BUSINESS LIABILITY POLICY REQUIRES INSURER TO DEFEND DEFAMATION AND BUSINESS TORT CLAIMS ARISING OUT OF BUSINESS' WEB SITE PUBLICATIONS

May 6, 2014 *Michael S. Levine and Patrick M. McDermott*

The U.S. District Court for the Eastern District of Virginia has held that an insurer has a duty to defend claims arising out of Web site publications.[1] In that case, the court rejected an insurer's attempt to disclaim coverage based upon an exclusion barring coverage for insureds whose business is advertising, broadcasting, publishing or telecasting, finding that posting news stories on a Web site was incidental to the insured's business and therefore not excluded.

Background

Franklin Center for Government and Public Integrity, a nonprofit corporation, was sued by GreenTech Automotive, Inc. GreenTech contended that Franklin Center had defamed it and intentionally interfered with advantageous business relations by posting on Franklin Center's Web site two articles authored by a Franklin Center employee.

When Franklin Center sought coverage under its business liability policy, State Farm disclaimed and filed a lawsuit against Franklin Center seeking a declaration that the business-owners' policy did not cover GreenTech's claims against Franklin Center. Franklin Center filed a counterclaim requesting that the court declare that the policy covered those claims.

The parties cross-moved for summary judgment on State Farm's obligation to defend. The parties stipulated that there were two coverage issues. First, whether GreenTech's claims alleged "personal and advertising injury" and second, if so, whether the claims fell within certain exclusions in the policy.

The Court's Opinion

In evaluating whether State Farm owed a defense to Franklin Center, the Eastern District of Virginia found that GreenTech's claims alleged "personal and advertising injury" and that the claims did not fall within the exclusions. The policy defined "personal and advertising injury" to include "oral or written publication, in any matter, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Because GreenTech's defamation and intentional interference with business claims were all based on "oral or written publications," the court concluded that the claims fell "squarely" within the "personal and advertising injury" coverage.

The burden then shifted to State Farm to establish that due to exclusions it could not be liable for any judgment based upon GreenTech's allegations. One exclusion barred coverage for personal and advertising injury committed by an insured whose business was publishing. The policy did not define "publishing" or "an insured whose business … is publishing," so the court gave the terms "their plain, ordinary and accepted meaning." The court explained that the policy must give Franklin Center "sufficient notice that its activities 'unambiguously' come within the exclusion" and that, therefore, "the test is not what the insurer intended the policy to mean, but rather what a reasonable person in the position of the insured would have understood it to mean."

Here, it was clear that Franklin Center was a business that engaged in the act of publishing. But, those publishing acts were the same as many other organizations that used Web sites to post articles or other information in connection with reaching their organizational goals. For the court, the line between an insured whose business activities included publishing and an insured whose business was publishing was not clear. Therefore, the exclusion did not bar coverage

because it did not put Franklin Center "on fair notice as to when and under what circumstances the exclusion applies to defamation or other claims that are otherwise covered but which arise out of an insured's postings on its website."

Because GreenTech's claims alleged "personal and advertising injury" and did not fall within any of the exclusions relied upon by State Farm, the court found that State Farm had a duty to defend Franklin Center against GreenTech's claims. The court also decided that it would resolve State Farm's duty to indemnify Franklin Center (i.e., its duty to pay for any settlement or judgment) after the conclusion of the litigation between GreenTech and Franklin Center.

Insurance Implications

The *Franklin Ctr.* decision demonstrates the broad nature of the duty to defend. That duty requires insurers to provide a defense when the allegations against an insured fall within the policy's coverage. To avoid its defense obligation, the insurer must show that under no set of circumstances could it become liable under the policy for a judgment against the insured. So, if there is an ambiguity about whether a policy applies, the insurer must defend. Therefore, when faced with any type of litigation, policyholders should remain mindful of their insurers' broad duty to defend and carefully inspect any potentially applicable insurance policies.

Further, with businesses increasing their use of Web sites as well as Twitter and other social media to publicize their activities, the decision makes clear that coverage for liability arising out of such publications is not necessarily barred by exclusions for policyholders in the publication business. Companies publicizing their business on the Internet may still be able to rely upon their advertising injury coverage.

Note

[1] *State Farm Fire & Cas. Co. v. Franklin Ctr. for Gov't & Pub. Integrity*, No. 1:13-cv-957, 2014 WL 1365758 (E.D. Va. Apr. 4, 2014).

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