wiley

ALERT

By Delaying Disclaimer of Coverage for 105 Days, Insurer Waived Right to Rely on Policy Exclusions

August 6, 2013

The United States District Court for the Eastern District of New York, applying New York law, has held that an insurer's 105-day delay in disclaiming coverage for a suit alleging that an insured sexually assaulted others was untimely as a matter of law, thus waiving the insurer's right to deny coverage based on the criminal acts exclusion of the policy. *Jewish Cmty. Ctr. of Staten Island v. Trumbull Ins. Co.*, 2013 WL 3816735 (E.D.N.Y. July 22, 2013).

A supervising employee of the insured nonprofit organization pled guilty to three counts of forcible touching in connection with allegations that the supervising employee forcibly spanked under-age employees during breaks at work. The family of one of the victims brought suit against the insured nonprofit organization for negligent supervision, among other causes of action. As it concerns the instant coverage litigation, the insured provided notice to its Nonprofit D&O Liability insurer shortly after the suit was served against it. The insurer issued a denial of coverage 105 days later based on the policy's criminal acts exclusion. The insured then initiated coverage litigation, contending that the underlying lawsuit fell within the coverage grant of the policy and that the insurer had waived its right to rely upon the criminal acts exclusion by failing to provide its disclaimer of coverage in a timely manner, as required by New York Insurance Law (NYIL) § 3420(d)(2). Section 3420(d)(2) provides that "[i]f under a liability policy issued or delivered in [New York], an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of . . . any other type of accident occurring in this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability

Practice Areas

D&O and Financial Institution Liability

E&O for Lawyers, Accountants and Other Professionals

Insurance

Professional Liability Defense

or denial of coverage to the insured and the injured claimant or any other claimant."

The court first addressed whether the underlying action fell within the insuring agreement of the policy, which provided coverage for "CLAIMS EXPENSES and DAMAGES that the INSURED becomes legally obligated to pay for any CLAIM(s) first made against the INSURED for a WRONGFUL ACT(s) which arise solely out of the discharge of an INDIVIDUAL INSURED'S duties on behalf of the ENTITY." In this regard, the court stated that the insuring agreement's language "is unambiguous and supports only one common sense interpretation: that the [underlying] lawsuit does, indeed, fall within the scope of the policy's coverage provision." In reaching this conclusion, the court focused on the fact that the underlying lawsuit alleged "wrongful acts" of, among others, vicarious liability for workplace harassment against the insured. Further, the court disposed of the parties disagreement concerning whether the supervising employee was an "individual insured," recognizing that New York courts broadly interpret the phrase "arising out of" and stating that the supervising employee's "malicious activities arose solely out of his role as a supervisor of [the victim]."

Next, the court examined the parties' argument concerning the criminal acts exclusion and application of NYIL § 3420(d)(2), concluding that "that § 3420(d)(2) does apply and that [the insurer] failed to timely assert the exclusion provision under that statute's requirements." In so holding, the court rejected the insurer's argument that § 3420(d)(2) did not apply because the claim at issue arose from the supervising employee's intentional acts, and was not an "accident," as required by the statute. While recognizing that the insurer's contention has support from certain New York intermediate appellate and federal district court cases, the court ultimately cited decisions from the New York Court of Appeals standing for the proposition that, when determining whether there has been an "accident," the court must look at, "*from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen." Based on this case law, the court held that the supervising employee's actions were "unexpected, unusual and unforeseen" from the point of view of the insured organization. The court also held that "[t]here can be no dispute that the [insured] seeks coverage for an accident involving 'bodily injury,'" and thus, that § 3420(d)(2) applied to this case.

Having found that § 3420(d)(2) is applicable, the court stated that it must determine whether the insurer provided written notice of its disclaimer "as soon as [was] reasonably possible." The court stated that "[a]n insurer's delay is measured from the point at which it has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage," and that "it is the insurer's burden to demonstrate a reasonable excuse for its delay in disclaiming coverage." (Internal quotations omitted). Relying on a host of cases finding that a delay shorter than the insurer's delay in this case was unreasonable, the court held that the insurer's 105-day delay in disclaiming coverage was unreasonable as a matter of law. And because the insurer "simply failed to meet its burden of providing a legally sufficient explanation or excuse for its delay," the court held that, under § 3420(d)(2), the insurer waived any right to rely on policy exclusions, including the criminal acts exclusion. The court thus found that the insurer was obligated to defend and indemnify the insured in the underlying action.