PLUNKETT COONEY

Occurence, Duty to Defend, Attorney Fee Shifting Provision Insurance Coverage Update

May 15, 2020
Louisiana, Texas, Oklahoma Coverage Update

Occurrence – Fifth Circuit (Louisiana)

Gilchrist Constr. Co. v. Travelers Indem. Co.
--- Fed. Appx.---, 2020 WL 2311934 (5th Cir. May 8, 2020)

The U.S. Court of Appeals for the Fifth Circuit upheld the district court's ruling that there was no "occurrence" alleged in the lawsuit against the insured, a construction company. The underlying plaintiffs alleged that the insured intentionally and maliciously buried rubble and debris on the plaintiffs' property and underpaid plaintiffs for the dirt it excavated, contrary to their agreement. After the jury returned a $5.5 million verdict in the plaintiffs' favor, the insured filed a breach of contract and declaratory judgment action against its insurers, Travelers Indemnity Company (Travelers) and Arch Insurance Company (Arch).

The district court held that neither Travelers nor Arch owed coverage because the underlying action involved the insured's alleged intentional and malicious behavior, which is not an "accident," and, thus, not an "occurrence." The appellate court agreed, reasoning that the insured's actions were "intentional and not accidental." The fact that the underlying plaintiffs had expected their land to be left in a certain way, and the insured violated that expectation, did not mean that the property damage was "unforeseeable or unexpected." The allegations were simply "not the sort of unexpected incident the policies cover."

Duty to Defend – Texas

Loya Ins. Co. v. Avalos
--- S.W.3d ---, 2020 WL 2089752 (Tex. May 1, 2020)

The Supreme Court of Texas recognized an exception to the state's "eight-corners rule," which holds that a court may only refer to the relevant policy language and factual allegations in the complaint against the insured when deciding whether an insurer has a duty to defend. The exception allows an insurer to revoke its defense of the insured when there is "conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to

secure a defense and coverage where they would not otherwise exist."

This new exception arises out of an underlying automotive accident in which Loya Insurance Company's (Loya) policyholder Karla Flores Guevara (Guevara) colluded with two individuals who were bringing suit against her. Guevara's husband was driving her automobile when he collided with Osbaldo Hurtado Avalos and Antonio Hurtado (plaintiffs). Knowing that her husband was not an insured under the automobile policy and that coverage might be denied, Guevara and the plaintiffs agreed that the plaintiffs would identify Guevara as the at-fault driver in their complaint. During the course of the legal action, however, Guevara admitted under oath that she was not the driver and that she had colluded with the plaintiffs.

Prior to learning of the collusion, Loya had agreed to defend Guevara in the underlying action. However, once Loya learned of the collusion, it revoked its defense of Guevara. The plaintiffs received a default judgment against Guevara, and they subsequently sued Loya for breach of contract and bad faith. The case ultimately made its way to the Supreme Court, which recognized a new fraud exception to the "eight-corners rule." Additionally, the Supreme Court held that Loya did not act improperly by withdrawing its defense without a declaratory judgment ruling in its favor. The Supreme Court cautioned, however, that the best course of action, in most cases, is to seek a declaratory judgment, and that foregoing such an action should be reserved to those situations in which the insurer is aware of "undisputed evidence of collusive fraud."

Attorney Fee Shifting Provision – Oklahoma

Hamilton v. Northfield Ins. Co.
--- P.3d ---, 2020 WL 2140459 (Okla. May 5, 2020)

Answering certified questions from the U.S. Court of Appeals for the Tenth Circuit, the Oklahoma Supreme Court held that an insured commercial property owner was entitled to an award of attorneys' fees against Northfield Insurance Company (Northfield) following a finding that Northfield breached its insurance contract. The dispute arose when Hamilton filed a claim with Northfield in December 2015, seeking coverage for his leaking roof. Northfield denied the claim, and Hamilton ultimately filed suit against Northfield alleging breach of contract and bad faith. In June 2017, Northfield offered $45,000 to resolve the case, which was more than three times Hamilton's claimed damages. Hamilton rejected the offer, and a jury ultimately awarded Hamilton $10,652.

Hamilton then sought attorneys' fees under 36 O.S. § 3629(B), which provides for an award of attorneys' fees to the "prevailing party." Hamilton argued that he was the prevailing party because Northfield initially rejected his claim and did not make its settlement offer within the 60-day statutory window for making such offers. In response, Northfield argued that Hamilton was not the prevailing

party because the award was less than the offer, regardless of the fact that the offer was made outside of the 60-day window following receipt of a proof of loss. The district court agreed with Northfield, holding that Hamilton was not the prevailing party under the statute because his award was less than the pre-trial settlement offer.

After initially agreeing with the district court, the appellate court ultimately certified two questions to the Oklahoma Supreme Court, the determinative questions being: who is the prevailing party under Section 3629(B) and can the court consider settlement offers made outside the 60-day window for making such offers under the statute? The Supreme Court held that the answer to both questions is "no," and that Hamilton was entitled to an attorneys' fee award. In so finding, the Supreme Court held that the plain language of Section 3629(B) imposed an affirmative duty on the insurer to make an offer of settlement or to reject the claim within 60 days after receipt of a proof of loss. The Supreme Court reasoned that because the statute specifically referenced the proof of loss as the event triggering the duty to promptly make a settlement offer or reject the claim, rather than the filing of a lawsuit, the fee shifting provision only exists in reference to settlement offers made within the 60-day window.

The Supreme Court held that when determining who is the prevailing party under 36 O.S. § 3629(B), a court can only consider settlement offers made within the 60-day statutory window. Accordingly, the fact that Hamilton's award was less than the amount of the Northfield's offer prior to trial, but long after the closure of the statutory window, was irrelevant. Therefore, Hamilton was entitled to attorneys' fees as the prevailing party.

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