PLUNKETT COONEY

Covered-Auto Endorsement, 'Suit,' Assault and Battery Coverage Update

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Covered-Auto Endorsement – Tenth Circuit (Oklahoma Law)

Genzer v. James River Ins. Co.
--- F.3d ---, 2019 WL 3926934 (10th Cir. Aug. 20, 2019)

The U.S. Court of Appeals for the Tenth Circuit held that an Uber insurer was not required to cover the medical expenses of an injured Uber driver. In April 2017, Uber driver Bonni Genzer had completed a 139-mile trip from Oklahoma City's airport to a rural town. On her return trip, after dropping off her passenger, a metal object flew off an oncoming semi-truck and crashed through her car's windshield, injuring her face. Genzer sought $1 million in uninsured motorist benefits under Uber's policy with its insurer, James River Insurance Company (James River). James River denied Genzer's claim on the grounds that the "covered-auto endorsement" under which Genzer sought coverage did not apply after a driver drops off a passenger at the final destination.

The trial court agreed with James River and held that under the plain language of the endorsement, no coverage is available to a driver who is injured after dropping off their passenger at the final destination. The appellate court affirmed the decision of the trial court and held that "subpart (a)(2) of the covered-auto endorsement covered Genzer from when she accepted her passenger's request for transportation from Will Rogers World Airport in Oklahoma City until she dropped off the passenger at the requested final destination in Woodward." Therefore, no coverage was available to Genzer under the James River policy. The appellate court ultimately stated that "[t]hough we sympathize with Genzer's misfortune and injuries, this outcome is dictated by the covered-auto endorsement's plain terms."

'Suit' – Illinois

Illinois Tool Works, Inc. v. Ace Specialty Ins. Co.
--- N.E.3d ---, 2019 WL 3997165 (Ill. App. Ct. Aug 23, 2019)

The Appellate Court of Illinois, First District affirmed that Ace Specialty Insurance Company, New Hampshire Insurance Company, and Zurich American Insurance Company (collectively, the Insurers) had no duty to defend their collective insured, Illinois Tool Works, Inc. (ITW), in a request for mediation

by the U.S. Environmental Protection Agency (USEPA) seeking to recoup the USEPA's costs in remediating the site in question.

The Insurers issued general liability policies to Diagraph Corporation (Diagraph) between 1974 and 1985. Diagraph built manufacturing equipment and was acquired by ITW in 2001. After an investigation revealed potential environmental contamination in the vicinity of Diagraph's manufacturing site, the USEPA designated the surrounding area a Superfund site and began remediation activities. ITW was eventually notified that it was a potentially-responsible party and was invited to participate in a mediation through which USEPA would be seeking reimbursement for the remediation costs. ITW sought coverage from the insurers, but the insurers did not provide coverage, prompting ITW's suit against the insurers.

The circuit court granted partial summary judgment to the Insurers, finding that the mediation did not trigger the Insurers' duty to defend because it was not a "suit," and because the request for mediation was not sufficiently connected to another suit for reimbursement of costs relating to a nearby site. The appellate court agreed, saying "the allegations in the … lawsuit are different from the claims in the ... mediation. Therefore, the duty to defend triggered by the ... lawsuit does not extend to the ... mediation." Furthermore, the mediation did not constitute a lawsuit for which a duty to defend existed. The appellate court reasoned that "[t]he [I]nsurers do not have a duty to defend against a hypothetical lawsuit that has not yet occurred. Indeed, the reason ITW agreed to participate in the … mediation was to resolve the … claims without a lawsuit." Therefore, there was no duty on the part of the insurers to defend ITW in the mediation.

Assault and Battery – Sixth Circuit (Kentucky Law)

United Specialty Ins. Co. v. Cole's Place, Inc.
--- F.3d ---, 2019 WL 3955847 (6th Cir. Aug. 22, 2019)

The U.S. Court of Appeals for the Sixth Circuit held that an insurer had no duty to defend or indemnify an insured nightclub for six lawsuits arising from a shooting. In the underlying cases, six patrons of Cole's Place, Inc. (Cole's Place) who sustained injuries during the shooting sought damages from Cole's Place, arguing that it had negligently failed to protect them from foreseeable harm. United Specialty Insurance Company (United Specialty) defended Cole's Place under a full and complete reservation of rights and filed a declaratory judgment action in federal court seeking a finding of no defense and indemnity based, in part, on an assault and battery exclusion contained in its policy.

The assault and battery exclusion precluded coverage for, among other things, injuries arising out of or resulting from "any actual, threatened or alleged assault and battery." The district court agreed with

United Specialty that the underlying cases, which all arose from a nightclub shooting, clearly alleged injuries arising from battery as that term is defined under Kentucky law. Therefore, the district court entered judgment in favor of United Specialty, finding that it did not owe a defense or indemnity for the underlying cases. The appellate court affirmed, finding that there was no genuine issue of material fact that the nightclub shooting constituted battery and, therefore, the assault and battery exclusion applied.

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