PLUNKETT COONEY

Bodily Injury, Duty to Defend Coverage Update

January 17, 2022

Bodily Injury – Delaware

ACE Am. Ins. Co. v. Rite Aid Corp.
--- A.3d ---, 2022 WL 90652 (Jan. 10, 2022)

The Supreme Court of Delaware held that a collection of insurance companies (Chubb) did not have a duty to defend their insured Rite Aid Corporation (Rite Aid) in multi-district litigation in federal court arising out of the opioid epidemic (MDL opioid lawsuits). The supreme court held that the underlying plaintiffs in the MDL opioid lawsuits were not seeking damages "for" or "because of" bodily injury as defined in Rite Aid's policy, and, therefore, Chubb did not have a duty to defend Rite Aid under the policy.

The plaintiffs in the MDL opioid lawsuits filed over 1,000 lawsuits against different entities, including a bellwether suit by Summit and Cuyahoga Counties in Ohio (counties) against Rite Aid. The counties sought "economic damages" as a "direct and proximate result" of Rite Aid's failure to "effectively prevent diversion" and "monitor, report, and prevent suspicious orders" of opioids. Due to the opioid crisis, the counties claimed they incurred direct and specific response costs that totaled tens of millions of dollars, including in areas of medical treatment and criminal justice. In order to circumvent the Ohio Product Liability Act's statute of limitations, the counties specifically disavowed that they were seeking damages for death, physical injury to person, emotional distress or physical damages to property. The damages alleged were only suffered by the counties and were not based upon or derivate of the rights of others.

Chubb denied Rite Aid's claim for coverage and refused to defend Rite Aid in the MDL opioid lawsuits. In response, Rite Aid filed suit against Chubb in the Superior Court of Delaware, claiming breach of contract and seeking declaratory judgment on, *inter alia*, the duty to pay or reimburse defense costs. The lower court granted summary judgment to Rite Aid and found that Chubb had a duty to defend Rite Aid because "some of the economic losses sought by the governmental entities are arguably because of bodily injury."

The Supreme Court granted Chubb's request for an interlocutory appeal and reversed. The Supreme Court examined whether the counties sought damages "for or because of bodily injury" as required to impose a duty to defend under the policy. The Supreme Court found that the damages were not "for bodily injury" because such damages were not asserted by "1) the person injured, 2) a person recovering on behalf of the person injured, or 3) people or organizations that treated the person injured

or deceased, who demonstrate the existence and cause of the injuries." The Supreme Court also determined that the damages were not sought "because of bodily injury." There had to be a showing of "bodily injury to the plaintiff, and damages sought because of that specific bodily injury" – neither of which was alleged in the MDL opioid lawsuits. Therefore, because the lawsuits did not seek damages for or because of bodily injury, Chubb did not have a duty to defend Rite Aid.

By: Joshua LaBar

Duty to Defend – Third Circuit (Pennsylvania Law)

Vitamin Energy, LLC. V. Evanston Ins. Co.
--- F.4th. ---, No. 20-3461, 2022 WL 39839 (3d Cir. Jan. 5, 2022)

The U.S. Court of Appeals for the Third Circuit held that Evanston Insurance Company (Evanston) had a duty to defend a nutritional supplement company in a lawsuit alleging false claims in its advertising about its competition.

Vitamin Energy, LLC (Vitamin Energy) obtained a policy from Evanston and was subsequently sued by a competitor, the owners of the 5-Hour Energy brand. The claims brought against Vitamin Energy were for publishing certain comparative claims and infringing the 5-Hour Energy mark in advertising and packaging. After Evanston denied coverage, Vitamin Energy filed a declaratory judgment action in the Pennsylvania Court of Common Pleas, which Evanston removed to federal court. The district court granted Evanston's motion for judgment on the pleadings, holding that 5-Hour Energy's complaint did not allege an advertising injury within the meaning of that term in the policy.

The appellate court disagreed, and found that Evanston had a duty to defend Vitamin Energy in the underlying suit, at least until it could be determined that there is no possibility that 5-Hour Energy could prevail against Vitamin Energy on a claim covered by the policy. The appellate court reasoned that Pennsylvania law imposes on insurers a broad duty to defend lawsuits brought against those they insure. The appellate court held an insured's burden to establish its insurer's duty to defend is light, and Vitamin Energy carried that burden. Specifically, the appellate court found that an allegedly false chart comparing Vitamin Energy to other supplements, including 5-Hour Energy, could fall under the policy's "adverting injury" coverage, triggering a duty to defend.

The appellate court further rejected Evanston's argument that the underlying suit fell under the "intellectual property" exclusion, and other exclusions in the policy. The appellate court reasoned that the trademark infringement claim was distinct from the false-advertising claim, and an insurer has a duty to defend until there is no possibility that the plaintiff in the case can prevail against the insured on any claim covered by the policy. Therefore, a policy exclusion that may apply to only some allegations does not excuse an insurer from its obligation to defend the entire lawsuit. This obligation continues as long

as at least one claim is potentially covered by the policy.

The appellate court vacated the lower court's summary judgment ruling and remanded the case back to the district court for further proceedings.

By: Michael Hanchett