BAD FAITH BLOG

Summary Judgment Confusion

AUTHOR: SANDBERG PHOENIX

Summary: Progressive Casualty Insurance Company ("Progressive") issued a Directors and Officers (D&O) Liability Policy to the National Bank of California ("Bank") on October 30, 2010. The Declarations Page stated that the defense costs were included within the limit on liability. The policy further gave the insured a defense option, but the Bank did not choose the defense option for D&O Liability. The Bank presented six separate claims to Progressive to which Progressive asserted multiple affirmative defenses. The Bank and Progressive then filed multiple partial motions for summary judgments relating to key issues regarding the claims handling. Only two of those complex issues are addressed here.

National Bank of California v. Progressive Casualty Insurance Company 938 F.Supp.2d 919

The application of Progressive's "Fraud/Violation of Law Exclusion Modification" was of key importance to the resolution of the Bank's claim regarding the Porter Parties. That was a complex transaction which involved the issuance of a $6 million life insurance policy to Mr. Porter, the sale of that policy on the secondary life insurance market, a loan related to that policy, and the Bank's attempt to collect that loan. The various claims and counterclaims regarding that complex transaction were submitted to arbitration. The arbitrator found against the Bank on that transaction concluding that "the loan agreement is not enforceable because of fraud in the execution or inception" and found that the Porter Parties were entitled to their attorney's fees and costs. The facts were determined in the arbitration resulting in an award later confirmed by an Order of the California Superior Court which entered judgment on the arbitration award. The issue before the federal court was whether the Fraud Exclusion Modification applied and should be enforced as written.

In California, an insured has the burden of showing that an event falls within the scope of the basic coverage of the policy. If that happens, the burden shifts to the insurer to establish whether the event is excluded from coverage.

The U.S. District Court analyzed the Fraud Exclusion Modification in detail. After finding that the Bank was a sophisticated party, the court concluded that "it reasonably expected the Fraud Exclusion Modification language to cover the 'different varieties of fraud affecting contractual relationships [under California law].'" The court further concluded that the arbitrator's findings established fraudulent activity by the Bank and its representatives. In addition, the arbitrator found the Bank's witnesses were not credible. The witnesses' conduct typified actions excluded from coverage under the Fraud Exclusion Modification.

The court denied the Bank's motion for partial summary judgment on the Fraud Exclusion Modification finding that the arbitration award triggered the Fraud Exclusion Modification. In addition, the court found the Fraud Exclusion Modification was "sufficiently conspicuous, plain, and clear; that it would attract a reader's attention; and that it is not misleading." For those reasons, the court concluded that the Fraud Exclusion Modification was enforceable. Although the court denied the Bank's motion for summary judgment, under Federal Rule of Civil Procedure 56(f), the Court granted Progressive partial summary judgment on that exclusion because the only dispute between the parties was the interpretation of the exclusion, a matter of law for the court to decide.

Another key issue was whether Progressive was entitled to summary judgment on the Bank's claim for the breach of the covenant of good faith and fair dealing implied in all California insurance policies. This concept is frequently referred to as insurance bad faith for which an insured can obtain tort damages. To succeed in California, an insured has to show the insurance company "erroneously failed to pay benefits under an insurance policy, and the failure to do so was without proper cause." The bad faith liability is determined by reviewing "whether the refusal to pay policy benefits… was reasonable." The bad faith test in California is generally a question of fact. However, "where there is a genuine issue of an insurer's liability under a policy, a court can conclude that an insurer's actions in denying the claim were not unreasonable as a matter of law." (Emphasis added.) The burden is on the insurance company to show reasonableness. Whenever there are bad faith claims based on several different claims decisions or courses of conduct, the insurance company will not prevail by showing there was a genuine dispute regarding only one of those decisions or courses of conduct.

In this complex case involving Progressive's handling of the legal fees and cost and expense allocations regarding five relevant underlying matters, the court concluded "Progressive has not submitted sufficient evidence to show that its coverage decision was reasonable." There were genuine issues of material fact preventing the court from finding "that Progressive acted reasonably" and did not breach the implied covenant of good faith and fair dealing on at least one of the claims. Accordingly, Progressive's motion for partial summary judgment regarding the Bank's claim for breach of the implied covenant of good faith and fair dealing was denied.

This case demonstrates that an insurance company can prevail on a fraud exclusion from coverage when the arbitrator in the underlying matter has concluded that the insured committed fraud. However, it is far more challenging for that same insurance company to prevail on a summary judgment motion seeking to defeat bad faith claims (claims for breach of the implied covenant of good faith and fair dealing) when there are multiple claims submitted on complex fact patterns including whether certain legal fees and costs were covered and/or there were appropriate allocations made regarding those legal fees and costs.

By Anthony L. Martin

Martin, A

Image not found or type unknown