

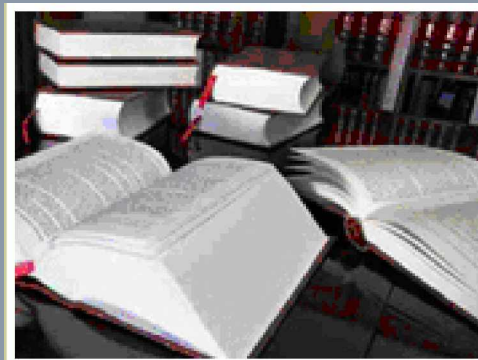
# LEGAL ALERT

## Duty to Defend: Supreme Court Of Virginia Rejects Strict Eight Corners Approach.

The general rule under Virginia law is that an insurer's duty to defend arises when the complaint alleges facts and circumstances, some of which, if proved, fall within the risk covered by the Policy. Courts have often described this as an "eight corners" rule, which confines the inquiry concerning the duty to defend to the policy language and the allegations of the complaint; evidence outside the eight corners of these documents may not be considered. The Supreme Court of Virginia has never expressly endorsed the "eight corners" approach, but its decisions have been widely understood as adopting and applying this rule. In one 1988 case, however, the court, without discussion, considered extrinsic evidence when assessing an excess insurer's duty to defend. Two years later, the court stated, again without discussion, that the duty to defend is "initially" to be determined from the allegations in the complaint. Some attorneys interpreted these cases to mean that external evidence could be considered if it was not clear from examining the complaint and the policy whether there was a duty to defend.

In keeping with the two prior decisions mentioned above, the Supreme Court of Virginia recently looked to circumstances not evident from the allegations in the complaint to determine an insurer's duty to defend. *Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 675, 692 S.E.2d 220 (2010). In *Copp*, the insured was sued for intentional assault and battery. On its face, the "expected or intended" injury exclusion in the policy relieved the insurer of any duty to defend. The exclusion also contained an exception, however, where the insured had acted in self defense. The insured contended that he was entitled to a defense because he acted in self-defense. The insurer argued that, under the "eight corners" rule, it owed no duty to defend because the complaint alleged only an intentional tort. Disagreeing, the Virginia high court explained that the exception to the exclusion required consideration of the insured's self-defense claim. Thus, in *Copp*, the insurer's "eight corners" argument

HCCW  
HARMAN  
CLAYTOR  
CORRIGAN  
WELLMAN  
ATTORNEYS AT LAW



If you would like more information regarding this publication or to discuss this opinion, please contact a member of the firm's coverage practice group:

Mark G. Carlton  
804-762-8003  
mcarlton@hccw.com

John M. Claytor  
804-762-8018  
jclaytor@hccw.com

Jeffrey L. Cole  
804-762-8007  
jcole@hccw.com

Thomas S. Garrett  
804-762-8005  
tgarrett@hccw.com

Carson W. Johnson  
804-762-8001  
cwjohnson@hccw.com

Joseph Robinson  
804-762-8036  
jrobinson@hccw.com

Elizabeth S. Skilling  
804-762-8016  
eskillling@hccw.com

Stanley P. Wellman  
804-762-8015  
swellman@hccw.com

P. O. Box 70280  
Richmond, VA 23255  
T: 804-747-5200  
F: 804-747-6085

www.HCCW.com

was rejected because the policy expressly afforded coverage for self-defense.

A more liberal extrinsic-evidence approach arguably favors insurers, at least where the allegations in the complaint are not entirely clear. For example, the allegations in a complaint may be unclear with respect to whether certain insuring agreement requirements are met, including, among other things, insured status, covered auto, insured premises, or injury during the policy period. Under the *Copp* decision, an insurer should be able to consider extrinsic evidence to determine whether a covered claim exists – e.g., did the injury in fact take place during the policy period. Importantly, however, if the complaint expressly, albeit inaccurately, pleads facts that bring the claim into coverage – e.g., insured status through an incorrectly alleged employment relationship – the insurer cannot negate those express allegations through the use of extrinsic evidence to defeat its duty to defend. Thus, consideration of extrinsic evidence should be confined to a complaint that is ambiguous with respect to whether a covered claim is alleged.