PLUNKETT COONEY

Voluntary Payment, Advertising Injury, Duty to Defend, Physical Loss Coverage Update

April 15, 2021

Voluntary Payment and No Action Provisions – U.S. District Court for the Western District of Michigan (Michigan Law)

Trident Fasteners, Inc. v. Selective Ins. Co. of South Carolina
2021 WL 1310576 (W.D. Mich. Apr. 8, 2021)

The U.S. District Court for the Western District of Michigan held that an insurer did not owe coverage for an approximately $1.3 million settlement because the plaintiff settled the claim without the carrier's consent. The claim at issue involved Trident Fastener Inc.'s (Trident) provision of defective fasteners to another company, Tenneco, which in turn, manufactured parts incorporating the fasteners for use in General Motors' (GM) vehicles. The fasteners were defective due to improper heat treating performed by a company retained by Trident. As a result of the defective fasteners entering the supply chain, GM initiated a chargeback to Tenneco, which in turn, demanded payment from Trident. Trident turned to Selective for coverage, and Selective began investigating the claim. In the meantime, Trident entered into settlement discussions with Tenneco. Selective learned of the settlement negotiations and advised Trident that it would not consent to settlement. Selective then issued a reservation of rights letter to Trident, offering to provide attorney representation for the claim. Trident nevertheless settled the claim with Tenneco without Selective's consent and without a suit having been filed. Selective then denied coverage on the basis that the settlement violated its policy's voluntary payment and no action provisions.

Trident filed suit against Selective, alleging breach of the insurance contract. Selective moved for judgment on the pleadings arguing that Trident's voluntary settlement breached the policy's voluntary payment and no action provisions. The district court agreed with Selective, finding that Trident's voluntary settlement barred coverage for the claims. After finding that the voluntary payment and no action provisions are valid conditions precedent to coverage under Michigan law, the court held that compliance with the provisions is required unless the insurer both denies coverage and refuses to defend a suit filed against the insured. Because Selective neither denied the claim nor refused to defend a suit, coverage was barred based on Trident's breach of the conditions.

The court also rejected Trident's argument that Selective should have been deemed to have waived reliance on the provisions because it preemptively breached the contract by its bad faith delay in investigating the claim and refusal to participate in the settlement negotiations. In rejecting this argument, the court held that while a duty to act in good faith has been imposed upon insurers in limited circumstances, the duty to act in good faith with respect to investigation and settlement is not triggered until a suit is actually filed against the insured. Accordingly, because no lawsuit had been filed against Trident, the court found that "Trident cannot argue breach of contract through bad faith because the duties of good faith at issue only come into play after a lawsuit is filed against the insured." Finally, the court rejected Trident's argument that it should be permitted to file an amended complaint on the basis that coverage would always be precluded based on the breach of the voluntary payment and no action provisions regardless of any new or different allegations.

Advertising Injury – U.S. District Court for the District of Colorado (Colorado and Washington Law)

The Travelers Indem. Co. of Am. v. Luna Gourmet Coffee & Tea Co.
No. 19-cv-02039, 2021 WL 1293314 (D. Colo. Apr. 7, 2021)

The plaintiffs The Travelers Indemnity Company of America and Travelers Property Casualty Company of America (collectively, Travelers) brought an action seeking a declaration that it did not owe defense or indemnity to the defendant BCC Assets, LLC d/b/a Boyer's Coffee Company, Inc. (Boyer's) in two putative class action suits. In the underlying suits, filed on behalf of Hawaiian coffee farmers and consumers of "Kona" coffee, Boyer's, a manufacturer and seller of coffee, was accused of wrongfully profiting from labeling and selling its ordinary coffee as "Kona" coffee.

Travelers filed a motion for summary judgment partly on the basis that the underlying suits did not fall within the insuring agreement for personal and advertising injury. Specifically, Travelers asserted that there was no advertising injury as a matter of law because there was no "advertisement" or "disparagement" of the underlying plaintiffs' goods or products.

Initially, the trial court disagreed with Travelers' argument that there was no "advertisement." Rather, taking into consideration an insurer's broad duty to defend, the court found that there were "some allegations" that Boyer's marketed and advertised its coffee as originating from Kona. The court did, however, agree that there was no "disparagement." The court reasoned that pursuant to the policies' language and the tort of disparagement, the disparaging statement must be directed at the underlying plaintiffs' goods or products. However, Boyer's alleged false statements did not actually disparage the Hawaiian farmers or consumers of "Kona" coffee. The court explained: "Boyer's alleged false statement that its products contain Kona coffee which allegedly impugns or is derogatory to coffee from the Kona District, which then allegedly impugns Kona farmers' products or goods because they are made from

Kona coffee is too remote to constitute disparagement within the meaning of the Policies or the element of the claim under Colorado or Washington law." Additionally, the court noted that the consumers of "Kona" coffee do not allege to have sold a good or service, and, therefore, the underlying plaintiffs could not have been disparaged as a matter of law. Because the putative class actions did not allege disparagement, the court concluded that there was no personal and advertising injury coverage under the policies.

Duty to Defend – U.S. District Court for the Southern District of Texas (Texas Law)

New York Marine and Gen. Ins. Co. v. Hilliard Munoz Gonzales LLP
2:19-cv-260 (S.D. Tex. Mar. 30, 2021)

The U.S. District Court for the Southern District of Texas held that the plaintiff, New York Marine and General Insurance Company (New York Marine), did not have a duty to defend the defendants, Robert C. Hilliard and Hilliard Munoz Gonzales LLP (collectively Hilliard), in an underlying state court civil barratry lawsuit. New York Marine issued a Lawyer Professional Liability Insurance Policy (the policy) to Hilliard, which was effective Jan. 6, 2015. The underlying barratry lawsuit was filed against Hilliard on March 3, 2016, and alleged claims for misappropriation, fraud and conspiracy. New York Marine declined to provide a defense under the policy.

The genesis for the underlying barratry lawsuit was the 2010 *Deepwater Horizon* oil rig explosion. Hilliard allegedly capitalized on the litigation against British Petroleum (BP) by participating in a scheme, targeting Vietnamese American fishermen and seaman. Hilliard and others allegedly "paid runners several million dollars for tens of thousands of cases." The runners would solicit clients for the BP litigation by gathering identities, social security numbers, and dates of birth of approximately 44,510 Vietnamese Americans with potential claims of economic damages arising from the oil spill. None of the purported clients were aware that their information would be used to file claims against BP. Despite knowing that the clients were not legitimate, Hilliard and other alleged co-conspirators submitted 44,004 presentment forms to BP, seeking approximately $2 billion on behalf of the purported clients. A group of Vietnamese Americans who were solicited as "clients" for the BP oil spill litigation filed the barratry lawsuit against Hilliard. In turn, Hilliard requested a defense from New York Marine. Eventually New York Marine filed a declaratory judgment action and claimed it had no obligation to defend Hilliard.

The court in the declaratory judgment action examined "the eight corners of the pleadings and the policy" and determined that New York Marine did not have a duty to defend Hilliard in the underlying lawsuit. In so holding, the court concluded that the allegations in the barratry lawsuit did not constitute a "claim" under the policy because "professional services" were not rendered by Hilliard on behalf of the litigants in the underlying BP litigation. That is, the claims did not arise from "any act, error, omission

or Personal Injury in the rendering of or failure to render Professional Services." In particular, Hilliard's attempted solicitation of the clients (by mailers and other methods) and the unauthorized filing of presentment forms to BP did not have a causal connection or relation to the rendering or failure to render professional services. In other words, "filing of the presentment forms and claims done without the knowledge or consent of the [underlying plaintiffs] did not qualify as rendering 'Professional Services for others' as required by the Insurance Policy" and the definition of "claim." Therefore, New York Marine did not have a duty to defend under the policy.

Physical Loss – U.S District Court for the Eastern District of Pennsylvania (Delaware, New Jersey, Pennsylvania and Virginia Law)

SSN Hotel Mgmt., LLC. v. Hartford Mut. Ins. Co.
No. 20-6228 (E.D. Pa. April 8, 2021)

The U.S. District Court for the Eastern District of Pennsylvania ruled that nearly two dozen hotel operators could not force the Hartford Mutual Insurance Company (Hartford) to cover losses from pandemic-driven business closures. The court reasoned that there was no "physical loss" from shutting down due to the pandemic and related government orders. In its order, the court further refused to allow the plaintiff SSN Hotel Management, LLC (SSN) to amend its pleadings in an effort to allege physical loss because the virus exclusion precluded any possible coverage even if a physical loss occurred, and the amendment would be futile.

The suit was initiated in December 2020 by hotel operators affiliated with SSN. The suit claimed the hotels had to modify their operations due to shutdown orders by the governors in Delaware, New Jersey, Pennsylvania and Virginia. The hotel operators argued that the governors' orders were "civil authority" actions covered under the Hartford policies. Hartford argued that the hotel operators did not suffer a "physical loss" to the covered properties, so no coverage obligation existed, and moved to dismiss the case.

The district court agreed with Hartford, finding that the hotel operators failed to show their business income losses were caused by a physical loss under the policy. The court reasoned that the losses were the result of the hotels being unable to be used at full capacity because of the governors' orders, not because of a physical loss. The court also found it compelling that the hotels were not required to be closed, limits on capacity were not due to damage or dangerous conditions, and the orders were issued for purposes of addressing a health crisis not physical loss.

Finally, the court held that allowing SSN to amend its complaint for a second time would be futile. SSN already had an opportunity to amend its complaint in response to Hartford's first motion to dismiss, and, at that time, had the opportunity to proffer their best possible pleading. The court further reasoned that the virus exclusion in the policy would make any amendment futile as the exclusion would apply to bar coverage even if SSN alleged physical loss.

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