PLUNKETT COONEY

Declaratory Judgment, Business Interruptions, Duty to Defend Insurance Coverage Update

June 1, 2021

Declaratory Judgment Actions –Texas

Allstate Ins. Co. v. Irwin
No. 19-0885, 2021 WL 2021446 (Tex. May 21, 2021)

The Supreme Court of Texas held that Allstate Insurance Company's (Allstate) liability for coverage to its policyholder, Daniel Irwin (Irwin), under an Underinsured Motorist (UIM) policy may be established through an action filed pursuant to the Uniform Declaratory Judgments Act (UDJA). Irwin was injured in a car accident involving an underinsured driver while he was insured under an Allstate policy that included UIM coverage up to $50,000. After the accident, Irwin sought the UIM policy limits from Allstate, but Allstate offered to settle for $500. Invoking the UDJA, Irwin sued Allstate seeking, *inter alia*, a declaration that he was entitled to the full UIM policy limits under his Allstate policy and attorney's fees.

At trial, Irwin was awarded damages and attorney's fees pursuant to the UDJA. Allstate appealed the award of attorney's fees and objected to the judgment to the extent that it invoked the UDJA. The appellate court affirmed the award to Irwin, holding that the UDJA was appropriately invoked to determine Irwin's right to UIM benefits. On appeal, Allstate argued that Irwin's use of the UDJA to determine his contractual rights and to seek attorney's fees for UIM coverage was impermissible. Allstate further contended that Irwin was not entitled to an award of attorney's fees because Allstate did not breach its contractual duty to pay UIM benefits. Therefore, Allstate concluded that the UDJA did not apply, and that it was wrongly used in an attempt collect attorney's fees.

In response, Irwin argued that because Allstate did not make a "reasonable adjustment" of his UIM claim, his only remedy was to bring a declaratory judgment action against Allstate to establish the conditions precedent to UIM coverage. Moreover, Irwin argued that he could not sue Allstate directly for the underlying tort because Allstate was not the tortfeasor. Finally, Irwin contended that he could not sue Allstate for breach of contract because Allstate committed no breach. Irwin, therefore, concluded that declaratory relief was the only remedy available to him. The court of appeals agreed with Irwin, stating "an insured can use the UDJA to establish the prerequisites to recovery in a UM/UIM case."

On appeal, the Supreme Court of Texas recognized that the UDJA's "purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." The Supreme Court reasoned that the UDJA was properly used to determine the prerequisites for Irwin's UIM claim, which, the court noted, serves a useful purpose and eliminates the controversy between Allstate and Irwin. Thus, the Supreme Court held that the UDJA was properly invoked to determine both Allstate's and Irwin's rights and duties under the policy. In order to disclaim the dissent's argument that a declaratory judgment action is unnecessary because a breach of contract claim exists to determine whether UIM coverage is available, the majority noted that this was not a breach of contract case because "the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist." Rather, the majority reasoned, this case is an issue of establishing coverage. Thus, the Texas Supreme Court held declaratory judgment was proper.

Prepared by: Danielle Chidiac

Business Interruption – District of Minnesota (Minnesota Law)

Essentia Health v. ACE Am. Ins. Co.
--- F. Supp. 3d ----, 2021 WL 2117241 (D. Minn. May 25, 2021)

The U.S. District Court for the District of Minnesota granted an insurer's motion to dismiss a lawsuit filed by an operator of health care facilities that alleged the insurer had wrongfully denied the health care system's business interruption claim.

ACE American Insurance Company (ACE) issued a Premises Pollution Liability Portfolio Insurance Policy to Essentia Health (Essentia) for Essentia's properties that were part of its integrated health care system in Minnesota and other states. On March 19, 2020, Minnesota's Governor placed a moratorium on all non-essential and elective surgeries as a result of the COVID-19 pandemic. Essentia partially or completely suspended operations at all of its Minnesota locations. Essentia gave notice of its claim to ACE on March 31, 2020 for, among other things, loss of business income stemming from the Governor's order. ACE denied coverage in May 2020, and Essentia commenced a lawsuit, alleging breach of contract.

ACE moved to dismiss Essentia's complaint, which the district court granted. The district court found that Essentia was not entitled to coverage under the ACE policy, which provided pollution coverage, because the SARS-CoV-2 virus did not constitute a pollutant as defined in the ACE policy. ACE's policy provided coverage to Essentia for, among other things, "'loss' ... resulting from: ... 'First-party claims' arising out of ... 1) a 'pollution condition' on, at, under or migrating from a 'covered location'; [or] 2) an 'indoor environmental condition' at a 'covered location[.]'" Essentia argued that the virus fit within

the policy's definition of a "pollution condition" because the definition encompassed the terms "irritant" and "contaminant."

While the district court agreed that "ACE does not seem to dispute that these terms [irritant and contaminant], considered in isolation, could plausibly encompass the coronavirus that causes COVID-19," it noted that the "court must read the policy 'as a whole,' considering the language 'within its context, and with common sense.'" The policy's Healthcare Amendatory Endorsement altered the definition of "indoor environmental condition" to specifically include bacteria and viruses, but extended coverage only for remediation costs resulting from such viruses, and not business interruption losses. The district court reasoned that "the specific inclusion of 'viruses' in the [Healthcare Amendatory] Endorsement's definition of 'indoor environmental condition' suggests an intent not to include 'viruses' in the Policy's definition of 'pollution condition.'" Because Essentia's interpretation of the business interruption coverage would essentially render the Healthcare Amendatory Endorsement superfluous, the district court found that Essentia's interpretation was incorrect.

Duty to Defend – Illinois

West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.
No. 125978, 2021 IL 125978 (Ill. May 20, 2021)

The Illinois Supreme Court held that West Bend Mutual Insurance Co. (West Bend) must defend salon Krishna Schaumburg Tan, Inc. (Krishna), against a plaintiff's claims that Krishna disclosed the plaintiff's fingerprint data to a third-party vendor in violation of the Illinois Biometric Information Privacy Act (Act). The Supreme Court held that the plaintiff's claim triggered a policy provision that covers personal injury stemming from advertising by the business when there is an alleged violation of the right to privacy.

Krishna's policy with West Bend defined an advertising injury as one occurring from the "oral or written publication of material that violates a person's right of privacy." West Bend argued that "publication," which was not defined in the policy, occurred only when private information was disclosed to the general public. The Supreme Court disagreed and defined the term as a disclosure to one or more individuals. The Supreme Court relied upon several dictionary definitions, the common law and other legal authorities in arriving at this definition. Additionally, the Supreme Court considered the language to be ambiguous and, thus, construed the language against West Bend.

West Bend further argued that it did not have a duty to defend the tanning salon because the policy excluded coverage for personal injuries which arise from the violation of a statute that prohibits sending, transmitting, communicating or distributing data. The Supreme Court disagreed, reasoning that the exclusion only applied to faxes and emails. Such communications are fundamentally different from the Act, which regulates the collection, use, safeguarding, handling, storing, sharing and

destruction of individuals' biometric information.

Finally, while the West Bend Policy did not define the phrase "right of privacy," the Supreme Court held that the plaintiff's underlying suit sufficiently alleged that she has such a right under the Act. The Supreme Court reasoned that the Act protects individuals' rights to keep their biometric information secret. Therefore, the plaintiff's claim that her fingerprint data was shared with a third-party without her permission sufficiently alleged a potential privacy violation under the policy. Accordingly, the Supreme Court held that West Bend had a duty to defend.

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