

Insured that Controlled Defense Bears the Burden To Prove Allocation Between Covered and Non-Covered Claims

August 2009

The West Virginia Supreme Court of Appeals, in response to two certified questions posed by a federal district court, has held that, where an insurer has no duty to defend, West Virginia law requires (1) that the insured bear the burden of proof to establish proper allocation of a jury verdict between claims covered by the policy and claims not covered by the policy, and (2) that the insured bear the burden of proof to establish that claims resulting in a punitive damage award are covered by the policy. *Camden-Clark Mem. Hosp. Assoc. v. St. Paul Fire & Marine Ins. Co.*, 2009 WL 1835016 (W. Va. June 25, 2009).

The insurance carrier issued a policy to a hospital that provided \$1,000,000 in liability coverage and \$15,000,000 in excess coverage for, among other things, medical professional liability. The policy contained a \$2,000,000 self insured retention, and did not impose a duty to defend covered claims on the insurer. The policy also excluded coverage for claims based on expected or intended conduct, but it did not exclude coverage for punitive damages.

In the underlying suit, the estate of a deceased patient sued the insured hospital, contending that the patient's death resulted from over-sedation. The insured controlled its own defense, and the suit resulted in a \$6,545,000 verdict of compensatory and punitive damages against it. The jury verdict form did not ask the jury to specify whether liability was imposed for negligent or intentional conduct.

In the coverage litigation that followed, the United States District Court for the Southern District of West Virginia acknowledged that the issue of burden of proof would be outcome determinative. According to that court, because the jury verdict was based on conduct that may or may not be intentional, and the verdict did not state whether the conduct giving rise to damages was intentional, whatever party bore the burden of proof could not prevail. Accordingly, the district court posed two certified questions to the West Virginia Supreme Court of Appeals: (1) when a jury verdict is based on conduct that may or may not be covered, but the verdict does not specify the relevant information, who bears the burden of proving that liability was based upon non-covered conduct; and (2) when a jury awards punitive damages based on a claim that may or may not be covered, but the jury verdict does not specify the relevant information, who bears the burden of proving that the punitive damages were based on a non-covered claim.

In answering the certified questions, the state supreme court first determined that, where there is no duty to defend, the insured bears the burden of proof regarding allocation of a damages verdict between covered and non-covered claims. The court stated that the insured generally has the burden of proving that the claim falls within the insuring clause, assuming no exclusions are applicable. Once the insured has established a *prima facie* case, the burden shifts to the insurer to demonstrate the application of an exclusion. The court acknowledged that the absence of a duty to defend was centrally relevant to the burden of proof with respect to allocating a judgment between covered and non-covered claims and determined that the insured bears the burden of allocating a jury verdict between covered and non-covered claims where the insured controls its own defense. The court also specifically stated that, if an insurer had assumed defense of a claim pursuant to a duty to defend, the burden would fall on the insurer.

With respect to the second certified question regarding punitive damages, the court applied the same reasoning to conclude that, in a case where the jury awarded punitive damages against the insured and the insured controlled the defense, the insured has the burden of proving that the claim on which the punitive damage award is based is covered by the terms of the policy. In doing so, the court again emphasized that this result was dictated by the absence of a duty to defend on the insurer's part.