Focus INSURANCE

High price paid for delay in filing notice

Nicole Mangan

SHUTTER_M / ISTOCKPHOTO.COM

Is giving notice of an action to an insurer a prerequisite to triggering its obligation to assume the cost of providing a defence? Does the obligation to assume defence costs arise from the time the action is commenced? Is any prejudice suffered by the insurer, arising from late notice, appropriate to consider in this analysis? Recently the British Columbia Court of Appeal addressed these questions in *Lloyd's Underwriters v. Blue Mountain Log Sales Ltd.* 2016 BCCA 352.

As background, in 2012, litigation ensued between two groups of companies referred to as the "Clarke Group" and the "Global Group." Initially only Clarke Group companies in the state of Washington were sued. In August, 2013 they submitted the claims to their insurer. Later on, Canadian Clarke Group entities were also sued. These claims could have been tendered to Lloyd's for a defence. However, the Clarke Group did not immediately realize this and did not take this step until April, 2014. By then $588,000 had been incurred in pre-tender defence costs. Lloyd's agreed that it owed a defence to the Clarke Group companies and that it was obligated to assume the defence costs from April, 2014 forward but it refused to pay or share in the pre-tender defence costs — resulting in more litigation.

The trial judge, T.M. McEwan of the British Columbia Supreme Court, acknowledged there were two lines of cases from other jurisdictions addressing the issue of when the obligation to assume defence costs arose. The first held an insurer is obligated to cover these costs from the time the action is commenced and issues related to late notice should be analyzed from the perspective of whether the insurer is prejudiced. The second held that notice is required before the duty to defend, and to incur the associated costs, is triggered. Policy terms relating to: the duty to defend; notice; the insured's duty to co-operate; and the restriction on voluntary payments, all formed part of the analysis. The trial judge concluded an insurer's obligation to assume defence costs arises when a claim covered by the policy is made. The result, for this case, was that the insurer should have paid or shared in the pre-tender defence costs that had been incurred. No prejudice had been pleaded by the insurer. Delayed notice was treated as imperfect compliance and, at the trial level, relief from forfeiture was granted for the insured's failure to provide earlier notice. Lloyd's appealed.

The Court of Appeal reached different conclusions on when the insurer's obligation to cover defence costs arose and on whether relief from forfeiture was available. Drawing from case law that analyzed the duty to defend, the court concluded that no assessment of whether a claim's allegations are potentially covered by the policy can occur until that claim is provided to the insurer. A defence could not, therefore, be owed prior to the insurer being given notice of the action. One important caution, as with most insurance issues, is to carefully review the policy terms. Some policies have language that requires notice to be given before an obligation to incur defence costs arises thereby creating a true condition precedent. The policy language in this case, however, contained no such language and the court confirmed it was not creating a "condition precedent." Instead, it concluded there is nothing to defend until an insurer has the opportunity to determine whether a duty to defend exists.

A useful analysis of when relief from forfeiture is available was also provided that emphasized this statutory provision's fundamental requirements. Simply put, an insured must breach a policy term before relief is available. The insured had argued it was losing out on reimbursement of defence costs due to its failure to provide timely notice and, also, due to the insurer's position that incurring pre-tender defence costs was a "voluntary payment." The court concluded, however, that despite late notice, a defence was provided going forward and the defence costs were, given the court's earlier conclusion, "incurred before the duty to defend arose." The insured had, therefore, not forfeited anything due to a breach of a policy term and relief from forfeiture could not apply. The court's analysis also suggested that the consequence of the insured incurring its own pre-tender defence costs may not be a "forfeiture" at all if a voluntary payment clause serves only to impose on the insured the consequence of its actions rather than to prevent any coverage being available.

Canadian case law provides little guidance on when the duty to defend arises and the conflicting U.S. authorities do not provide a conclusive answer. There is also very little Canadian law on relief from forfeiture in the context of pre-tender costs incurred and late notice. This case is, therefore, an important one for Canadian insurance practitioners.

Nicole Mangan is a partner at Richards Buell Sutton LLP in Vancouver. She practises in the areas of insurance litigation, real estate disputes and employment law.

Lawddities

JRCASAS/ ISTOCKPHOTO.COM

Felony charge for unlicensed vehicle operation

Persistence is a good thing, unless of course it get you into trouble with the law. A case in point is a man from Cortlandville, N.Y., who has had his licence suspended on average once every two years. As ottawasun.com reports, when police pulled 51-year-old Darwin Barnes over for speeding on Interstate 81 south of Syracuse (he was allegedly going 95 m.p.h. in a 65 m.p.h. zone), the state trooper was astounded to find that Barnes, once again, did not have a valid drivers' licence. In fact, Barnes has had his licence suspended 46 times over his driving lifetime. Unfortunately for him, at this point the authorities have begun to take his driving record seriously. The upshot is that, although he did get out on bail, he is facing a felony charge of first-degree aggravated unlicensed operation of a vehicle. – **STAFF**