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Request denied

August 29, 2003

The Honorable Chief Justice Ronald M. George
And the Honorable Associate Justices
Of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Petition for Review of Rocky Cola Café v. Golden Eagle Ins. Corp
Supreme Court Case No. S117935

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

We write on behalf of United Policyholders (UP) in support of Petitioner Rocky Cola Café's Petition for Review.

UP is a national, non-profit organization dedicated to educating the public on insurance issues and the interests of both business and individual policyholders. UP serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting their rights and obligations. It is funded by donations and grants and is tax exempt under Internal Revenue Code § 501(c)(3).

UP has submitted numerous amicus curiae briefs in courts throughout the country. Its amicus brief was cited by the U.S. Supreme Court in Humana v. Forsyth (1999) 525 U.S. 299, and its arguments were adopted by this Court in Vandenberg v. Sup. Ct. (1999) 21 Cal.4th 815.

ISSUES

UP believes the present action gives rise to at least two critical and unsettled legal issues: (1) whether an insurer who provides a litigation defense to its insured can seek total reimbursement of all defense fees and costs incurred from the time of tender on the ground that it never had a duty to defend in the first place; and, (2) what is the appropriate remedy for the insured when the insurer wrongfully brings such an action?

No case has squarely addressed these particular issues. However, this Court's decision in Buss v. Superior Court (Transamerica Insurance Company) (1997) 16 Cal.4th 35 is a helpful

point of reference. In Buss, this Court held that in cases involving mixed claims, some which require a duty to defend, some which do not, an insurer must defend the entire action so that its insured has an immediate and meaningful defense. (Id. at pp. 48-49). In exchange for the entire defense, this Court held that the insurer should be reimbursed for fees and costs solely allocable to claims which did not require a duty to defend because no potential for coverage ever existed. (Id. at 52). Buss, however, did not address the situation at issue here where an insurer claims total reimbursement of all defense fees and costs provided to its insured.

PROCEDURAL HISTORY

In the instant case, Golden Eagle Insurance Corp. ("Golden Eagle") provided an entire defense for the action against Rocky Cola Café under a reservation of rights. (Golden Eagle Insurance Corporation v. Rocky Cola Café (2001) 94 Cal.App.4th 120, 124). Golden Eagle acknowledged that at least one claim, defamation, came within the basic scope of coverage in its commercial general liability (CGL) policy. (Id., at 125, 126). Despite this, Golden Eagle, by a separate declaratory relief action, sought recovery for all defense costs, including the cost to defend the defamation cause of action. (Id., at 128, 129).

In its declaratory relief action, Golden Eagle argued that although the third party complaint's allegations of defamation triggered coverage under the CGL policy, those same allegations also triggered an employment related practices (ERP) exclusion which barred coverage. (Id. at 125, 126). Therefore, according to Golden Eagle, there never was any potential for coverage requiring a duty to defend. (Id., at 126).

The trial court in the declaratory relief action rejected Golden Eagle's novel position in summary judgment, finding that there was a duty to defend. Golden Eagle lost again on appeal. (Id., at 129). After spending substantial attorneys' fees and costs to prove that Golden Eagle's declaratory relief action violated the defense and indemnity promises it made in its insurance policy, Rocky Cola filed a new action against Golden Eagle for breach of its insurance contract and breach of the covenant of good faith and fair dealing.

In the breach of contract and bad faith action, both the trial court and the Court of Appeals ruled against Rocky Cola. The Court of Appeals held that although Golden Eagle was incorrect that its ERP exclusion applied, the law regarding its ERP exclusion was unsettled when it filed its declaratory relief action, and Golden Eagle was free to test the law to see whether it had a duty to defend Rocky Cola in the first place. The Court of Appeals also held that it was proper for Golden Eagle to continue to pursue its reimbursement action even though all indemnity issues had been rendered moot by summary judgment in the underlying action.

ARGUMENT

UP submits that Golden Eagle's reimbursement action was manifestly improper. No authority exists for an insurer to claim total reimbursement of all defense costs once it has

accepted tender of a defense, even under a reservation of rights. Moreover, the disputed ERP exclusion related solely to Golden Eagle's duty to indemnify, which was rendered moot by Rocky Cola's successful motion for summary judgment. The duty to defend, on the other hand, was clearly triggered by the defamation claim, which all parties agree fell within the basic scope of coverage. The potential for coverage of the defamation claim mandated that Golden Eagle provide its insured with a defense regardless of the ultimate outcome of the case.

It has long been the law of this state that the duty to defend is far broader than the duty to indemnify. (Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 271). Courts have zealously preserved the distinction between the broad duty to defend and the narrower duty to indemnify, finding that a duty to defend exists when any conceivable theory as to any single issue in a third party complaint raises the potential for coverage under the applicable policy. (Montrose Chem. Corp. v. Sup.Ct. (Canadian Universal Ins. Co., Inc.) (1993) 6 Cal.4th 287, 295). The duty to defend turns upon information available to the insurer at the time of the tender of the defense and/or the inception of a third party lawsuit. (Montrose, 6 Cal.4th at 295; B&E Convalescent Center v. State Comp. Ins. Fund (1992) 8 Cal.4th 78, 92; CNA Cas. of Calif. v. Seaboard Sur. Co. (1986) 176 Cal.App.3d 598).

Applying these well-established principles, one must conclude that a potential for coverage clearly existed. The defamation claim fell within the basic coverage provisions of the CGL policy, thereby triggering the duty to defend. The disputed ERP exclusion applied solely to the duty to indemnify.

A case which well illustrates this point is Cal-Farm Insurance Company v. TAC Exterminators, Inc. (1985) 172 Cal.App.3d 564. In Cal-Farm, the court found that the plaintiff's wrongful death action was a risk of the nature and kind covered by the CGL policy at issue. (Id., at 576). However, the court also found that exclusions barred coverage. (Id., at 580). Relying in part on this Court's decision in Gray, Cal-Farm held that damage of the kind covered by a broad coverage clause gives rise to the duty to defend, as distinguished from the duty to indemnify. (Id., at 576). In reaching this holding, Cal-Farm distinguished those cases where the issue was whether the risk itself fell within basic coverage provisions, as opposed to those cases where the risk would be covered but for a disputed exclusion. (Id). According to Cal-Farm, issues regarding the scope of basic coverage properly related to the duty to defend, while issues regarding disputed exclusions solely applied to the duty to indemnify. (Id).

In explaining this dichotomy, Cal-Farm stated:

> "If we were to hold otherwise, any time an insurance company had a questionable claim due to an uncertain exclusion clause, it could defend, under a reservation of rights, and immediately bring an action for declaratory relief seeking to rid itself of the arguable duty to defend. As a result, the duty to defend would eventually be no broader than the duty to indemnify."

(Id., at 580).

The logic behind the Cal-Farm decision should be applied here. Claims which fall under the basic coverage provision of a liability policy trigger the duty to defend. Whereas Buss stands for the principle that an insurer can seek reimbursement of defense costs for those claims bearing no relationship to the risks insured against, Buss should not be interpreted to allow insurance companies to claim total reimbursement of all defense costs every time an insurer claims that a disputed exclusion applies. Otherwise, as Cal-Farm correctly points out, the distinction between the duty to defend and the duty to indemnify would become meaningless.

By finding no breach of the covenant of good faith and fair dealing, the Court of Appeals decision opens the door for insurance companies to claim total reimbursement of all defense costs every time a claim falls within the basic scope of coverage, but may or may not be subject to an exclusion. UP believes that this Court never intended Buss to be applied in that manner.

Moreover, the Court of Appeals decision threatens to leave the insured without a remedy in the face of an improper reimbursement action. It is important that this Court provide guidance. The duty to defend in a liability policy is just as important as the duty to indemnify. (Montrose, at 295-296). When an insured pays premiums under a liability policy, the insured is reasonably expecting that the insurer will provide all attorneys' fees and costs required to defend potentially covered claims. When, in addition to paying premiums, the insured is forced to expend his or her own funds to fight an improper declaratory relief action, the insured is getting less than what was bargained for under the contract of insurance. When the insurer is proven wrong, as is the case here, at the very least the insured should be entitled to recover his or her attorneys' fees and costs as benefit of the bargain contract damages.

The policy considerations underlying Buss were to encourage insurance companies to provide a vigorous and effective defense at the time of tender. (Buss, at 62). It would be an incredible abuse of Buss, however, to allow insurance companies to use the threat of total reimbursement of all defense fees and costs as a hammer against their insureds. Rocky Cola's Petition for Review should be granted.

Respectfully submitted,

CHIPMAN MILES & ASSOCIATES

By: Joel Westbrook

Chipman Miles
Brian Miles
Joel M. Westbrook
On behalf of United Policyholders

CM/BBM/JMW:cll

PROOF OF SERVICE

Letter in Support of Petition for Review

I am employed in Contra Costa County, California. My business address is 1407 Oakland Blvd., Suite 107, Walnut Creek, California 94596. I am over the age of 18 years and am not a party to this case. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business.

On August 29, 2003, I served the foregoing Rule 14 Letter in Support of Petition for Review on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows and mailing it following ordinary business practices to:

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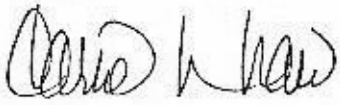
Court of Appeal
Second Appellate District
Division One
300 S. Spring Street
Los Angeles, CA 90013

Hon. J. Stephen Czuleger
Los Angeles Superior Court
111 N. Hill Street, Dept. 50
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing it true and correct. Executed on August 29, 2003.



Carrie L. Law