

Washington Supreme Court takes Broad, Pro-Policyholder View of Liability Insurer's Duty to Defend.
(below)

Washington Supreme Court Takes Broad, Pro-Policyholder View of Liability Insurer's Duty to Defend

Insurer Must Defend If Policy "Conceivably" Covers Allegations in Complaint, and Extrinsic Evidence Can Create, But Not Defeat, Duty to Defend

Woo v. Fireman's Fund Ins. Co., 164 P.3d 454 (Wash. 2007) (en banc)

Case at a Glance

Under Washington law, a liability insurer's duty to defend is triggered if the insurance policy conceivably covers the allegations in a complaint against the insured. There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both the exceptions favor the insured. First, if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend. Second, facts extrinsic to the complaint may only trigger the duty to defend; they cannot defeat a defense obligation arising from the complaint. Moreover, uncertainty in the law regarding the scope of an insurer's duty to defend a particular

type of claim may create a potential for coverage and thus a duty to defend. Thus, a dentist's professional liability and general liability insurer had a duty to defend allegations that a dentist played a practical joke on a patient/employee under anesthesia by inserting boar tusks in mouth, photographing her, removing the tusk flippers, and inserting temporary partial bridges, during the course of a dental procedure.

Summary of Decision

Facts. Woo was a dentist who had his own practice. He employed several staffers to work for him. One of them was Tina Alberts. She had worked for Woo for about five years as a dental surgical assistant.

Woo was a "kiddier." Alberts' and her family raised potbellied pigs. She often talked about them at work. Woo apparently made offensive comments about these pigs. He argued that his comments were part of the "friendly work environment" he encouraged in the office.

Near the end of this process, Woo played a practical joke on Alberts. It came to a bad end. The joke process had three phases.

In Phase One ("P-1") there was dental surgery. Woo had agreed to replace two of Alberts' teeth with implants. The procedure required Woo to install temporary partial bridges as spacers. These bridges are called "flippers." He had ordered two of them. One was to do the work, and one was "shaped like boar tusks." He planned to insert the boar-tusk-flipper first, take pictures, remove the joke flipper, and finish the surgery with the first flipper.

Woo's original intention was that Alberts would be under local anesthetic, and he would explain the joke to her and ask permission. However, she asked for general anesthesia so Woo decided to insert the tusk-flipper, take pictures while she was "out," and then show them to her later. Since Alberts was under general anesthesia, Woo added an additional component to the setup: he and the attending staff pried Alberts' eyes open for some of the pictures.

In P-2, Woo had the pictures developed and took a look. Once he saw them Woo decided they portrayed her as ugly and hence that Alberts should not (have to) see them. According to Woo, he informed his staff of his decision.

In P-3, about a month after the surgery, Alberts was given an office party to celebrate her birthday. She was also given the photographs by the staff as some sort of gift.

Now we get into the causal consequences. Alberts was stunned. She assisted with one surgical procedure after the party, went home, and never returned to her job. Woo called several times and wrote to apologize, but Alberts did not respond.

Procedure. Thereafter, Alberts' sued Woo allegedly outrage, battery, invasion of privacy, false likeness, public disclosure of private acts, non-payment of overtime wages, retaliation for requesting payment of overtime wages, medical negligence, lack of informed consent, and negligent infliction of emotional distress.

Fireman's Fund insured Woo, and his policy contained three independent components: professional liability, employment practices liability, and general liability. Fireman refused to defend under any of the policy's coverages. Its grounds for refusing a defense were slightly different for each of the policies. It thought that what Woo had done was not within his professional capacity—the provision of dental services—and so was not covered. Employment practices liability insurance was restricted to sexual harassment, discrimination, and wrongful discharge. What happened to Alberts was none of these three, said Fireman's. It refused to defend under the CGL policy for two different reasons. First, the practical joke was intentional, and second, it was not a "business activity," which is what the policy insured against.

Since Fireman's Fund refused to defend him, Woo hired an attorney and the two of them defended vigorously for a time. Eventually, Woo settled with Alberts just prior to trial for \$250,000.

Thereupon, Woo sued Fireman's Fund, among other insurers, and his insurance broker. (One of the other insurer defendants was a corporate affiliate of Fireman's, and Fireman's agreed to pay any amounts for which it might be liable. Woo's homeowner's carrier and personal excess liability carrier paid at least part of Woo's defense subject to a reservation of rights. It obtained a partial summary judgment and assigned its rights to Woo. Woo dismissed its broker.)

Woo obtained summary judgment against Fireman's as to its duty to defend, and then the case went to the jury with respect to both common law bad faith

and statutory bad faith. The jury awarded Woo damages of \$750,000, on the basis of which the trial court entered judgment against Fireman's for the jury amount. In addition, it awarded attorneys' fees and costs plus recovery of the \$250,000 settlement Woo negotiated with Alberts. In other words, Woo recovered \$1 million from Fireman's Fund, plus attorneys' fees.

Fireman's appealed to the Washington Court of Appeals, which reversed the trial court's summary judgment regarding Fireman's duty to defend and therefore instructed the trial court to vacate the jury's verdict and dismiss the case. *Woo v. Fireman's Fund Ins. Co.*, 114 P3d 681 (Wn.App. 2005). Woo petitioned the Supreme Court for review, and it accepted the petition. *Woo v. Fireman's Fund Ins. Co.*, 134 P3d 1171 (Wn. 2006).

In accepting Woo's petition, the Washington high court articulated three issues. First, did Fireman's Fund have any duty to defend under any of the three policies? Second, did any of the other issues raised by Fireman's at the appellate level have merit? Third, is Woo entitled to attorneys' fees and court costs on appeal? The supreme court answered the first and third question affirmatively and answered the second question negatively. In effect, the Washington Supreme Court affirmed the judgment entered by the trial court.

Duty-to-Defend Rule. Much of what this court says about the rules governing duty-to-defend decision is true in a great many states. The duty to defend is broader than the duty to indemnify. The duty defend arises at the time an action is first brought, and when the insurer receives notice, whereupon it is based upon the insured's *potential for liability*. In making a decision about whether to defend an insured, an insurer must construe the complaint liberally, and if it alleges "facts which *could*, if proved, impose liability upon the insured within the policies coverage[.]" it must defend. Liability insurers which may have a duty to defend are not relieved of their duty to defend unless "the claim alleged in the complaint is 'clearly not covered by the policy.'" Furthermore, if a complaint is ambiguous, it will be construed by courts as "triggering the insurer's duty to defend[.]" so that an insurer needs to interpret it in the same way. In summary, said the court, "the duty to defend is triggered if the insurance policy *conceivably covers* the allegations in the complaint,

whereas the duty to indemnify exists only if the policy *actually covers* the insured's liability. (The two phrases italicized in the last sentence were italicized in the court's text, whereas the words italicized before that in this paragraph were added here.)

Fairly obviously, the foregoing is a very strong version of what is often called the "Eight Corners Rule," under which that which is in the pleadings—or suggested by them—determines the duty to defend. Washington State has two exceptions to the "Eight Corners Rule." Both of these exceptions favor the insured. Here they are. First, "if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist, the insurer *must* investigate and give the insured the benefit of the doubt that the insurer has a duty to defend." Notice pleading rules, which require only a short and plain statement of the claim showing that the pleader is entitled to relief, impose a significant burden on the insurer to determine if there are *any* facts in the pleadings that could conceivably give rise to a duty to defend. Second, "if the allegations in the complaint conflict with facts known to or readily ascertainable by the insurer, or if the allegations . . . are ambiguous or inadequate, facts outside the complaint may be considered. The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend—it may do so only to trigger the duty." (Citations, internal quote signs, and ellipses are omitted.) "[I]f it is not clear that the complaint does *not* contain allegations that are not covered by the policy, the insurer has a duty to defend."

Fireman's tried a radical approach to modifying Washington's Eight Corners Rule, which is also sometimes called the "Complaint-Allegation Rule." Fireman's argued that it was lawful for an insurer to refuse to defend someone when there was an undetermined rule of law at stake, and it was "fairly debatable" as to whether the insurer would have a duty to defend once the undecided law was actually decided. The court rejected this view for the simple reason that by law (in Washington state any way) all doubts are to be resolved in favor of the insured, and not against them. This follows from the fact that "[t]he duty to defend arises based on the insured's *potential* for liability and whether allegations in the complaint could *conceivably* impose liability on the insured." Fireman's argument, the court pointed out, essentially allows "an insurer [to] rely on its own

interpretation of case law—or what is bought from a sympathetic coverage lawyer—to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured.” Such an approach cannot be reconciled with the rule that insurers must give their policyholders the benefit of the doubt when determining whether a policy covers allegations in a complaint.

Duty to Defend under Professional Liability Provision. Utilizing these rules, the Supreme Court found that Fireman’s had a duty to defend under the professional practice policy. Most significantly, the court found that what Woo did to Alberts was within the definition of “dental services,” which definition includes owning, maintaining, or operating an office for the practice of dentistry. The court’s reasoning was that virtually everything which led up to Alberts’ injury happened at the office during legitimate dental surgery. The court of appeals below had held that “[n]o reasonable person could believe that a dentist would diagnose or treat a dental problem by placing boar tusks in the mouth while the patient was under anesthesia in order to take pictures with which to ridicule the patient.” This was the wrong standard, according to the supreme court. The proper standard is whether the actions are conceivably covered under the insurance policy, not whether a reasonable and rather small group of highly educated people would think it was not. The supreme court emphasized that “Woo’s practical joke did not *interrupt* the dental surgery procedure[; rather,] the acts that comprise the practical joke were *integrated into* and *inseparable* from the overall procedure.” (Emphasis added.) In addition, the court of appeals paid no attention to the breath of the statutory definition of the “practice of dentistry.” The court distinguished Woo’s practical joke from sexual acts which might be forced on a patient by a doctor. The use of anesthesia did not, in the supreme court’s view, create the analogy between sexual intercourse and the insertion of boar tusks in the mouth. Hence, *Standard Fire Ins. Co. v. Blakeslee*, 771 P.2d 1172 (Wn. App. 1989) (duty to indemnify) was irrelevant.

Duty to Defend under CGL Provision. The court also found that there was a duty to defend under the CGL policy. It was not a completely standard policy. As usual, the term “occurrence” was defined as an “accident,” but the term “accident” was also defined in the policy, whereas in most CGL policies it is not

defined. In any case, it was defined as follows: A “fortuitous circumstance, event or happening that takes place and is neither expected nor intended from the standpoint of the insured.” Fireman’s argued that Alberts’ resulted from Woo’s intentional conduct, and not from an “accident.” The supreme court rejected this view. There were three separate assertions of negligence in the complaint: medical negligence, lack of informed consent, and negligent infliction of emotional distress. It was *conceivable* that the jury could find a covered loss under this policy. Hence, there was a duty to defend. In addition, Woo’s conduct was not exclusively intentional conduct. Under this policy, in order to defeat the proposition that there was an accident, Woo “had to have ‘expected or intended’ the specific ‘event or happening’ alleged in the complaint. Thus, he would have had to have intended not only the ‘event or happening’ of photographing her with the boar tusk flippers in her mouth but also the ‘event or happening’ that Alberts would sustain the specific injury she alleged is in the complaint.” Thus, although Woo’s conduct in P-1 was likely intentional, it is conceivable that he did not intend the conduct in P-3 which actually resulted in Alberts’ injuries.

Moreover, the Woo policy covers “continuous or repeated exposure substantially the same general harmful conditions.” Those harmful conditions, the supreme court ruled, included the prolonged kidding about potbelly pigs. It is conceivable that the jury would find that these taunts were part of what injured Alberts. Additionally, Woo’s CGL policy covers not only bodily injuries but “personal injury.” This coverage is widely known as Coverage B. The Washington policy covering Woo defined “personal injury” to include “harm that arises out of one or more of the following offenses: assault, battery, mental anguish, mental shock or humiliation. . . [or] invasion of an individual’s right of privacy.” To be covered, the “personal injury” must be “caused by an offense which arises in the context of the insured’s business.” The term “offense” was defined as “a fortuitous, inadvertent or mistaken business activity giving rise to . . . personal injury neither expected nor intended from the standpoint of the insured.” The phrase “your business” was defined as “the trade, profession, or occupation in which [the insured is] engaged and which is shown on the declarations page.” According to the court, “Alberts’ complaint did not clearly allege

that Woo expected or intended that his taunts or the practical joke would cause personal injury to Alberts," so, as a consequence, "Fireman's had a duty to defend him."

No Duty to Defend under Employment Practices Liability Provision. The court agreed with Fireman's that there was no duty to defend under the employment practices liability coverage provision which obligated Fireman's to "pay all sums which [the insured is] legally required to pay as damages as a result of sexual harassment, discrimination, or wrongful discharge that arises out of a wrongful employment practice." Obviously, there was no sexual harassment here and there was no discrimination. The only question then was "Is there a wrongful discharge?" The court thought not. What happened was that Alberts quit the biz because of the emotional distress inflicted upon her as the result of taunting and tushes.

Extracontractual Liability. Having established that Fireman's breached the contract of insurance by failing to defend. It went on to decide that no new trial was needed on the issue of bad faith. Nothing was wrong with the jury instructions. There was no proof that the settlement of the case was fraudulent or performed in collusion in order to injure the insurance company. Indeed, the settlement was reasonable. There was testimony as to the injury to Woo resulting from Fireman's failure, namely, his own mental distress. The court acknowledged that the damages were "extraordinarily high" given the medical, psychiatric, and expert testimony, which was nonexistent. Nevertheless, the supreme court stated that it could not substitute its judgment for that of the jury. Finally, and in the end, the supreme court affirmed the award of attorneys' fees, thereby affirming a significant and influential past case regarding the recovery of attorney's fees, namely, *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673 (Wn. 1991).

Comment

This is a wonderful teaching case! That includes both law students and CLE-attenders. The facts are wonderful; the prose is good; the arguments are clear.

At the same time, it is clear that the Washington

duty-to-defend rule is more favorable to insureds than they are in many states. In Washington, the rule is that if coverage is *conceivable* then the insurer owes a duty to defend. There are those—and I am almost among them—who believe that there is no such thing as a lawsuit which cannot be pled in such a way that covered liability conceivably exists. There should be a course in law school entitled "Creativity, the Imagination, and the 'Truly Great Pleading.'" One wonders what will happen when "Notice Pleading Rules" really start sinking—a process which has already begun.

One has to wonder about some of the logic in the Woo decision. The court says that the "Tuskany Joke" did not "interrupt" the surgical procedure. That proposition seems to me very clearly mistaken. It certainly did not interrupt it in the same way Woo's having had sex with Alberts in the chair and on spot. (Woo wooing Alberts would be no joke.) Nor did it interrupt the proceeding in the same way a hand of bridge would have, if he tied her down and woke her up to play. Nevertheless, it was an interruption. So, of course, would have been a quick surgery for a burst appendix.

For the same reason, it seems to me that Woo's Joke was not integral to the surgical procedure. It was integrated into what Woo did, but it was not integral to or integrated into the type of surgery he was performing. Surgeries have plans, steps, and techniques; the "Tuskany Joke" is not part of any of them.

For roughly the same reason, the Woo Dental Prank was in fact separable from the surgery. The court asserts otherwise, saying that the two were inseparable. Of course, they did happen in the same place and at the same time and both required the skills of a dental surgeon. Still, it is easy to imagine doing the original operation without the tusk insertion; in fact it happens all the time in the offices of dental surgeons. It is also easy to imagine doing the tusk insertion independently of the orthodox surgery. One can easily imagine a staff member in Woo's office volunteering to play the role of the "tuskiaque." Perhaps the one who gave the pictures to Ms. Alberts would be a good candidate. //Quinn