TRAUB LIEBERMAN

INSURANCE LAW BLOG

April 1, 2019

Illinois Federal Court Grants Summary Judgment To Insurer On Late Notice Defense Despite Finding A Genuine Issue Of Material Fact As To The Insured's Sophistication

BY: Jeremy S. Macklin

The underlying plaintiff, Kyler Moje, played minor-league hockey for the Danville Dashers, a team in the now-defunct Federal Hockey League ("the League"). During a game on or about February 10, 2012, a player from the opposing team allegedly struck Moje in the face with a hockey stick and thrust the blade of his skate under Moje's helmet.

Moje filed a lawsuit against the League and the manufacturer of the helmet he was wearing. On February 6, 2014, Moje served the Commissioner with the lawsuit. At the time the Commissioner was served, he "believed the policy would provide coverage" for the lawsuit but that it was not worth contacting National Casualty about the lawsuit because the claim did not involve "substantial losses." Instead of contacting National Casualty, the Commissioner hired a New York attorney (a solo practitioner) to defend the lawsuit. The New York attorney prepared a general denial, but he never filed the pleading or an appearance.

On May 14, 2014, the court entered a default against the League. On June 11, 2014, the court held a hearing at which Moje proved up his damages, and the court entered a default judgment against the League in the amount of $800,000. The Commissioner did not learn about these events until October 9, 2014, at which time he notified National Casualty of the default judgment. National Casualty reserved its rights to deny coverage, but retained an attorney to set aside the default, which was denied. The Seventh Circuit upheld the district court's denial.

Moje then filed a declaratory judgment action against National Casualty Company, the insurer for the League and the League's Commissioner, along with policy producer The David Agency Insurance, Inc. (the claims against The David Agency for failure to procure insurance are not addressed in this summary). While Moje argued that the National Casualty Policy provides coverage for his injury, National Casualty asserted several policy provisions to dispute coverage.

National Casualty argued unreasonable notice as a bar to coverage and moved for summary judgment on that issue. In its ruling, the district court examined the five factors set forth in *West American Insurance Co. v. Yorkville National Bank*, 939 N.E.2d 288 (Ill. 2010): (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.

With respect to factor (1), the policy at issue required the insured to provide notice to National Casualty "as soon as practicable of an "occurrence" or an offense that may result in a claim, and also if a claim is made or lawsuit is brought against the insured. The court held that "as soon as practicable" means within a reasonable time, and that the phrase "reasonable time" refers to the remaining *Yorkville* factors. The policy also required the insured to "immediately" provide copies of demands, notices, or legal papers to National Casualty – the court emphasized that the intent of this provision is to ensure that the insurer will be able to timely investigate and defend claims against its insured.

As respects factor (2), the insured's sophistication, the court found an issue of fact based on the fact that the Commissioner had no insurance training, had not read the insurance policy, and was never told about the notice requirement sin the policy. On the one hand, the court held that general liability insurance policies are on the "more complex end of the spectrum of sophistication." On the other hand, the court was required to resolve the factual issues regarding the Commissioner's insurance knowledge in his favor.

The court found factor (3), the insured's awareness of an event that may trigger coverage, weighed strongly in favor of National Casualty. The Commissioner believed that the policy would cover the suit at the time he was served with it, yet he made a strategic decision to hire the New York attorney believing that notifying National Casualty was "not worth it." For the same reasons, the court found that factor (4), the insured's diligence in ascertaining whether policy coverage is available, weighed in favor of National Casualty.

With respect to factor (5), prejudice to the insurer, Moje argued that National Casualty was given an opportunity to set aside the default judgment but blamed the lawyer hired by National Casualty for the court's denial of the motion. Moje argued that the retained attorney built a thin record for the motion to set aside the default judgment by failing to investigate the New York attorney's reasons for his conduct and by failing to advise the court that the policy might not provide coverage. The court rejected this argument, holding that Moje did not cite to any evidence supporting his contention that bringing either matter to the district court's attention would have produced a different outcome. According to the court, Moje's focus on a hypothetical motion to set aside the default glosses over the reality that, had it received prompt notice of the summons and complaint, National Casualty would have had the opportunity to prevent the entry of a default in the first place.

The court reasoned that reasonableness of notice is a question of law on undisputed material facts. After examining the five factors, the court held that the only genuine, material dispute concerned the Commissioner's level of sophistication. The court, nevertheless, held that the undisputed evidence makes clear that the Commissioner believed that coverage was available when he received the complaint and summons in February 2014, but he decided to hire the New York attorney for reasons that were his own. In doing so, the Commissioner, and the League, knowingly breached the policy's notice requirements and deprived National Casualty of the benefit of its bargain. The court, therefore, granted summary judgment in favor of National Casualty.

Kyler Moje, Plaintiff, v. Fed. Hockey League, LLC, Nat'l Cas. Co., The David Agency Ins., Inc., & Don Kirnan, Defendants., No. 15-CV-8929, 2019 WL 1399966 (N.D. Ill. Mar. 28, 2019)