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CGL Policies In 4th Circ. May Cover Intentional Conduct

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On March 13, 2015, the Fourth Circuit ruled in Liberty Mutual Fire Insurance Co. v. JM Smith Corp., et al.,[1] that Liberty Mutual must defend a drug distributor in a lawsuit brought by the West Virginia attorney general alleging the distributor's business practices contributed to prescription drug abuse in the state. The decision serves as a reminder that general liability insurance broadly extends to claims and investigations arising out of, among other things, allegedly improper business practices.

Background

In June 2012, the attorney general of West Virginia sued 13 wholesale drug distributors, including JM Smith, in an eight-count complaint alleging violations of the West Virginia Uniform Controlled Substances Act, the West Virginia Consumer Credit and Protection Act and antitrust law, and for public nuisance, unjust enrichment and negligence.[2] The crux of the complaint was that the drug distributors failed to identify, block and report excessive prescription drug orders that allegedly contributed to the state's drug abuse epidemic.

JM Smith tendered the lawsuit to its general liability insurer, Liberty Mutual, seeking a defense and indemnification under its commercial general liability policy. The policy required Liberty Mutual to defend against any suit seeking damages because of "bodily injury" or "property damage" resulting from an "occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although the definition's key term — "accident" — was undefined, relevant state law interprets that term to "require that the act or the injury resulting from the act be unintentional," in other words, something that "would not ordinarily follow and cannot be reasonably anticipated."

Liberty Mutual denied coverage and, in its suit for declaratory judgment, argued the West Virginia complaint did not allege an occurrence (i.e., "accident") under the policy but, instead, alleged intentional conduct. JM Smith countered with its own motion for summary judgment, in which JM Smith argued the complaint's allegations sounded in negligence and, thus, were sufficient to create the possibility of coverage under the policy, requiring Liberty Mutual to defend.

The district court granted JM Smith's motion and denied Liberty Mutual's motion on the ground that the complaint alleged acts of negligence or, in the very least, intentional acts that caused alleged injuries or violations that could not be reasonably anticipated, either of which qualified as an occurrence under the policy. Liberty Mutual, therefore, was under a duty to defend. Liberty Mutual appealed.

Holding

The Fourth Circuit affirmed.[3] The court found Liberty Mutual owed a defense under the policy if the allegations, as pled, created a possibility of coverage "for even just one claim in the complaint." Thus, that some intentional acts were alleged would not be dispositive where one claim sounded wholly in negligence. Moreover, the court of appeals found that even the intentional acts alleged in the complaint were, at their core, claims that JM Smith failed to exercise reasonable care, which is the hallmark of negligence. Thus, because one count sounded wholly in negligence and the others described a mix of negligence and intentionality, Liberty Mutual was required to defend JM Smith.

In finding for JM Smith, the court of appeals rejected Liberty Mutual's argument that the underlying allegations of willful negligence amounted to intentional conduct that was not covered by the policy. Liberty Mutual's argument was premised on Fourth Circuit precedent that described negligent behavior that, over time, became intentional. In C.Y. Thomas Co. v. Lumbermens Mutual Casualty Co.,[4] for example, a construction company dug a ditch and piled large amounts of construction dirt next to a garage. Over time, the ditch and dirt pile caused mud and water to flood the garage, but the construction company did nothing about it. The court held that the originally negligent behavior, over time, became intentional as the company witnessed the direct harm and did nothing to correct the situation.

The Fourth Circuit distinguished C.Y. Thomas on two grounds.

First, causation of the harm alleged in the West Virginia suit was not direct. Unlike the construction company — which saw the harm "openly visited as a direct result of [its] negligence" — there was no claim that JM Smith, or any other defendant, "provid[ed] prescription drugs [directly] to any person or entity knowing that it was enabling an abuser." Instead, JM Smith was just one of many defendants, all of whom were participating in legal drug sales and any of whom could have contributed to the alleged injuries.

Second, the Fourth Circuit noted that repetition of the alleged injurious act "cannot on its own render the harm outside the policy's coverage," since the policy's definition of an "occurrence" specifically includes "continuous or repeated exposure to substantially the same general harmful conditions." This, according to the Fourth Circuit, illustrates the insurer's contemplation that "an insured might engage in behavior repeatedly over a period of time that results in harm unbeknownst to it." The West Virginia complaint did not allege that any defendant knew of any harm directly attributable to it, as compared to the construction company in C.Y. Thomas, which witnessed the harm caused by its digging and piling.

Implications

Liberty Mutual is significant for policyholders for several reasons. First, the decision is a reminder that general liability insurance broadly extends to claims and investigations arising out

of allegedly improper business practices. Second, the decision illustrates that, even when faced with allegations of intentional conduct, coverage still may be available under standard commercial general liability policies where the true import of the allegations is failure to exercise reasonable care. This is particularly so where the causal connection between the alleged conduct and resulting injury becomes more attenuated. Finally, the decision underscores the requirement that policy provisions must be read in the context of the entire policy. Here, the court rejected the insurer's interpretation of "occurrence," in part, because the insurer's interpretation was not reconcilable with the remainder of the policy.

[1] No. 13-2451 (4th Cir. March 13, 2015), available here.

[2] A claim for medical monitoring was dropped from the suit during the appeal.

[3] Because the issue had not been properly preserved below, the court refused to entertain Liberty Mutual's argument that, even if the West Virginia complaint alleged an "occurrence," the complaint did not allege bodily injury or property damage. That argument had successfully prevented coverage of the West Virginia suit in disputes between other defendants and their insurers. See, e.g., Travelers Prop. Cas. Co. v. Anda Inc., No. 0:12-cv-62392-KMM (S.D. Fl. March 9, 2015); Cincinnati Insurance Co. v. Richie Enterprises LLC, No. 1:12-cv-00186 (W.D.Ky. July 16, 2014).

[4] 183 F.2d 729 (4th Cir. 1950).