PLUNKETT COONEY

Bad Faith, Gross Negligence & Defective Workmanship Exclusion Insurance Coverage Update

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Bad Faith – Indiana

Smith v. Progressive Southeastern Ins. Co.
--- N.E.3d ---, 2020 WL 3067807 (Ind. Ct. App. Jun. 10, 2020)

The Indiana Court of Appeals unanimously affirmed the trial court's dismissal of a case brought against Progressive Southeastern Insurance Company (Progressive) by Gregory Smith (Smith), finding that Progressive had not acted in bad faith or improperly defended its insured in an underlying case brought by Smith against Progressive's insured.

Smith was injured in a single-car accident while riding as a passenger in his own vehicle, which was being driven by his friend, Nolan Clayton (Clayton) after a night of drinking. Clayton crashed the car, causing serious injury to Smith when he was ejected from the vehicle, and Smith subsequently sued Clayton. Progressive, as the insurer of Smith's vehicle, agreed to defend Clayton in the negligence action. Smith eventually obtained a $35 million verdict and was awarded a judgment of $21 million against Clayton. Clayton assigned his rights under the Progressive policy to Smith. Smith then brought a bad faith action against Progressive, alleging that Progressive was vicariously liable for the actions or inactions of defense counsel assigned to Clayton that precipitated such a large judgment.

The appellate court rejected Smith's arguments, ruling that Smith had not actually made any specific allegations of malpractice against Clayton's attorneys in the liability case and failed to "show how a smaller judgment would have resulted if [the law firm] had represented Clayton differently." Smith's claim of vicarious liability must fail because it was, in reality, "nothing more than a negligence claim that involves alleged legal malpractice by [the law firm] – a claim that is not assignable under Indiana law."

Additionally, the appellate court found that Smith had also failed to allege how Progressive had engaged in any behaviors set forth in established Indiana law that indicated a breach of the duty of good faith: "(1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim."

Accident – Iowa

T.H.E. Ins. Co. v. Glen
--- N.W.2d ---; 2020 WL 3022764 (Iowa June 5, 2020)

The Iowa Supreme Court reversed the district court's grant of summary judgment in favor of T.H.E. Insurance Company (T.H.E.) and remanded the case back to the lower court. The district court found that T.H.E. did not have a duty to defend Stuart Glen (Glen), an employee of its named insured, Adventureland Amusement Park (Adventureland), in a tort action against the estate of Stephen Booher (Booher), who was also an employee of Adventureland. According to the estate, Glen and Booher were both working on the Raging River ride, Glen as the operator and Booher as a loading assistant, when Glen started the ride before Booher gave the "thumbs up signal." As a result, Booher fell into the water. Glen did not stop the ride until several ride patrons repeatedly yelled at him to stop the ride. Booher ultimately died from his injuries. The estate asserted a gross negligence cause-of-action against Glen.

The Supreme Court held that a gross negligence action may constitute an "accident" within the meaning of the CGL policy. In so holding, the Supreme Court reasoned that a trier of fact could find Glen acted "with the expectation that an injury was more likely than not" to occur, but found that Glen did not act with the expectation that "the injury was highly likely or substantially certain to result." In such case, Glen's actions could constitute an "accident" within the meaning of the policy. "It is possible for a plaintiff to thread the needle by convincing a factfinder that acts or omissions of a co-employee gave rise to an expectation that an injury was more likely than not to occur, and thus amounts to gross negligence, but was not 'highly likely' and therefore outside of coverage for accidents." Given this possibility and the fact that the tort action was in the early stages of litigation, the Supreme Court could not make a ruling on whether coverage was owed.

Defective Workmanship Exclusion – Tenth Circuit (Colorado Law)

Rocky Mtn. Prestress, LLC v. Liberty Mut. Fire Ins. Co.
--- F.3d ---, 2020 WL 2844701 (10th Cir. June 2, 2020)

The U.S. Court of Appeals for the Tenth Circuit ruled that Liberty Mutual Insurance Company (Liberty Mutual) did not have to cover repairs to a building resulting from a subcontractor's substandard workmanship, holding that the defective workmanship exclusion clearly applied.

Rocky Mountain Prestress LLC (Rocky Mountain), a subcontractor, performed construction work on an office building for the building's owner. Rocky Mountain was included as an additional insured on the building owner's Liberty Mutual insurance policy. During its work, it was found that Rocky Mountain insufficiently grouted hundreds of joists in the building. This defective workmanship was confirmed by

an engineering firm that examined the property. Rocky Mountain subsequently tendered the claim to Liberty Mutual. When the claim was denied, Rocky Mountain sued for insurance coverage.

The appellate court found that the defective work clearly fell within an exclusion in the policy, which stated that losses caused by a "defect, error, or omission" related to workmanship would not be covered. Rocky Mountain did not dispute this, but rather argued that an exception to the exclusion applied. This exception provided that coverage would be afforded if the defective work "result[ed] in a covered peril." Rocky Mountain argued that the insufficiently grouted joints caused damage elsewhere in the building, arguing that the exception to the exclusion applied to its work. The appellate court found Rocky Mountain's argument to be insufficiently supported and noted that the evidence only demonstrated that repairs were needed to the joists themselves. More importantly, however, the appellate court explained that a "covered peril" under a policy must be one that is exactly that – a separate, non-excluded loss. The appellate court stated that regardless of how broadly courts interpret "resulting" losses under this type of exception, one overarching principle remains true: "the exception cannot be allowed to swallow the exclusion."

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