

# “Pleading In” to AI Coverage

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## American College of Coverage Counsel CGL/Excess Liability Insurance Committee

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**U.S. Specialty Insurance Co. v.  
Harleysville Worcester Ins. Co.**

No. 1:20-cv-07691-SLC  
(S.D.N.Y. Sept. 3, 2021)

## U.S. Specialty

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- Oil-to-gas conversion project: building owner hires GC (Aggressive), which hires sub (E.M. Chimney)
  - Contract requires that owner be an AI on Aggressive's insurance
- Employee of E.M. claims on-the-job injury against owner
- Owner brings third-party complaint against Aggressive
- Owner tenders to Aggressive's GL carrier

# U.S. Specialty

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- HELD:
  - Aggressive’s insurer owed a defense to owner
  - Third-party complaint raised a “reasonable possibility” that injuries were “caused in whole or in part” by E.M.’s actions on behalf of Aggressive, which is enough under NY law
  - Third-party complaint connected the dots between generalized allegations in u/l complaint and Aggressive (because E.M. was working on Aggressive’s behalf) – and did not create legal certainty that Aggressive was not “a” proximate cause of injury.

# **Axis Construction Corp. v. Travelers Indemnity Co. of America**

No. 2:20-cv-1125 (DRH)  
(E.D.N.Y. Sept. 1, 2021)

# Axis Construction

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- Typical employee-of-sub claim against general contractor for a construction site bodily injury
- Subcontract required that sub name GC as an AI (primary & noncontributory), but no sub responsible for conditions caused by other subs

# Axis Construction

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- Axis is GC
  - Sub AWI does millwork
  - Sub ABC does flooring
- Peter Filippone (AWI employee) trips on Masonite sheets left untaped to floor of project
- Axis tenders to AWI's insurance – rejected because loss did not arise out of work done by Filippone's employer
- Axis brings third-party complaint against AWI

# Axis Construction

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- HELD:
  - Third-party complaint triggers coverage because “reasonable possibility” of recovery
  - Carrier must look to complaint, judicial admissions, and third-party complaint facts



# Axis Construction

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- Axis’ allegations “fair game” for DTD:
  - Realities of NY litigation (WC bar)
  - Look to all facts, not just conclusions (evidence in depositions, bills of particulars)
  - First-party complaint is a starting point for duty, and does not narrow that duty

**Trend of self-serving allegations permitting an AI to plead itself into coverage?**

**Limited to unique law of New York?**

**Use of extrinsic evidence to tamp down judicial resort to speculation about what could be shown?**

# Questions ?

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**“Checking your policy, I see you are insured for fire, water storms, auto, medical and disability...but not zombies.”**

# Questions ?