Client Alert

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“Personal Injury” and “Employment Practices” Provisions Reconcile; Insurer Must Defend

On December 5, 2014, Florida’s First District Court of Appeals held in *Khatib et al. v. Old Dominion Insurance Co.*, case number 1D13-4652, that an insurance carrier must defend its insureds, defendants in a third-party defamation claim, where the general liability insurance policy afforded coverage for “‘personal injury’ caused by an offense ‘arising out of [the insured’s] business’” while also specifically excluding coverage for employment-related practices. The court reconciled these potentially competing policy provisions, finding that the two clauses do not conflict. The court concluded, therefore, that the insurer would be required to provide a defense since at least some of the alleged defamatory comments were made at a business-related event, thereby “arising out of [the insureds’] business” as required under the insuring agreement, yet they were not necessarily made in furtherance of the employment relationship, thus avoiding the scope of the “employment practices” exclusion. The court demurred on the issue of indemnity.

Background

Khatib arises from a dispute between Dr. Majdi Ashchi and his former colleagues. Dr. Ashchi was the president and founder of First Coast Cardiovascular Institute (“FCCI”), a professional service organization that treats heart and cardiovascular disease. FCCI’s other officers and directors, the appellants in the case, sued Dr. Ashchi and others for fraud, among other things. Dr. Ashchi denied the allegations and filed a third-party defamation complaint against the appellants. The third-party complaint alleged that as part of a systematic plan to take control of FCCI and oust Dr. Ashchi from power, one of the appellants made baseless allegations against Dr. Ashchi at an FCCI shareholders’ meeting and that each of the appellants published defamatory statements about Dr. Ashchi to third parties. Appellants tendered the third-party claims to their general liability insurer, Old Dominion, under a policy naming FCCI as the named insured. The policy also afforded coverage to FCCI’s “‘executive officers’ and directors … but only with respect to their duties as officers and directors.”

Analysis and Holding

Because some, if not all, of the alleged defamation occurred while the third-party doctor defendants were either discharging their obligation at a shareholders meeting or executing other official duties, the appellate court had little difficulty in concluding that at least some of the alleged wrongs were performed by the third-party defendant doctors “with respect to their duties as officers and directors.” The insurance policy applied to “‘personal injury’ caused by an offense ‘arising out of [the insured’s] business,’” so it afforded coverage to the third-party defendant doctors unless a policy exclusion applied.

Old Dominion argued that the employment-related practices exclusion found in one of the policy endorsements excused it from any coverage obligation in this case. The insurer pointed to an exclusion for damages for “‘[p]ersonal injury’ caused by an offense arising out of [an insured’s] business” where the “personal injury” also “aris[es] out of any … (c) [e]mployment-related practices … such as … defamation.” The appellants claimed that language was ambiguous as a matter of law because it negated the coverage afforded elsewhere in the policy. The court acknowledged that an insurance policy cannot, with impunity, grant a right in one paragraph, then retract the very same right in an exclusion. However, the

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court found no conflict between the policy and exclusion: A defamatory utterance might easily “arise out of [a company’s] business” while being not at all “employment related.” The court found that some of the examples in the third-party complaint may not have been employment related and may instead have been made at a business-related conference or business-related social event, therefore “arising out of [the insureds’] business” for insuring agreement purposes but not being employment related for purposes of the policy exclusion.

Finding it “axiomatic in the law of insurance coverage in Florida that if a complaint alleges some facts within and some facts outside of coverage under an insurance policy, the insurer must nevertheless defend the entire suit,” the court held that the insurer owed a defense to the third-party defendant doctors. The court further held that the decision of the trial court exonerating Old Dominion from a duty to indemnify the third-party defendant doctors was premature because the duty to indemnify is often dependent upon further factual development through discovery or at trial.

Implications

Khatib serves as a reminder that the duty to defend in Florida is broad, and policyholders, therefore, should vigilantly pursue a defense where there is any potential for coverage under the policy. The decision also underscores the basic tenet that an insurer may not avoid coverage where some but not all of the allegations against its policyholder fall beyond the scope of coverage or within the scope of a policy exclusion. Where at least one of the allegations is within the scope of coverage, a defense is owed as to all. Likewise, if there is doubt as to whether an allegation is within the scope of coverage afforded under the policy, *Khatib* illustrates that a court will likely find that a defense is owed, since the benefit of any doubt under the policy must inure to the benefit of the policyholder.

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