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Insurance Law Alert
June 2009

The Southern District of New York Gets Tough on Disclaimer Timing

On April 21, 2009, the United States District Court for the Southern District of New York (McMahon, J.) held that an insurer was barred from asserting an applicable exclusion to coverage and, therefore, was obligated to defend an uncovered claim because it took 40 days to issue a disclaimer. In *Koegler v. Liberty Mut. Ins. Co.*, 2009 U.S. Dist. Lexis 33734 (S.D.N.Y. April 21, 2009), the court addressed an insured's demand for a defense in connection with an underlying action brought against the insured, Michael Koegler, by his former girlfriend, Pamela Woodward (who is also the mother of his child) and their daughter. The complaint alleged that Koegler was liable for damages associated with his negligent or knowing infection of Woodward and their daughter with both human papillomavirus (HPV) and Herpes. Koegler allegedly had unprotected sex with Woodward, resulting in her contraction of HPV and Herpes. The child was allegedly infected when Koegler kissed her on the lips.

Liberty Mutual issued a Tenants Policy and a Personal Catastrophe Liability Policy to Koegler, which both contained exclusions for injury arising out of "the transmission of a communicable disease by an 'insured.'" Notwithstanding these exclusions, Koegler tendered the complaint to Liberty Mutual under the policies. Liberty Mutual disclaimed coverage 40 days after receipt of the tender. Koegler filed a motion for partial summary judgment seeking a declaration that Liberty Mutual had a duty to defend him in the underlying action based on its alleged failure to disclaim coverage in a timely manner as required by § 3420 (d) of the New York Insurance Law.[1]

Liberty Mutual opposed Koegler's motion for partial summary judgment, arguing that there were questions of fact relating to (1) whether it provided written notice of disclaimer as soon as was reasonably possible and (2) whether § 3420 (d) applied to the matter. The court dispensed with the second argument quickly, finding that § 3420 (d) applied because the underlying action contained counts based on negligence and, therefore, alleged injury potentially caused by an accident. The court reasoned that because a reasonable trier of fact could conclude that Koegler's alleged conduct amounted only to negligence rather than intentional conduct even if he knew that he carried the viruses,

[1] Section 3420 (d) provides:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within the state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant. N.Y. Ins. Law § 3420 (d) (McKinney's 2009).

the complaint involved a claim for "death or bodily injury arising out of . . . any other type of accident occurring within the state" as contemplated by § 3420 (d).

Moving to the question of the timeliness of the disclaimer, the judge rejected Liberty Mutual's claim that the delay was reasonable because it had to conduct a thorough coverage review prior to issuing a disclaimer. The judge took issue with Liberty Mutual's argument that the review was necessary because the underlying action involved an unusual type of claim and a seldom-used exclusion. In response to these arguments, the judge stated:

> Insurers should be cautious when disclaiming coverage. But in this case, the applicable policy exclusions are so obvious that they either were or should have been readily apparent to the claims handler. The complaint in the Underlying Action alleged transmission of a communicable disease. Both of Koegler's policies contained exclusions for just such a claim. The exclusions are couched in plain English, and are not at all difficult to understand (internal citations omitted). As soon as Liberty received the complaint in the Underlying Action, it should have known that Koegler's request for defense and indemnity could be denied under the Communicable Disease Exclusion. Defendant offers no evidence at all to support its contention that the invocation of this particular exclusion is rare; claims for transmission of communicable diseases apparently occur with enough frequency that Liberty Mutual finds it prudent to include a communicable disease exclusion in standard form policies.

The court also found that the facts at issue in this case were substantially similar to an earlier case decided by the Appellate Division for the Fourth Department. In that case, the court found an insurer's delay of almost two months in disclaiming coverage based on a communicable disease exclusion was unreasonable as a matter of law. Even though the court recognized the delay in that case was longer than the delay at issue, it reasoned that "[g]iven the ease with which one can find the relevant exclusion in the policy and its obvious applicability to the claim asserted in the Underlying Action, the slightly shorter period at issue here is equally unreasonable."

The court concluded its opinion stating:

> The result may seem unfair, because Koegler is not contractually entitled to be defended (or indemnified) by his insurer for the claims asserted against him. However, New York is an exceedingly pro-insured jurisdiction. Again and again its Legislature and courts hold insurers' feet to the fire, penalizing them for the slightest misstep. This is just such a case.

The result in this case highlights the importance of issuing coverage denials without delay. The court's finding of unreasonable delay as a matter of law based on a time period of only 40 days sets an almost unreasonable standard for insurers in connection with the processing of claims, which makes this an opinion worthy of note.[2]

[2] There have been no notices of appeal filed in connection with this decision. In a separate order, the court held that the decision was limited to the determination of Liberty Mutual's duty to defend. The parties apparently agreed that a decision on indemnity was not ripe because it had not yet been determined whether the defendant's liability, if any, was based on accidental conduct as required by the insuring agreements of the policies. The indemnity portion of the declaratory judgment action was, therefore, dismissed without prejudice.

Although the decision did not address whether Liberty Mutual could later refuse to indemnify the insured based on the communicable disease exclusion, language in the opinion supports the conclusion that the court was inclined to rule that Liberty Mutual was estopped from asserting the exclusion as a bar to indemnity coverage as a result of its purportedly delayed disclaimer.

If you would like to discuss issues related to this case, or its potential ramifications, in more detail, please contact one of the authors listed below, or your regular Drinker Biddle contact.

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