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## PERSPECTIVE

## Extrinsic evidence may be used to defeat application of insurance policy exclusion

By Peter S. Selvin

In coverage disputes, extrinsic evidence can be used to support an insurer's duty to defend (*Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App.3d 1072, 1987-1088 (1987)) or a carrier's declination of coverage (*Fire Ins. Exchange v. Jiminez*, 184 Cal.App.3d 437 (1986)). A recent unpublished case, however, carries this principle one step further by establishing that extrinsic evidence may be used to defeat the application of an exclusion.

In *Dua v. Stillwater Ins. Co.*, No. B314780 (Cal. Ct. App. May 5, 2023), the insured (Dua) and her boyfriend (Taylor) were sued by the Peroffs for personal injuries sustained caused by Taylor's dogs. Relying on an animal liability exclusion, Stillwater declined to provide Dua a defense. The exclusion in question stated that there would be no coverage for injuries arising from any animals "owned by or in the care, custody or control of the insured, or any member of the insured's family or household".

Pushing back against Stillwater's declination, Dua informed Stillwater that she did not own the dogs and that the dogs were in the care, custody and control of her boyfriend

Taylor. Notwithstanding this information, Stillwater stood by its declination. In other words, Stillwater ignored information from its insured that defeated the application of the exclusion relied upon by the carrier.

Following Stillwater's declination, Dua settled with the Peroffs and she filed suit against Stillwater. Although the trial court granted summary judgment to Stillwater, the appellate court reversed.

In this regard, the appellate court held that "Stillwater ignored the facts provided by Dua suggesting that the policy's animal exclusions did not apply because she did not own the dogs, nor were they in her care, or control. The duty to defend exists where extrinsic facts, both disputed and undisputed, that the insurer knows or becomes aware of from any source at the time of inception of the third party lawsuit or at the time of tender, suggest there may be coverage." (*Hartford Casualty, supra*, 59 Cal.4th at p. 287.) "Thus, '[i]f any facts...known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates "all facts suggesting potential coverage."' (*Ibid.*) There is no evidence that Stillwater took any measures to in-

vestigate or otherwise negate the facts suggesting that an animal liability exclusion may not apply and there was potential coverage, and therefore it had a duty to defend Dua."

The appellate decision in *Dua* raised another point of interest.

On appeal, Stillwater argued that Dua's acknowledgement that she did not own or have custody or control over Taylor's dogs meant that the Peroffs could not establish liability as to Dua and therefore Stillwater did not have a duty to defend her.

In making this argument, Stillwater conflated the possibility of Dua's liability with its own duty to defend. The court reasoned that "even if Dua cannot be found legally liable under the Peroffs' complaint as pleaded, and is therefore not entitled to indemnity coverage under the policy, Stillwater may still be required to defend her. The Peroffs' claims, when evaluated in light of the facts presented by Dua to Stillwater when she tendered the claim, may have been frivolous and unmeritorious, but did not come within the animal liability exclusion. They thus created at least a possibility of coverage and the duty to defend. (*Horace Mann, supra*, 4 Cal.4th at p. 1086 ["An insured buys liability insurance in large part to secure a defense

against *all* claims potentially within policy coverage, even frivolous claims unjustly brought"].) The duty to defend is broader than the duty to indemnify. (*Horace Mann, at p. 1081; Gray, supra*, 65 Cal.2d at p. 278)"

The court concluded that Stillwater had failed to demonstrate that there was no conceivable theory to bring the Peroffs' complaint within the possibility of coverage. For this reason, the appellate reversed the trial court's granting of summary judgment to Stillwater.

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