Article

Critical Insurance Law Developments for Corporate Counsel

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There have been a number of developments this year in insurance law that will impact corporate counsel. At an organic level, we are once again facing questions about the duty to defend under liability policies. Defense dollars are a critical part of making corporate and litigation budgets work. Texas has long followed the "eight corner" rule in determining the duty to defend, requiring consideration of the four corners of the underlying suit and the four corners of the policy. The "defense" language in standard liability policies has morphed in recent years, jettisoning the admonition that the duty exists regardless of whether the underlying allegations are groundless, false or fraudulent. In 2006, Judge McBride held that this change eliminated the eight-corner rule. Hall Contracting Inc. v. Evanston Ins. Co., 447 F. Supp. 2d 634 (N.D. Tex. 2006), rev'd on other grounds, 273 Fed. Appx. 310 (5th Cir. 2008). In a 2018 decision, Judge McBride again held that the difference in policy language means the eight-corner rule does not apply and thus the court may consider extrinsic evidence in determining if the policy provides coverage and a corresponding duty to defend. State Farm Lloyds v. Richards, 2018 WL 2225084 (N.D. Tex. 2018)(appeal to Fifth Circuit pending).

Late notice is a critical problem with claims made against professional liability policies, such directors & officers ("D&O") and many technology and cyber related insurance products. The court in Adi WorldLink, LLC v. RSUI Indem. Co., 2017 WL 4112112 (E.D. Tex. 2017), held that (a) an initial action under the Fair Labor Standards Act, ("FLSA") brought by some employees in an arbitration in 2014 ("the Lamb arbitration"), (b) amended claims under state law later added to the same arbitration, and (c) litigation brought in 2015 by other employees in a different state were "interrelated." The court held all of the actions arose from the insured's failure to categorize engineers as non-exempt and involved claims under the FLSA and state equivalents. The D&O policy in Adi stated: "All Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts . . . shall be deemed to be a single Claim for all purposes under this policy." The court concluded there was one claim that started with the Lamb arbitration, notice as to that claim was untimely, and the additional claims did not create a new "claim" for which notice could then be timely given.

Sexual harassment and misconduct claims potentially involve Employment Practices Liability Insurance (EPLI) or commercial general liability (CGL) coverage. EPLI is targeted at employee related problems, while CGL coverage is directed to third-parties not employed by the insured. In AIG Property Cas. Co. v. Cosby, 892 F.3d 25 (1st Cir. 2018)(Mass. Law), the court found that a sexual misconduct exclusion did not defeat the duty to defend defamation claims based on allegations the perpetrator lied in denying the sexual assault allegations. The court found the misconduct exclusion ambiguous in the face of such claims.

Criminal acts exclusions are often used to defeat sexual misconduct and other similar claims. Insureds in the hospitality industry should be particularly wary of claims involving any sort of potentially criminal conduct. In Century Sur. Co. v. Seidel, No. 17-10026, slip op. (5th Cir. 2018), the victim of a sexual assault brought suit against Pastazios Pizza, Inc. and its owner Deari (the perpetrator of the assault). The Fifth Circuit broadly applied a criminal acts exclusion, which excluded coverage for bodily injury "arising out of or resulting from a

criminal act committed by any insured." The court held that "arising out of" would require that the claim only "bear an incidental relationship to the described conduct for the exclusion to apply." Mere allegations that the insured negligently gave alcohol to a minor, the court reasoned, is a misdemeanor and thus a "crime." The policy did not define "crime." Moreover, the company, independent of the owner/perpetrator, was not charged, tried or convicted of the misdemeanor.

Many corporate counsel are challenged by the dynamics of the relationship between primary and excess carriers. Many primary carriers will try to spend as little as possible on defense in hopes the excess carriers will take over the defense. Others try their best to get out of the defense and shift it to the excess carrier. In Aggreko, LLC v. Chartis Specialty Ins., No. 1:16-CV-297 (E.D. Tex. 2018), the primary carrier entered into a settlement with the underlying plaintiffs agreeing to pay its policy limits of $1 million in exchange for a covenant that plaintiffs would limit execution in the event of a recovery against insured Aggreko to coverage actually available under the policies of other primary and excess carriers. Aggreko had two lines of coverage available to it: (a) its own coverage, and (b) additional insured coverage provided to it by a drilling subcontractor. Applying Texas law, the court found that the primary carrier exhausted its limits and owed no further duty to defend or indemnify after payment of its limits subject to the covenant not to execute. The court rejected arguments that the settlement was contrary to public policy.

One thing is clear, insurance coverage litigation is continuing in frequency and growing in complexity. Corporate counsel are faced with a complex array of pitfalls and traps in connection with D&O and other professional liability policies. These types of policies and thus the difficulties are expanding to include many forms of technology errors and omissions coverage and cyber coverage. The lesson from these cases is to disclose freely in your applications as to claims and potential claims; if in any doubt, give notice of circumstances or an actual claim; and make sure coverage critical to your company is being requested and actually obtained by a competent agent.

The full article can also be viewed here.

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