

NEWS & ARTICLES

VERMONT COURT: INSURER CAN INTRODUCE EXTRINSIC EVIDENCE TO NEGATE DUTY TO DEFEND

ProSelect Insurance Co. v. Springfield Hospital, Docket No. 227-4-12 (Vt. Sup. Ct. Windsor Unit May 16, 2013)

By [Michael Passman](#)

On May 16, 2013, the Vermont Superior Court, Windsor Unit, held that an insurer could introduce extrinsic evidence in a declaratory judgment action to negate the duty to defend its insured. The court's well reasoned opinion provides guidance for insurers grappling with the issue of whether an insurer can introduce extrinsic evidence to negate a duty to defend, and, if so, when.

In *ProSelect Insurance Co. v. Springfield Hospital*, the underlying plaintiff, a hospital patient, was allegedly sexually assaulted by another patient. The underlying plaintiff filed suit against the hospital, alleging only that she had been "assaulted" and that the hospital negligently failed to keep her safe from the assault. The underlying plaintiff's complaint did not allege that the assault had been *sexual* in nature. The underlying plaintiff's attorney, however, stated in correspondence with the hospital that his client was claiming that she was sexually assaulted.

The hospital submitted the underlying lawsuit to its insurer. The insurer's policies contained an exclusion for claims arising out of sexual abuse or molestation. Because the underlying complaint mentioned only a "generic assault" the insurer agreed to provide a defense subject to a reservation of rights. In its reservation of rights letter, the insurer noted that the underlying plaintiff's attorney's correspondence stated that the assault had been sexual in nature and reserved its right to deny if this information became confirmed through the litigation.

After the underlying plaintiff confirmed in her interrogatory answers that she had been *sexually* assaulted, the insurer filed a coverage action seeking a declaration that it owed no duty to defend or indemnify the hospital. The hospital conceded that the insurer did not owe a duty to indemnify, but contended that it was still entitled to a defense because the underlying complaint did not allege that the assault was sexual in nature. The insurer and insured each filed a motion for summary judgment.

Citing Vermont precedent, the court noted that the presence of a duty to defend is ordinarily determined by comparing the coverage provisions of the policy with the allegations of the underlying complaint. Under Vermont law, however, an insurer is permitted to make an independent examination of extrinsic facts to determine whether a policy exclusion applies when the determination of that issue involves factual questions not covered by the underlying complaint.

The court then considered whether the nature of the alleged assault was sufficiently independent from the merits of the underlying complaint to permit the insurer to consider extrinsic evidence to determine the existence of its duty to defend. The court explained the law as follows:

-Extrinsic evidence cannot be used to contradict the factual allegations of the underlying complaint.

-Extrinsic evidence cannot be used when it relates both to the coverage issue and to the merits of the underlying lawsuit.

-Extrinsic evidence can be used when the coverage issue will not be resolved by the

trial of the underlying plaintiff's suit against the insured.

The court found that whether the underlying plaintiff's injuries arose from an assault of a sexual nature was not related to the merits of the underlying lawsuit. The liability trial would determine whether or not a sexual assault occurred, but it would not differentiate between a sexual assault and a physical assault. The court held that it was therefore appropriate for the insurer to seek an answer to the coverage issue in a declaratory judgment action using the uncontested evidence that the underlying plaintiff was sexually assaulted.

The court further held that whether the sexual assault actually occurred – the focus of the underlying lawsuit – was *not* material to the coverage action. The focus of the coverage action was whether the assault, *if it occurred*, was sexual in nature. The court granted summary judgment in favor of the insurer and allowed the insurer to withdraw its defense because the evidence was undisputed that the alleged assault, if it occurred, was sexual in nature.

The *ProSelect* decision stands for the proposition that extrinsic evidence can be used in a coverage action to negate a duty to defend even when there are factual disputes in the underlying action. As explained in *ProSelect*, the coverage action does not need to reach the truth as to what actually happened. The coverage action need only address whether the *alleged* underlying injury, *if it occurred*, is covered or not covered.

For more information on the issues discussed above, or any other insurance coverage questions, please contact Adam Fleischer, AFleischer@BCNlaw.com or Michael Passman, MPassman@BCNlaw.com.