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In a pair of recent decisions issued in the same case, the Ohio Court of Appeals has grappled with the extent of an insurer's ability to rely on information extrinsic to the underlying complaint when determining whether a duty to defend its insured exists. In *Fireman's Fund Insurance Co. v. Hyster-Yale Group, Inc.*, 2018-Ohio-5236 (Oh. Ct. App., 8th Dist. Dec. 20, 2018) [*Hyster-Yale I*], the Court of Appeals held that Fireman's Fund properly considered information gleaned in discovery in underlying asbestos litigation in withdrawing its defense of Hyster-Yale in those proceedings. The Fireman's Fund policies issued to Hyster-Yale stated that Fireman's Fund would defend any suit alleging a covered injury "even if such suit is groundless, false or fraudulent." The information developed through discovery reliably established that the claims against Hyster-Yale involved alleged asbestos-related bodily injury plainly outside the Fireman's Fund policy periods.

In ruling for Fireman's Fund, the court relied in part upon the Ohio Supreme Court's decision in *Preferred Risk Insurance Co. v. Gill*, 30 Ohio St. 3d 108 (1987), where the Supreme Court permitted consideration of the "true facts" – not "solely . . . the allegations of the underlying tort complaint" – in adjudicating the duty to defend. *Preferred Risk* involved a policy that did *not* provide a duty to defend against "groundless, false or fraudulent" claims, and the Supreme Court reasoned that "[t]o compel the insurer to defend regardless of the true facts, where, as here, the insurer has not promised to defend groundless, false or fraudulent claims, imposes an onerous burden for which the insurer did not bargain." Nevertheless, *Hyster-Yale I* expressly cited *Preferred Risk* and concluded that Fireman's Fund had "no duty to defend against claims that are clearly outside the scope of coverage under the insurance contract."

Five months later, on reconsideration, the Court of Appeals vacated its prior opinion in *Hyster-Yale I* and issued a revised decision in *Fireman's Fund Ins. Co. v. Hyster-Yale Group, Inc.*, 2019-Ohio-1522 (Ct. App., 8th Dist. Apr. 25, 2019) [*Hyster-Yale II*]. Although *Hyster-Yale II* reached the same conclusion that Fireman's Fund properly considered information developed through underlying discovery in withdrawing its defense of Hyster-Yale, it conspicuously omitted any reference to *Preferred Risk*. Instead, the court relied upon its unreported decision in *Panzica Construction Co. v. Ohio Casualty Insurance Co.*, 1996 Ohio App. LEXIS 1975 (Ct. App., 8th Dist. May 16, 1996), which – unlike *Preferred Risk* – did involve a policy containing the "groundless, false or fraudulent" language. Applying *Panzica*, the court in *Hyster-Yale II* held that Ohio law permits an insurer whose policy provides a duty to defend against "groundless, false or fraudulent" suits to look to extrinsic evidence to *withdraw* its defense of its insured, but not to refuse to undertake such defense in the first instance.

It is unclear whether the Ohio Supreme Court will wade into the issues raised by *Hyster-Yale I* and *II* regarding the precise parameters applicable to the duty to defend inquiry under Ohio law. In the meantime, for policies that do not provide a duty to defend against "groundless, false or fraudulent" lawsuits, it is clear that *Preferred Risk* remains good law and the "true facts" – not solely those alleged in the underlying pleading – control any determination of whether a duty to defend exists.

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