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West Virginia High Court Holds That Policyholder Providing Its Own Defense Under Contract For Third-Party Liability Insurance Must Allocate Damages For Covered And Non-Covered Claims

The West Virginia Supreme Court of Appeals has ruled that a policyholder providing its own defense pursuant to the terms of a contract for third-party liability insurance must allocate between damages for covered and non-covered claims because, in such cases, the insurer is not in the best position to pursue allocation since it is not defending the litigation. *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.*, No. 33909, 2009 WL 1835016 (W. Va. June 25, 2009).

Background

The underlying litigation in *Camden-Clark* stemmed from the death of Hilda Boggs, a patient at Camden-Clark Memorial Hospital who had undergone an open reduction and internal fixation of an ankle fracture. Bernard Boggs, Ms. Boggs' husband, sued the hospital and other parties, alleging that medical professional negligence caused Ms. Boggs' death a week after the procedure. The complaint contained additional counts, including negligent hiring, retention and credentialing, as well as spoliation of evidence, fraudulent concealment and the tort of outrage.

Following the trial, the defendants were found liable, and the jury awarded \$6.45 million in compensatory and punitive damages. The jury verdict form did not specify whether liability was based on negligent or intentional conduct.

Coverage Dispute

The hospital's liability insurance contract did not require the hospital's insurer to provide a defense, and specifically provided that the hospital would defend itself. However, after the verdict, the hospital sought indemnification from the insurer. A disagreement ensued concerning the scope of coverage and the hospital commenced a declaratory judgment action.

The hospital moved for summary judgment, arguing that coverage should be available for the totality of damages awarded because the jury made no distinction between which damages were attributable to intentional acts and which were attributable to negligence. Similarly, the jury made no explicit finding as to the basis for the award of punitive damages, which could have been awarded due to conduct that was not intentional. The insurer, in contrast, argued that it was the hospital's burden to show which, if

any, damages were covered under the terms of the insurance contract.

Finding no clear guidance under West Virginia law, the federal district court certified the coverage issue to the Supreme Court of Appeals of West Virginia.

Court's Decision

The Supreme Court of Appeals of West Virginia concluded that it was the hospital's burden to prove that the portion of the verdict for which coverage was being sought constituted damages because of covered claims. The court began its analysis noting that an insured seeking recovery under a contract for insurance carries the burden of demonstrating a *prima facie* case of coverage by showing that the claim being made comes within the scope of coverage afforded. Only after that threshold showing has been made will the burden shift to the insurer to demonstrate the applicability of an exclusion. In addition, West Virginia courts have held that an insurer must defend a lawsuit in its entirety even if only some of the claims are covered.

The court noted that, per its terms, the insurance contract at issue did not impose a duty to defend on the carrier and that, as a result, the hospital was required to defend itself in the underlying litigation. The court reasoned that this aspect of the coverage "necessarily impacts the burden of allocating a judgment between covered and non-covered claims" This, the court explained, is because an insurer defending a lawsuit "is in the best position to see to it that the damages are allocated" See *Magnum Foods, Inc. v. Continental Casualty Company*, 36 F.3d 1491 (10th Cir. 1994); see also *Medmarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 199 S.W.3d 58 (Ark. 2004) (insurer had burden to allocate damages when it provided defense).

Based on these principles, the court reasoned that "the insured's ordinary burden to allocate a verdict between covered and non-covered claims does not shift to an insurer unless the insurer has an affirmative duty to defend the insured under the policy terms." Applying this reasoning to the facts presented, the court concluded that because the hospital's insurance

contract did not require the insurer to defend, the hospital would be required to demonstrate that coverage was being sought only for covered claims.

The court observed, however, that the outcome could be different if a policyholder "requests the insurer to participate in the defense" even though there is no duty to defend. Under those circumstances, "if the insurer affirmatively chooses not to participate in the defense, it should not be permitted to complain that the jury verdict is not allocated ... because it was given the [option] of participating, including the attendant opportunity to request an allocated verdict[,] and refused."

Implications

Camden-Clark confirms that, in cases in which the insurer has no duty to defend, the insured has the burden to establish that coverage exists for the entire damages award. Further, as the *Camden-Clark* court made clear, an insurer that rejects a request to participate in the defense — even if there is no duty to do so — could end up with the burden to allocate any damages.

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