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Century Surety Co. v. Andrew, 134 Nev. Adv. Op. 100 (Dec. 13, 2018) (en banc)

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INSURANCE LAW: INSURER'S LIABILITY FOR BREACH OF DUTY TO DEFEND

Summary

The Court held that when an insurer breaches its contractual duty to defend the insured, the insurer's liability is not capped at the policy limits plus the insured's defense costs; an insurer may be liable for any consequential damages caused by its breach. Moreover, whether the insurer acted in good-faith is irrelevant for determining the damages for a breach of this duty.

Background

Michael Vasquez struck the respondent, Ryan T. Pretner, with his truck and caused Pretner to sustain significant brain injuries. Vasquez used the truck both for personal use and for his automobile detailing business, Blue Streak Auto Detailing, LLC (Blue Streak). At the time of the accident, appellant, Century Surety Company, insured Blue Streak under a commercial liability policy.

Appellant refused to settle the claim within the policy limit, and respondent sued Vasquez and Blue Streak in state district court, alleging that Vasquez was driving in the course and scope of his employment with Blue Streak at the time of the accident. Respondents notified appellant of the suit, but appellant refused to defend Blue Streak. Vasquez and Blue Streak defaulted, and the notice of default was forwarded to appellant. Appellant maintained that the accident did not occur during the course and scope of Vasquez's employment, and thus the claim was not covered under its insurance policy.

Respondents, Vasquez, and Blue Streak then entered into a settlement agreement whereby respondents agreed to not execute on any judgment against Vasquez and Blue Streak, and Blue Streak assigned its rights against appellant to respondents. Respondents then filed an unchallenged application for entry of default judgment in state district court, and the district court entered a default judgment against Vasquez and Blue Street for \$18,050,183, finding that Vasquez negligently injured respondent. The district court further found that Vasquez was working within the course and scope of his employment and, consequently, that Blue Streak was also liable.

Respondents then filed suit against appellant, an assignee of Blue Streak, for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices in the state district court; the appellant removed the case to the federal district court. The federal court found that even though appellant did not act in bad faith, appellant breached its duty to defend Blue Streak and was liable for consequential damages that exceeded the policy limit for the appellant's breach of the duty to defend. The federal court also concluded that bad faith was not required to impose liability on appellant in excess of the policy limit.

The federal district court stayed the proceedings to ask the Nevada Supreme Court whether the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any costs incurred by the insured in mounting a defense, or whether the insurer is liable for all losses consequential to the insurer's breach.

¹ By Austin Maul.

Discussion

The Court evaluated two different approaches to the issue presented. The majority view is that the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs when there is no opportunity to compromise the claim and the only wrongful act of the insurer is refusing to defend the insured.² The minority view is that damages for a breach of the duty to defend are not automatically limited to the amount of the policy, but are instead awarded based on the facts of each case.³ The Court adopted the minority view, holding that the insured should be entitled to consequential damages that result from the insurer's breach of its contractual duty, reasoning that this approach is consistent with general contract principles and the obligation of the insurer to defend its insured is purely contractual.

Further, the right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith, because a party that breaches a contract is liable for all foreseeable damages flowing from the breach.⁴ Consequently, even in the absence of bad faith, an insurer may be liable for a judgment that exceeds the policy limits if the judgment is consequential to the insurer's breach. However, the court noted that an entire judgment is not automatically a consequence of an insurer's breach of its duty to defend; the insured must show that the breach caused the excess judgment, and "is obligated to take all reasonable steps to protect himself and mitigate his damages."⁵

Conclusion

The Court answered the certified question and concluded that an insured may recover any damages consequential to the insurer's breach of its duty to defend and, consequently, an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith.

² *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958).

³ *Burgraff v. Menard, Inc.*, 875 N.W.2d 596, 608 (Wis. 2016).

⁴ *Stockdale v. Jamison*, 330 N.W.2d 389, 392 (Mich. 1982).

⁵ *Thomas v. W. World Ins. Co.*, 343 So. 2d 1298, 1303 (Fla. Dist. Ct. App. 1977).