Bad Faith, Business Risk Exclusions, Trigger Coverage Update

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The e-POST

Bad Faith – Tenth Circuit (Oklahoma Law)

Shotts v. GEICO Gen. Ins. Co.
--- F.3d ---, 2019 WL 6461492 (10th Cir. Dec. 2, 2019)

The U.S. Court of Appeals for the Tenth Circuit affirmed that GEICO General Insurance Company (GEICO) did not act in bad faith relating to a case brought by an Oklahoma police officer who alleged that GEICO undervalued his medical expenses related to injuries he sustained from a car accident. The underlying case arose after police officer Brian Shotts (Shotts) suffered injuries when another driver, Dana Pollard (Pollard), drove through a red light and struck Shotts' police car. Shotts alleged that the accident worsened his pre-existing back injuries, which led to an increased dosage in medication and the development of ulcers.

Initially, Pollard's insurance company, Farmers Insurance Group (Farmers), paid out the full amount under Pollard's policy to resolve the claims. In order to get the full policy amount, however, Shotts had to get GEICO to agree to waive its subrogation rights against Farmers. GEICO agreed to the waiver but also began its own investigation into Shotts' claim for benefits. GEICO originally determined that it did not owe Shotts any benefit payments. Later, however, it determined that it owed Shotts approximately $3,200, which was the amount of medical benefits that exceeded Farmers' payout.

Shotts declined GEICO's offer as "unreasonably low" and subsequently filed a bad faith claim against it. Shotts asserted that GEICO had a "first dollar" obligation to cover all of his outstanding expenses once it determined that the amount exceeded Farmers' policy limits, including the amount that would be covered by the Farmers' policy. The appellate court rejected this argument, however, because ruling in Shotts' favor could lead to a double recovery. Such a result would occur because ruling in favor of the "first dollar" argument would obligate GEICO to pay out the full amount to Shotts, but would not stop Shotts from coming to an agreement with Farmers to pay out its policy limit in exchange for GEICO forfeiting its subrogation rights. The appellate court ultimately determined that GEICO's waiver of its subrogation rights extinguished its obligation to promptly pay the full value of Shotts' claim.

Business Risk Exclusions – Ninth Circuit (Georgia Law)

Pulte Home Corp. v. TIG Ins. Co.
--- F.3d ---, 2019 WL 6525203 (9th Cir. Dec. 4, 2019)

The U.S. Court of Appeals for the Ninth Circuit reversed a trial court's decision that held an insurer does not have to provide coverage for the faulty workmanship of a concrete subcontractor. In the underlying cases, the residents of a housing development sued Pulte Home Corporation (Pulte), the general contractor for the housing development. The residents alleged various concrete-related defects stemming from the work of Pulte's concrete subcontractor, Concrete Concepts, Inc. (CCI). Pulte was listed as an additional insured under insurance policies TIG Insurance Company (TIG) issued to CCI. Pulte sought coverage from TIG for the underlying lawsuits, but TIG denied Pulte's request under various business-risk exclusions. Pulte subsequently sued TIG seeking recovery of the defense costs expended in the underlying litigation.

The trial court found in favor of TIG, holding that the business-risk exclusions applied to preclude coverage because the underlying lawsuits resulted from liability that arose after construction on the housing development was completed. On appeal, Pulte argued that the trial court erred by focusing on when the liability arose as opposed to when the alleged property damage potentially occurred. Ultimately, the appellate court reversed the decision of the trial court and held that the allegations in the underlying lawsuits arguably fell within the coverage provided by the TIG policies. Specifically, the appellate court noted that "[n]othing in the policies requires property damage to 'manifest' during the policy period. Rather, the property damage simply must 'occur' during the policy period, no matter when it becomes apparent to a homeowner." Therefore, the appellate court held that because some of the damage alleged in the underlying lawsuits arguably occurred during the policy period, Pulte was entitled to recovery of its defense costs.

Trigger – Illinois

Liberty Mut. Fire Ins. Co. v. Ferrara Candy Co.
No. 1-18-1385, 2019 WL 6830764 (Ill. App. Ct. Dec. 11, 2019)

The Appellate Court of Illinois affirmed the trial court's decision that Liberty Mutual Fire Insurance Co. and Liberty Insurance Corp (collectively, Liberty) had no duty to defend their insured, Ferrara Candy Co. (Ferrara), for Ferrara's alleged intellectual property violations because the insured's alleged actions occurred after the policies at issue were cancelled. Ferrara was created through the merger of two corporations in 2012. One of those corporations manufactured candies pursuant to a relationship with Promotion In Motion, Inc. (PIM), which owned the formula for the candies, trade dress and other intellectual property. As part of the merger, Ferrara cancelled its insurance policies with Liberty. After the merger, Ferrara continued manufacturing the candies pursuant to a new confidentiality agreement executed in November 2012 as part of the relationship with PIM. In April 2015, PIM filed a lawsuit against Ferrara, alleging that Ferrara stole the trade secrets relating to the candies' formulas, and copied packaging design and trade dress for the candies.

Liberty initially defended Ferrara under a reservation of rights, but later withdrew from that defense and commenced a declaratory judgment action once it determined coverage did not exist under the policies at issue. Liberty then filed a motion for judgment on the pleadings, which the trial court granted. The trial court held that because the alleged violations of trade secrets and trade dress occurred after the merger and after the Liberty policies had been cancelled, coverage was not triggered and Liberty did not have a duty to defend Ferrara in the lawsuit by PIM. The trial court also held that Liberty was entitled to reimbursement of the defense costs that it paid in defending Ferrara in the underlying action.

The appellate court affirmed the trial court's ruling, saying that the trade dress infringement claim was the only potentially covered allegation in PIM's lawsuit, and the complaint specifically alleged that such conduct occurred after the merger – and, therefore, after the Liberty policies were cancelled. Moreover, because Liberty's initial agreement to defend Ferrara in the lawsuit by PIM was under a reservation of rights, Liberty was also entitled to recoup the defense costs it paid to defend Ferrara in the lawsuit by PIM.

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