 5-6 (5th ed. 2007)

Last year, in ***Wendel v. Travelers Cas and Sur. Co.***, 2011 WL 864863 (E.D. Wash. March 10, 2011), Judge Lonny Suko adopted this approach and granted summary judgment in favor of an insurer based upon a prior litigation exclusion and evidence regarding a prior lawsuit against the insured that was admittedly all true but not referenced in the underlying complaint.

On March 29, 2012, the 9th Circuit reversed Judge Suko's summary judgment ruling, finding that it

had been error to rely upon out-of circuit precedent and secondary sources. Citing to and quoting from the Washington Supreme Court's decisions in ***Am. Best Foods, Inc. v. Alea London, Ltd.***, 168 Wn.2d 398(2010) and ***Woo v. Fireman's Fund Ins. Co.***, 161 Wn.2d 43 (2007), the 9th Circuit stated that Washington law permits the use of extrinsic evidence only for the benefit of the insured and that, to the extent that this issue is unresolved under Washington law, an insurer must give the insured the benefit of the doubt as to how a Washington appellate court would rule. Thus, at least according to the 9th Circuit, an insurer must defend when they are faced with an obviously uncovered claim but plaintiff's complaint does not include the undisputed facts that demonstrate the absence of coverage.

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