BARNES & THORNBURG LLP

Texas Supreme Court To Decide Key Coverage Question On Policyholders' Rights

July 13, 2015 | | Claims,Policyholder Protection

In recognition of the opening of our Dallas, Texas, office, this week's blog focuses on an important Texas Supreme Court decision anticipated by policyholders and insurers to define the manner in which policyholders may resolve disputes with claimants after an insurer wrongfully denies a defense and coverage. *Seger, et al. v. Yorkshire Ins. Co., Ltd. And Ocean Marine Ins. Co., Ltd. (Case No. 13-0673)* is currently pending before the Texas Supreme Court for decision. Oral argument has been set for Sept. 15, 2015.

Amicus curiae briefs have been filed by the American Insurance Association, the Property Casualty Insurance Association of America, Lloyd's America, Inc., the Texas Insurance Coverage League and the Texas Civil Justice League.

Both sides of this dispute have weighed in heavily on the key issue that plagues insurers and insureds alike in Texas and across the country: How may an insured settle or otherwise dispose of a claim once the insurer wrongfully denies a defense and coverage? In this soft insurance market, claims disputes are on the rise as policyholder dissatisfaction with claim denials has fomented coverage litigation across all lines. Policyholders are being left to defend or settle claims for which they expected coverage.

Must the insured in these circumstances aggressively defend itself (on its own nickel) through a fully adversarial trial before it can reach a judgment with the claimant and assign rights to obtain insurance proceeds? Or does a default judgment suffice to pursue reimbursement from the defendant-insured's insurance companies?

This is the question before the Texas Supreme Court in *Seger*. The dispute arises from the wrongful death of a drilling company worker killed on the job in Texas. Seger family members sued the drilling company who received a denial of coverage from their carriers (the appellees in the Supreme Court). A default judgment was entered against the drilling company, who failed to defend the action. A $72,000,000 judgment was rendered against the defaulting insurers in the trial court in Hutchinson County, which was subsequently overturned in the Court of Appeals. That court found that the underlying default judgment against the drilling company could not support a judgment against its insurers due to insufficient evidence on damages, relying on 1996 Texas Supreme Court authority in *State Farm Fire & Casualty v. Gandy* , 925 S.W.2d 696 (Tex. 1996) (holding that an insured's damages must be determined by "a fully adversarial trial"). However, *Gandy* appears to conflict with the later 2008 Texas Supreme Court decision in *Evanston Insurance Co. v. Atofina* , 256 S.W.3d 660 (Tex. 2008) (holding that an insurer may not challenge a settlement when it has wrongfully declined to provide a defense); thus the battle lines are drawn in Seger to determine this vitally important question to both policyholders and insurers alike.

Texas law has long recognized that an insured buys insurance first and foremost for the defense provided for claims brought against it—the duty to

RELATED PRACTICE AREAS

Commercial General Liability
Copyright, Trademark, and Media Liability
Credit and Mortgage Insurance
Directors and Officers Liability
Employment Practices Liability
Fidelity Bonds and Commercial Crime Policies
First-Party Property
Insurance Recovery and Counseling
Ocean Marine and Cargo Coverage
Professional Liability
Representations and Warranties
Workers' Compensation and Employers' Liability

RELATED TOPICS

Claims
Policyholder

defend being much broader than the duty to indemnify. There should be consequences for an insurer who refuses to defend its insureds when they need that assistance the most.

May an insured properly default on a suit and then risk a non-covered judgment, preserving its rights to seek full reimbursement from the insurer? Or must an insured expend substantial resources to defend itself through “a fully adversarial trial” in order to protect its rights against its insurers? This frequently recurring issue will be decided by the Supreme Court in *Seger*. The court will likely draw a bright line rule for insureds to follow when insurers walk away.

Because of the potential for collusion, balanced with the turmoil caused by defaulting insurers, we believe the court may conclude that defaulting insurers will be held liable for default or consent judgments entered into when the defense is denied, so long as the insurer cannot prove collusion or bad faith in the process of obtaining those judgments. Insurers should bear the responsibility of “guessing wrong” and not providing a defense to its insureds, who must, conversely, act in good faith when choosing to defend or settle claims rejected by their carriers.