Case Alert

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Wisconsin Tests Breadth of Duty to Defend: Declines to Strip Wholesaler of Defense

Wisconsin's Supreme Court recently held that even where a complaint generally alleges a company acted wrongfully and with intent to defraud, a single potentially covered claim still triggers the duty to defend. The case is yet another in a long line of state high court decisions finding that the duty to defend is exceedingly broad and applies where there is a single potentially covered claim.

In *West Bend Mutual Insurance Company v. Ixthus Medical Supply, Inc.*, Ixthus sought coverage from West Bend for defense of the underlying suit brought by Abbott Laboratories against Ixthus. 2019 WI 19. The underlying suit alleged that Ixthus, a medical supplies distributor, imported foreign versions of an Abbott diabetes test trip – which Abbott sells at a lower price in foreign markets – and sold them in the U.S. Although the complaint largely included allegations of intentional, wrongful, and fraudulent conduct, for coverage purposes, the court emphasized the allegation that the strips were sold in a way "that caused substantial injury to Abbott."

The court explained that, in order to determine whether a duty to defend exists, Wisconsin "compare[s] the four corners of the underlying complaint to the terms of the entire insurance policy." In performing that analysis, "if there are any potentially covered claims – any allegations in the complaint that give rise to the possibility of coverage – the insurer has a duty to defend. The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage."

In cases involving coverage under the personal and advertising injury part of a commercial general liability policy, the court asks three questions to determine if the duty to defend exists: "(1) Does the complaint allege a covered offense under the advertising injury provision? (2) Does the complaint allege that the insured engaged in advertising activity? and (3) Does the complaint allege a causal connection between the plaintiff's alleged injury and the insured's advertising activity?" Upon performing that analysis, the court then considers whether an exclusion applies to those allegations.

West Bend did not contest the first two questions in the test but argued that the "complaint lacks any allegations suggesting a causal connection between Abbott's injury and Ixthus's actions." The court disagreed, finding that "[t]he allegations in Abbott's complaint very plainly allege[d] that Ixthus, as a Defendant, engaged in advertising that caused substantial injury to Abbott." The court determined that any exclusions potentially relevant to the Abbott complaint did not apply to this allegation.

In the absence of an applicable exclusion, the court held that "[t]he claims in the complaint are sufficient to allege a causal connection between Ixthus's advertising activity and Abbott's injuries." The court further held that "neither the knowing violation nor the criminal acts exclusions apply to remove West Bend's duty to defend because the complaint alleges at least one potentially covered claim unaffected by either exclusion."

This holding aligns with the many other decisions nationwide demonstrating the extreme breadth of the duty to defend. Commercial General Liability insurance is often referred to as "litigation insurance" because, in most instances, lawsuits have an allegation or cause of action within them that triggers a duty to defend. This is something that all policyholders should have cemented in their thought process. Any attorney drafting a lawsuit should keep these principles in mind as well. If the defendant's defense is funded by insurance, there will most likely be more money available at the settlement table.

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