

## Insurer Owes Defense Despite "Extrinsic Evidence," New York Court Holds

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An insurer's duty to defend generally is based on a comparison of the complaint against the insured and the insurance policy language. However, in some jurisdictions, an insurer may consider "extrinsic" evidence — information outside of the complaint — to determine any defense obligation, so long as the evidence is unrelated to the merits of the underlying action. If, based on that evidence, the claim against the insured is not covered, the insurer may deny or withdraw its defense of the insured. Deciding what is, and is not, related to the merits of the underlying action can be a risky endeavor, as the recent case *Travelers Indemnity Company v. Harleystown Insurance Company of N.Y. & A.K.S. Int'l*, 2020 U.S. Dist. LEXIS 47817 (S.D.N.Y. Mar. 19, 2020) (AKS), demonstrates.

AKS involved a dispute between two insurers over whether one of them properly denied a defense to common insureds — Genesys, CUNY, and the State of New York — in an underlying bodily-injury action brought by a pedestrian who was struck by a vehicle near a college campus. Genesys was the general contractor for a construction project at the campus, and hired AKS to erect fencing around the project. AKS agreed to secure insurance coverage for Genesys, CUNY, and the State of New York as additional insureds under AKS's policy, issued by Harleystown. The pedestrian sued the vehicle's driver, AKS, Genesys, CUNY, and the State, alleging in part that AKS negligently installed the fencing which "created a blind curve that obstructed the driver's view," resulting in the driver striking the pedestrian. However, during discovery, the driver testified that "the fence erected by AKS played no role in the accident." Based on that information, Harleystown declined to defend Genesys, CUNY, and the State under AKS's policy, which provided additional-insured coverage for their "liability caused, in whole or in part, by the acts or omissions of [AKS]." Travelers, which insured Genesys, CUNY, and the State, sued Harleystown for a declaration that Harleystown was required to defend those entities. The federal district court in AKS agreed with Travelers.

The district court first found that the allegations in the pedestrian's complaint "plainly" triggered in Harleystown a duty to defend Genesys, CUNY, and the State, because, if the allegations were true, the accident was caused, in whole or in part, by AKS's acts or omissions. Turning to New York's extrinsic-evidence exception, which "allows an insurer to refuse or withdraw a defense if . . . extrinsic [evidence] . . . unrelated to the merits of plaintiff's action, plainly take[s] the case outside the policy coverage," the district court held that the exception was not applicable. "For this exception to apply," the court stated, "the extrinsic evidence relied upon may not overlap with the facts at issue in the underlying case." The driver's testimony, the court found, "goes directly to the merits of [the pedestrian's] claims against AKS and, by extension, his claims against Genesys, CUNY, and New York State (to the extent that [the pedestrian] seeks to hold these entities liable for A.K.S.'s conduct)." Thus, the court held, Harleystown could not rely on that extrinsic evidence to "defeat a duty to defend claim."

In so holding, the district court contrasted another recent case, *Striker Sheet Metal II Corporation v. Harleystown Insurance Company*, 2018 U.S. Dist. LEXIS 15892 (E.D.N.Y. Jan. 31, 2018), in which the court held that the insurer — ironically, also Harleystown — was permitted to deny a defense to its insured based on extrinsic evidence which was "**wholly irrelevant** to the principal merits of the Underlying Action," and which proved the claim against the insured was "**definitively excluded** from the policy's coverage." Because the extrinsic evidence in AKS was not "wholly irrelevant" to the merits of the pedestrian's suit, the district court entered judgment for Travelers on its claim that Harleystown owed the additional insureds a defense.

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As *AKS* demonstrates, duty to defend decisions in New York depend not only on whether extrinsic evidence is sufficient to take a claim outside of the policy's coverage, but also on whether any such evidence is sufficiently unrelated to the merits of the underlying action. Insurers that get either part of the analysis wrong will be found to have breached their duty to defend.

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