PLUNKETT COONEY

Prosecution of Counterclaim, Employee Coverage Update

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Massachusetts, New Jersey Coverage Cases
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Prosecution of Counterclaim – Massachusetts

Mount Vernon Fire Ins. Co. v. Visionaid, Inc.
--- N.E.3d. ---, 2017 WL 2703949 (Mass. June 22, 2017)

The Massachusetts Supreme Judicial Court ruled that an employment practices liability insurer did not have a duty to pay to prosecute the insured's counterclaims, even if such claims were integral to the insured's case. In the underlying wrongful termination lawsuit against the insured, the insured wished to raise counterclaims of misappropriation of funds involving the fired employee's embezzlement and wanted the insurer to pay for the prosecution of those counterclaims. The Supreme Court, however, held that "an insurer with a contractual duty to defend an insured is not required to prosecute an affirmative counterclaim on the insured's behalf" and that "the duty to pay defense costs has the same scope as the duty to defend, and thus does not require an insurer to pay the costs of prosecuting a counterclaim on behalf of the insured[.]" The Supreme Court declined to deviate from the plain meaning of the word "defend," holding that "the essence of what it means to defend is to work to defeat a claim that could create liability against the individual being defended[.]" The Supreme Court found that to adopt a contrary interpretation "would require us to read in a number of provisions that the parties did not include in the policy and ... place an additional duty on the insurer[.]" The Supreme Court also found its ruling was consistent with the "in for one, in for all" rule, which generally obligates the insurer to defend even against uncovered claims, because to rule otherwise would result in a misalignment of interests and "lead to increased litigation between insurers and insured parties on the question whether a successful counterclaim would result in reduced liability on the underlying claim."

Employee – New Jersey

Gil v. Clara Maass Med. Ctr.
--- A.3d ---, 2017 WL 2625964 (N.J. Super. Ct. App. Div. June 19, 2017)

The Superior Court of New Jersey, Appellate Division ruled that a doctor was not an employee of a hospital, and thus not an insured under the hospital's insurance policy, because he was not paid by the hospital. The plaintiff commenced an action against a doctor and the Clara Maass Medical Center (Clara Maass) for alleged birth defects that were caused when the doctor performed an emergency

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caesarean section at Clara Maass. The plaintiff amended its complaint, as the assignee of the doctor, to seek relief against Clara Maass' insurer. The insurance policy at issue defined an insured as those expressly named and "any employee or volunteer." The appellate court rejected the plaintiff's argument that the court should look to common law definitions of "employee" because the policy specifically defined the term "employee" as "any person who has an assigned work schedule for and is on the regular payroll of the Named Insured, with federal and state taxes withheld." The court determined that the doctor was not an employee of Clara Maass, the named insured, because the doctor was not on Clara Maass' regular payroll. Accordingly, the doctor did not qualify as an insured under the policy.

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