

Insurer's Duty To Defend Did Not Terminate upon Exhaustion of Per Claim Limit in Defense Costs

March 2010

Applying West Virginia law, the United States District Court for the Southern District of West Virginia has held that an insurer's duty to defend did not terminate when the insurer had paid the per claim limit of liability in defense costs. *Liberty Ins. Underwriters, Inc. v. Camden Clark Mem. Hosp. Corp.*, 2009 WL 4825199 (S.D. W. Va. Dec. 8, 2009). The court also held that a fraud exclusion did not preclude indemnity coverage for alleged intentional wrongful conduct, and that allegations concerning two separate acts of misconduct in one underlying lawsuit constituted a single claim.

The insurer issued a lawyers malpractice policy to the insured attorney for the policy period of November 11, 2005 to November 11, 2006 that provided for a \$100,000 per claim and \$300,000 aggregate limit of liability, inclusive of claim expenses. The policy provided that "[c]laims alleging, based upon, arising out of or attributable to the same or related wrongful acts shall be treated as a single claim." The policy also contained a limit of liability provision that stated that "[t]he most [the insurer] will pay for damages and claim expenses for each claim is specified as 'each claim' in the limits of liability section of the Declarations." In addition, the policy contained an exclusion providing that "[t]his policy does not apply to any judgment or final adjudication based upon, arising, out of or in any way related to any dishonest, fraudulent, criminal, malicious, or deliberately wrongful acts or omissions committed by [the insured]."

The underlying claims arose from the insured's representation of a hospital in three medical malpractice lawsuits filed in 2002 and 2003 by the same claimant. The medical malpractice claimant later filed a lawsuit against the insured in July 2006 alleging abuse of process, malicious prosecution and intentional infliction of emotional distress in the earlier medical malpractice litigation. Specifically, the claimant alleged that the insured had filed two frivolous counterclaims against him on behalf of the hospital in the underlying lawsuits. The insured notified the insurer of the claim in August 2006, and the insurer retained defense counsel for the insured. Subsequently, in a March 3, 2008 letter, the hospital notified the insured that it intended to pursue a legal malpractice suit against him concerning his representation of the hospital in the medical malpractice litigation.

After the hospital rejected the insurer's settlement offer in connection with the hospital's asserted legal malpractice claim, the insurer filed the instant declaratory judgment action. With respect to the lawsuit filed by the medical malpractice claimant, the insurer sought declarations that: (a) the lawsuit constitutes a single separate claim under the policy; (b) the insurer had no duty to indemnify due to the fraud exclusion; and (c) the insurer's duty to defend had expired due to its payment of the per claim limit under the policy in claim expenses. The insurer also sought certain declarations with respect to the potential claim by the hospital.

The court first held that the medical malpractice claimant's lawsuit against the insured was a single claim under the policy. Recognizing that no West Virginia court had defined the word "related" in the insurance context and that the policy did not define the term, the court noted that decisions in other jurisdictions interpreted the word broadly. The court concluded that, although the claimant alleged two separate acts of misconduct by the insured, those acts were "related" because the counterclaims at issue contained similar allegations of frivolous prosecution and were asserted in lawsuits that "asserted the same or similar claims."

Next, the court ruled that the fraud exclusion in the policy did not bar coverage for the causes of action against the insured for abuse of process, malicious prosecution and infliction of emotional distress. The insurer argued that, because West Virginia law bars claims of negligent legal practice against opposing counsel, the insured must be adjudged guilty of or admit to malicious or deliberately wrongful behavior in order for the claimant to prevail, and that the fraud exclusion would therefore bar indemnity coverage. The court rejected this argument, finding that the allegations at issue fell within the policy's definition of "wrongful act," which included alleged acts, errors, omissions or "personal injuries" that arise out of the rendering or failure to render professional legal services. The term "personal injury" was defined, in turn, to include abusive litigation, abuse of process and malicious prosecution. The court concluded that, while some fraudulent, malicious or deliberately wrongful acts might fall under the exclusion, the alleged abuse of process and malicious prosecution did not because they were specifically covered by the policy.

The court further held that the insurer's duty to defend under the policy had not terminated even though the insurer had paid the \$100,000 per claim limit of liability under the policy in claim expenses. In this regard, the insured argued that the "defense of claims" provision in the policy was the only policy provision permitting the insurer to terminate its defense of a covered claim, and that this provision provided for termination of a defense following the insured's refusal to consent to a settlement. The insured also noted that the fraud exclusion provided that the insurer would provide a defense of allegations of fraudulent or deliberately wrongful acts "until the time they are finally adjudicated or admitted by [the insured]." Based on this language, the insured argued that the insurer's duty to defend continued until a claim is resolved and does not expire when claim expenses meet or exceed the limit of liability.

In light of the policy provisions relied on by the insured, the court determined that the "purported monetary limitation on [the insurer's] duty to defend [in the limit of liability provision] is not set out in clear, direct, unambiguous language" and that the ambiguity would be construed against the insurer. The court further reasoned that, where courts had determined that the duty to defend expired upon exhaustion of the limit of liability, the policy language was "clearer and more direct" in limiting the insurer's duty to defend.