PLUNKETT COONEY

State Access to County Insurance, Duty to Defend Coverage Update

November 15, 2021

State Access to County Insurance – Superior Court of New Jersey, Appellate Division

State v. County of Ocean
--- A.3d ---, No. A-3665-19, 2021 WL 5113835 (Nov. 4, 2021)

The Superior Court of New Jersey, Appellate Division, held that the plaintiff, the state of New Jersey, was obligated to defend and indemnify the defendant, the county of Ocean, and the county's employee in a tort action without the ability to resort to the county's insurance. In May 2016, a county homicide detective operating a county vehicle rear-ended a van, injuring the van's passenger. At the time, the county was self-insured for the first $250,000 of defense and indemnity and an excess policy provided coverage beyond that. The passenger sued the county and the detective for damages.

In May 2018, the county's counsel wrote to the Attorney General requesting that the State defend and indemnify the county and the detective as set forth under the New Jersey Tort Claims Act (TCA). Under the TCA, the state is obligated to pay the county prosecutors and their subordinates' defense costs and to indemnify them if their actions involved a state function. The Deputy Attorney General (DAG) responded the same day and took over the defense and indemnification of the county and its detective. However, the DAG later advised the county that the state's obligation to defend and indemnify the county and the detective were secondary to the county's statutory obligation to maintain insurance. As support, the DAG cited to N.J.S.A. 59:10A-5, which states: "The Attorney General may provide for a defense pursuant to this act by an attorney from his own staff or by employing other counsel for this purpose or by asserting the State's right under any appropriate insurance policy which requires the insurer to provide the defense." The county did not respond, and eventually the State filed a complaint seeking a declaratory judgment that it was entitled to use the county's insurance to defend and indemnify the county under N.J.S.A 59:10A-5.

The lower court held in favor of the county and dismissed the complaint. On appeal, the Superior Court of New Jersey, Appellate Division, affirmed and held that the state was obligated to defend and indemnify the county without the ability to resort to the county's insurance. The appellate court determined that the issue of the state's defense and indemnity obligations was controlled solely by the TCA, which required the state to provide both a defense and indemnification to public employees performing an essential state function. The appellate court found, unavailing the state's argument, that N.J.S.A 59:10A-5 permitted the state to fulfill its duty to indemnify the county using the county's statutorily mandated insurance. The appellate court explained that N.J.S.A. 59:10A-5 did not address

indemnification. Instead, under this statute, if "the State is obligated to defend, regardless of who the State then designates to defend, the State bears the corresponding cost of indemnification." Therefore, the state was obligated to defend and indemnify the county without the ability to result to the county's insurance.

By: Joshua LaBar

Duty to Defend, Uninsurable Damages – Tenth Circuit (Colorado Law)

Nat'l Union Fire Ins. Co. of Pittsburgh v. Dish Network, LLC.
No. 20-1215, 2021 WL 5066571 (10th Cir. Nov. 2, 2021)

The U.S. Court of Appeals for the Tenth Circuit held that an insurer was not required to cover an insured in the underlying litigation alleging a violation of the Telephone Consumer Protection Act (TCPA), finding that the damages were uninsurable.

National Union Fire Insurance Company of Pittsburgh (National Union) brought a declaratory judgment action against insured Dish Network, LLC (Dish), seeking a judgment that it had no duty to defend or indemnify Dish in the underlying lawsuit alleging violations of the TCPA. The district court granted summary judgement to National Union.

The appellate court found that the district court correctly held that the TCPA suit sought an uninsurable penalty, the policy did not cover the costs of preventing future violations, and the underlying suit did not allege a covered injury. The appellate court reasoned that the TCPA suit "contained no allegation that unsolicited telemarketing calls physically injured any consumer," and the "only 'injury' alleged was the receipt of unwanted phone calls, which Congress has recognized as a legally cognizable concrete harm." Furthermore, the appellate court found that National Union did not have to defend Dish in the underlying action because the statutory damages claims were a "penalty" under Colorado law and, therefore, "uninsurable as a matter of Colorado public policy."

Dish further argued that the policy expressly covers its legal expenses arising from its obligation to pay. The appellate court disagreed with this argument, finding that the policy did not cover "costs of preventing future harm," and there was no duty to defend "against claims for prospective injunctive relief," because "preventing future violations is not an amount incurred 'because of' an injury that occurred during the applicable period."

Finally, the appellate court rejected Dish's motion to certify to the Colorado Supreme Court where the TCPA-related damages are punitive and unsustainable. The appellate court reasoned that the "question DISH seeks to certify is not novel or uncertain," because the U.S. Supreme Court previously answered this exact question. Therefore, the appellate court affirmed the judgment of the district court in favor of

National Union.

By: Michael Hanchett

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