N E W S

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News in a flash for Subrogation and Defense adjusters

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Deliberate Shooting May Require Insurer to Defend Tort Suit Even Under A Policy That Excludes Intentional Acts

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Please call me to discuss any legal issues or for a clarification of current law.

EW YORK

INSURER'S DUTY TO DEFEND

Automobile Ins. Co. Of Hartford v. Cook,
N.Y. Court of Appeals
7 N.Y.3d 131, 818 N.Y.S.2d 176
June 8, 2006

This case is one example in many of how an insurer's duty to defend its' insured in a tort suit is broader than its' duty to indemnify if the suit should go to judgment. The occurrence for which coverage was claimed in this case was a deliberate shooting of plaintiff's decedent by the insured and the wrongful death action arising out of the shooting. The decedent and defendant had a business relationship that soured. The Decedent, whom was three times defendant's size, barged into defendant's home with two cohorts, demanding money and pounding on a table. After a heated exchange, decedent charged at defendant and defendant, whom contemplated trouble and had retrieved a gun, shot decedent, killing him.

The insurance policy contained an exclusion of coverage for an injury to a third person "expected or intended" by the insured. Although on the face of things it appeared that the insured committed an intentional act for which coverage should be excluded, defendant claimed self defense and plaintiff asserted counts for negligence in the Complaint.

Although plaintiff's negligence claim on the surface appeared to be an attempt to assure that insurance coverage remained in the picture, the Court held that it was unable to dismiss all claims of negligence as a matter of law and that, given the broadness of the insurer's duty to defend, the insurer was obligated to defend the underlying tort action.

NEW JERSEY

BURDEN OF PROOF-UNINSURED MOTORIST COVERAGE

New Jersey Citizens United Reciprocal Exchange (NJ Cure) v. American International Ins. Co. Of New Jersey
N.J. Appellate Division
A-2099-05T5
December 27, 2006

This case stands for the rule of law that a UIM claimant other than the named insured has the burden of persuasion to establish that an insurer did not provide reasonable notice to its' insured of a change in UIM coverage.

The driver of the vehicle insured by defendant collided with a vehicle operated by the tortfeasor. Defendant's policy provided first-party underinsured-motorist (UIM) coverage of $100,000 per person and $300,000 per accident. The torfeasor's auto policy provided liability coverage of $15,000 per person and $30,000 per accident. The driver of the vehicle insured by defendant was the named insured under a policy issued by plaintiff. Plaintiff's policy provided UIM coverage of $100,000 per person and $300,000 per accident.

The Driver of the vehicle insured by defendant settled with the tortfeasor for $15,000 and received $85,000 in UIM benefits from plaintiff. Plaintiff, as subrogee, made a demand upon defendant for 50 percent of the UIM benefits its paid. Defendant denied the demand, asserting that its' policy contained a step-down provision for any insured who was not a named insured or resident family member under the policy, reducing the UIM coverage to $15,000 per person and $30,000 per accident, the same as the tortfeasor's policy and that therefore, the tortfeasor was not uninsured.

New Jersey Citizens United Reciprocal Exchange (NJ Cure) v. American International Ins. Co. Of New Jersey
Cont.

Plaintiff filed a declaratory action seeking to recover 50 percent of the UIM benefits it paid to the driver of the vehicle insured by defendant. Plaintiff asserted that defendant failed to properly notify its' policyholders of a change in UIM coverage. Judgement was entered in favor of plaintiff in the Superior Court, Law Division, and defendant appealed.

The Court held that where a claimant, other than the named insured, seeks to void a step-down provision, asserting that the insured failed to provide reasonable notice of a change in UIM coverage by including such a provision, the burden of persuasion to prove inadequate notice to the insured rests with the claimant, not the insurer.

COMPREHENSIVE GENERAL LIABILITY INSURANCE- DUTY TO WARN

S.T. Hudson Engineers, Inc. et al. vs. Pennsylvania National Mutual Casualty Co. et al
N.J. Appellate Division
A-5629-04T5
November 16, 2006

In this case, the issue was whether the professional services exclusion in a Comprehensive General Liability Policy excluded claims for property damage and personal injury resulting from the insured's failure to warn or give instructions.

The case arose out of the collapse of Pier 34, located on the western shore of the Delaware River in Philadelphia, PA, resulting in three deaths and numerous injuries to patrons of a restaurant/nightclub and significant property damage on May 18, 2000.

S.T. Hudson Engineers, Inc. et al. vs. Pennsylvania National Mutual Casualty Co. et al, Cont..

Actions were commenced in Pennsylvania on behalf of the deceased and injured persons, the pier owner, and the restaurant/nightclub owner alleging negligent failure to warn of a known defective condition(s) in the pier. Among the named defendants in said actions was the engineering and construction firm which designed and constructed the pier and two officers of those firms(hereinafter collectively referred to as the contractors).

While the underlying personal injury and property damage claims were pending, the contractors filed a declaratory judgment action against Pennsylvania National Mutual Casualty Company, seeking insurance coverage and a defense, including counsel fees and costs, pursuant to a comprehensive general liability (CGL) policy and a commercial umbrella (CU) policy. The trial Court ruled that Penn National had a duty to defend the contractors under the express provisions of the CGL policy. The underlying personal injury and property claims against the contractors settled and the contractors sought indemnification and costs of defense from Penn National.

Penn National asserted that it did not have a duty to defend or indemnify because the property and personal injury claims were excluded by the professional-services exclusion of the policy. The exclusion limited coverage to personal injury or property damage "arising out of the rendering of or failure to render any professional services by you or . . . on your behalf." Professional services were defined as including "the preparing, approving, or failing to prepare or approve" maps, drawings, opinions, reports, surveys, field orders, change orders, designs, or specifications, and supervisory, inspection, architectural or engineering services and activities.

S.T. Hudson Engineers, Inc. et al. vs. Pennsylvania National Mutual Casualty Co. et al, Cont..

Penn National argued that the language of its' professional-services exclusion should be construed broadly to include any property damage or personal injury originating from, growing out of, or having a substantial nexus with the professional activity of its' insured. Penn National also argued that its' products-completed operations coverage, which provides coverage for the failure to provide warnings, is subject to the professional services exclusion and therefore any injuries arising out of the contractor's failure to warn fall within that exclusion.

The Court found that the products-completed operations coverage does not emanate from the performance or failure to perform actual professional services, but rather from the giving or failure to provide information. Accordingly, it is the nature of the act or omission, not the nature of the resulting damage, that is determinative of coverage. The excluded acts in the CGL policy are the actual professional services, whereas the acts that fall within the products-completed operations coverage relate to the giving of information (i.e. instructions and warnings), albeit, resulting from either the performance or nonperformance of the contracted-for professional services.

Accordingly, the Court held that: (1) liability for property damage and personal injury resulting from the failure to warn or give instructions was not excluded by the professional-services exclusion in the CGL policy; (2) the Contractors' negligent failure to provide such warnings was covered under the products-completed operations provision of the policy; and (3) the Trial Court correctly ruled that Penn National had a duty to defend the Contractors under the express provisions of the CGL policy.

STAFF ADDITIONS

We are pleased to have recently hired **Saima Malik**, a graduate of London's Guildhall University. Ms. Malik is a Solicitor (an attorney in the United Kingdom) and is admitted to practice before the Supreme Court of England and Wales.

Brief Latin: *"Sua Sponte"*

Of his own will. To take a course of action without suggestion of another, e.g., a court may raise an issue sua sponte, i.e., on its' own.

- Black's Law Dictionary