

Rescission, Duty to Defend, Professional Services Exclusion Coverage Update

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Rescission – Missouri

Smith v. Keystone Mut. Ins. Co.

No. ED 106603, 2019 WL 2588308 (Mo. Ct. App. June 25, 2019)

The Missouri Court of Appeals found that Keystone Mutual Insurance Company (Keystone) had no responsibility to pay for the medical malpractice judgment against its insured, Dr. Wallace Berkowitz (Berkowitz), because Keystone and Berkowitz agreed to rescind the policy prior to Berkowitz's assignment of his rights under the policy to the underlying plaintiff, Helen Smith (Smith). The jury in the underlying case awarded Smith a judgment of \$870,625 for her medical malpractice claims arising out of her husband's death. After Smith obtained an assignment of Berkowitz's rights to insurance coverage under the policy, she sued Keystone for breach of contract for failing to pay the judgment.

The appellate court, however, found that Smith had no right to recover damages for breach of contract because she was only the assignee of Berkowitz, who previously signed a rescission settlement agreement with Keystone (Agreement). The Agreement provided for rescission of the policy in 2011, after Keystone learned that Berkowitz omitted from his policy application and renewal forms information regarding 15 lawsuits filed against him, a reprimand from a state board, hospital suspensions and a 2010 federal indictment for Medicare fraud. The Agreement also specified that Keystone would not be responsible to pay for any part of the underlying lawsuit. The appellate court found that the plain and unambiguous language of the Agreement revealed the intent of both parties to rescind the policy. Thus, the appellate court ultimately concluded that the policy "had been mutually rescinded prior to the time Smith received her assignment of Dr. Berkowitz's rights under the insurance policy." Therefore, because Berkowitz "had no right to Keystone's coverage and waived any breach of contract claim against Keystone, he could not pass coverage or claims on to Smith."

Duty to Defend – First Circuit (Maine Law)

Zurich Am. Ins. Co. v. Electricity Maine, LLC

--- F.3d ---, 2019 WL 2498240 (1st Cir. June 17, 2019)

The First Circuit Court of Appeals affirmed the district court's grant of summary judgment to Electricity Maine, LLC (Electricity Maine) finding Zurich American Insurance Company (Zurich) had a duty to defend Electricity Maine in a class action lawsuit. Electricity Maine, an electrical utility, was named in a lawsuit by several customers who alleged that Electricity Maine enticed them to sign up for its services by offering heavily-discounted rates that were well below standard rates. The utility would then abruptly raise the rates. The lawsuit alleged, *inter alia*, violations of the Maine Unfair Trade Practices Act, Racketeer Influenced and Corrupt Organizations Act, and that the plaintiffs suffered emotional distress.

Zurich filed suit, seeking a declaration that it had no duty to defend Electricity Maine in the lawsuit. Both Zurich and Electricity Maine filed motions for summary judgment. The district court granted Electricity Maine's motion, noting the extremely broad duty to defend standard under Maine law. Specifically, because the complaint broadly alleged negligence on the part of Electricity Maine, resulting in emotional distress experienced by the plaintiffs, Zurich had a duty to defend. The appellate court agreed with the district court. Specifically, the appellate court ruled that under Maine law, "whenever the allegations show a potential that liability will be established within the insurance coverage," even if the allegation will not survive a motion to dismiss, the insurer must defend.

Professional Services Exclusion – S.D. Florida (Florida Law)

Travelers Indem. Co. v. Figg Bridge Engineers, Inc.

No. 18-22585-CIV (S.D. Fla. June 24, 2019)

The U.S. District Court for the Southern District of Florida held that two insurers were entitled to recoup approximately \$270,300 in defense costs that were advanced to an engineering company. In the underlying cases, Figg Bridge Engineers Inc. (Figg) was sued after a pedestrian bridge collapsed on the campus of Florida International University, causing multiple deaths and injuries. Figg's insurers, The Travelers Indemnity Company of Connecticut and Phoenix Insurance Company (the Insurers), sought to recoup defense costs that had been advanced on the basis that a "professional services" exclusion in Figg's policies applies to preclude coverage.

Figg argued that the Insurers were not permitted to recoup the defense costs because the two underlying complaints included claims for negligent misrepresentation, which are unrelated to the rendering of professional services. However, the court agreed with the Insurers and held that the professional services exclusion applied to preclude coverage. In rejecting Figg's argument, the court

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stated that “Figg seems to suggest that if a specific term is not expressly listed as a professional service, it does not fall under the Exclusion. Not so. The Exclusion, by its own terms, provides a non-exhaustive list of predetermined professional services.” Therefore, the court held that the professional services exclusion applied to preclude coverage for all of the claims in the underlying complaints.

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