Coverage for Settlement, Occurrence Coverage Update

May 15, 2024

Coverage for Settlement – Michigan

Citizens Ins. Co. of Am. v. Livingston Cnty. Road Comm'n
No. 164951, --- N.W.3d ---, 2024 WL 1979983 (Mich. May 3, 2024)

The Michigan Supreme Court reversed the Michigan Court of Appeals and held that the parties did not have a binding settlement agreement for a pollution coverage dispute.

The Livingston County Road Commission (Road Commission) was involved in an insurance coverage dispute with three of its insurers, Citizens Insurance Company of America, Amerisure Mutual Insurance Company and Auto-Owners Insurance Company (Insurers). The parties attended a pre-suit mediation to try to avoid litigation over the insurers' refusal to defend the Road Commission in an environmental contamination lawsuit. The parties reached an agreement but that agreement required approval by a county commission. The Insurers sued the Road Commission in an attempt to enforce the parties' pre-suit settlement or in the alternative to allow further discovery on the issue.

The Insurers argued that the settlement agreement was binding because the Road Commission gave its lawyer pre-approval to settle the matter in a closed-door meeting in advance of the mediation. The Road Commission, on the other hand, argued that the series of emails that the Insurers relied upon did not establish that the Road Commission had unequivocally accepted the settlement agreement because the emails established that the settlement had to be presented to the Road Commission board for approval and signature. The Road Commission also argued that, as a public body, it is subject to the Michigan Open Meetings Act, and therefore, it could not approve the settlement agreement in a closed-door meeting.

The Michigan Supreme Court held that the parties did not have an enforceable settlement agreement. The Supreme Court noted that while it was clear that the parties reached a deal, their deal was conditional on the Road Commission board's approval and the board never ratified the settlement in a public meeting. As noted by one Justice, "[t]he board's decisions are not binding when made behind closed doors." The matter was remanded to the trial court for entry of an order granting the Road Commission's dispositive motion.

By: Amy L. Diviney

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'Occurrence' – Ohio

Travelers Property Cas. Corp. v. Chiquita Brands Int'l, Inc.
Nos. C-230094, C-230095 and C-230107, 2024 WL 2106139 (Oh. 1st Dist. Hamilton County, May 10, 2024)

The Ohio Court of Appeals affirmed a state trial court decision granting summary judgement against Chiquita Brands International, Inc (Chiquita), declaring that its insurers had no duty to indemnify Chiquita for numerous claims that it settled arising from the Anti-Terrorism Act because there was not an "occurrence."

The appellate court consolidated two actions for declaratory judgment inquiring on the duty to indemnify, initiated by two groups of Chiquita's insurers -- one group led by Travelers Property Casualty Corporation (Travelers) and the other led by Federal Insurance Company (Federal).

In the underlying action, the plaintiffs, a missionary organization and the relatives and representatives of six Americans who were kidnapped and killed in the 1990s by a Columbian terrorist organization known as Fuerzas Armadas Revolucionarias de Colombia (FARC), alleged that from 1989 through 2004, Chiquita illegally funneled money to FARC, causing injury to a number of American individuals in violation of the Anti-Terrorism Act or 18 U.S.C. 2333(a) (ATA suits). In February 2018, Chiquita and the plaintiffs settled the suits. Following settlement, Chiquita sought insurance coverage for its defense costs and liability from its insurers which resulted in litigation. *Chiquita Brands Int'l., Inc. v. Nat'l. Union Ins. Co.*, 2013-Ohio-759, 988 N.E.2d 897 (1st Dist.) (*Chiquita I*).

In 2013, Travelers and Federal brought separate actions against Chiquita seeking a declaration that there was no insurance coverage for the settlements. Travelers and Federal each argued they had no duty to indemnify Chiquita based on the collateral estoppel effect of the *Chiquita I* decision.

The trial court ruled that *Chiquita I* had no preclusive effect because the parties, insurance policies and issues were not identical. However, it further ruled that Travelers and Federal did not have a duty to defend because there was no "occurrence" under the policies as Chiquita's actions could not be construed as accidental. Ultimately, the trial court granted Travelers' and Federal's motions for summary judgment because Chiquita had not adduced facts or demonstrated underlying accidental liability, and therefore, the facts demonstrated there was no occurrence, so the insurers had no duty to indemnify Chiquita. Chiquita appealed both judgments.

On appeal, Chiquita argued that the trial court improperly shifted the burden of proof to Chiquita to prove the existence of an occurrence in both actions. However, the appellate court determined that Chiquita bore the burden of proof to prevail on its claims because it counterclaimed in both actions and filed a cross-motion for summary judgment seeking a judicial determination of the scope of insurance coverage.

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Chiquita also argued that the trial court improperly granted summary judgment in favor of the insurers because there was a genuine issue of material fact as to whether Chiquita intended to injure the ATA plaintiffs. Chiquita claimed that an intention to injure the plaintiffs could not be inferred as a matter of law because it denied any intent to injure them, and Travelers and Federal were not entitled to summary judgement in their favor because they offered no contrary evidence.

The appellate court reasoned that "[i]nherent in the word 'accident' is also the concept that an accidental outcome is fortuitous as opposed to intended." Therefore, an occurrence can include unintentional and unintended consequences that should have been anticipated. Undisputed facts evidenced that Chiquita intentionally made regular payments to FARC over a period of time to prevent FARC from attacking its employees or destroying its property, and during the time Chiquita was making those payments, FARC had kidnapped and killed at least six Americans. Consequently, the appellate court upheld the trial court's conclusion that the natural and probable consequences of paying a terrorist organization for protection is that the money would be used to perpetuate violence. Therefore, there was not an occurrence and no coverage under Chiquita's policies.

By: Shantinique Brooks

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