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# Sixth Circuit Decision Is a Reminder of Difficulty in Prevailing on "Dishonest Acts" Exclusion

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The Sixth Circuit Court of Appeals' Decision in *Evanston Ins. Co. v. Certified Steel Stud Association*, 2019 WL 4674072 (6th Cir. Sept. 25, 2019) is another reminder to insurers of the difficulty in prevailing on a "dishonest acts" exclusion to bar coverage. The decision, however, does provide some useful insight and a framework for analyzing "dishonest acts" or "intentional acts" exclusions which are common in most insurance policies.

In *Certified Steel*, ClarkDietrich, a producer of steel products, sued CSSA, a trade association composed of three competitors to ClarkDietrich, in Ohio state court alleging they disseminated false statements about ClarkDietrich and its products. ClarkDietrich claimed that CSSA and its members: (1) violated the Ohio Deceptive Trade Practices Act (ODTPA), (2) engaged in unfair competition, and committed (3) defamation and (4) commercial disparagement. ClarkDietrich also claimed that CSSA and its members committed the unlawful acts as part of a civil conspiracy.

CSSA tendered the suit to its insurer, Evanston, which provided coverage for claims resulting from acts, errors, or omissions committed by the insured arising out of the conduct of association business or publishers' liability. Evanston agreed to defend CSSA, but reserved the right to deny coverage under the policy's "Dishonest Acts" exclusion. The "Dishonest Acts" exclusion barred coverage for "any claim based upon or arising out of any dishonest, deliberately fraudulent or criminal act, error, omission, personal injury or publishers' liability committed by or at the direction of the Insured [.]"

CSSA refused to settle, and the case was submitted to a jury who returned a verdict against CSSA on all counts. Evanston filed a coverage action in the Southern District of Ohio seeking a declaratory judgment that it had no obligation to indemnify CSSA for the damages it owed ClarkDietrich. Evanston then moved for summary judgment, asserting that it had no coverage obligation because, among other reasons, the policy excluded coverage for claims based on dishonest conduct, and, in finding against CSSA the jury found that it had acted dishonestly. The district court granted Evanston's motion for summary judgment reasoning that the Policy's "Dishonest Acts" exclusion barred coverage because CSSA committed the unlawful acts in furtherance of a conspiracy, and therefore, the jury necessarily found that "CSSA's publication was intentionally false" and involved a dishonest act. The Sixth Circuit disagreed.

The Evanston policy did not define the term “dishonest act.” In giving the term its ordinary meaning, the Sixth Circuit held that a “dishonest act” is synonymous with a “lie,” and further that one cannot lie—i.e., “make an untrue statement with intent to deceive,”—without knowing the truth. Critically, the Sixth Circuit examined the elements of the underlying claims submitted to the jury, finding that the jury did not have to find that CSSA acted dishonestly (i.e. “lie”) when it violated the ODTPA or when it committed defamation and commercial disparagement. In other words the plaintiff did not need to prove intent or willfulness to establish a violation of these claims. The jury instructions on the ODTPA claim, for example, only required the jury to decide whether CSSA “made one or more false ... statements”— not whether CSSA published statements that it knew to be false. The jury interrogatories also failed to establish that the jury found CSSA published statements that it knew to be false. Similarly, the appeals court reasoned that the jury could have held CSSA liable for defamation and disparagement by concluding that CSSA entertained serious doubts as to the truth of its statements, not necessarily that it knew the statements were false. As such, the Sixth Circuit concluded that none of the unlawful substantive acts standing alone included or required an element of dishonesty.

Because the jury did not find that CSSA acted dishonestly when it committed the unlawful acts, the Sixth Circuit next considered whether the jury’s finding that CSSA committed each unlawful act in furtherance of a civil conspiracy necessarily meant that CSSA acted dishonestly. Under Ohio law, “[t]he tort of civil conspiracy is a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.” *Williams v. Aetna Fin. Co*., 83 Ohio St.3d 464, 700 N.E.2d 859, 868 (1998) (citations and internal quotations omitted). Because civil conspiracy is a derivative tort, “an underlying unlawful act” is required before a civil conspiracy claim can succeed. *Id*. Further, “[t]he malice involved in the tort is that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.” *Id*.

The district court reasoned that because the jury found “in favor of ClarkDietrich on its civil conspiracy claim, the jury necessarily determined that CSSA committed [the] unlawful acts ‘intentionally’” and that, therefore, “CSSA’s publication was intentionally false...” and within the “Dishonest Acts” Exclusion. According to the Sixth Circuit, the district court imputed the element of “intent” from the civil conspiracy claim onto the other unlawful acts. Because CSSA acted intentionally, the district court reasoned, CSSA published statements that were intentionally false and therefore dishonest.

The Sixth Circuit disagreed with this logic. Instead, the appeals court reasoned that because the jury instructions allowed the jury to find against CSSA on the civil conspiracy claim by finding that CSSA intentionally published false statements, the jury did not necessarily determine that CSSA published intentionally false statements. In other words, the jury could have found that CSSA intentionally published false statements rather than that CSSA published intentionally false statements. A finding that CSSA intentionally published statements that happened to be false was not equivalent to a finding that CSSA acted dishonestly. Consequently, the Sixth Circuit concluded that the jury did not necessarily find that CSSA acted dishonestly.

Some form of the “Dishonest Acts” or “Intentional Acts” exclusion is common in most insurance policies. The Sixth Circuit’s reasoning and decision provides valuable insight into how some courts view “Dishonest Acts” or similar exclusions that require some form of deliberate, intentional, or fraudulent conduct by the insured. *Certified Steel* provides a useful reminder of difficulty in prevailing on these exclusions even where the underlying conduct appears from the complaint to be intentional. Carriers and courts should closely review the underlying elements of a claim to determine whether and what type of “intent” is necessary to establish the underlying claim. Jury instructions should also be considered as should jury interrogatories or the potential need to intervene to obtain a necessary finding as to intent.