TRAUB LIEBERMAN

NEWS & EVENTS

April 9, 2020

New York – Second Circuit Certifies Question of Whether Failure to Accommodate is an Occurrence Under CGL Policy

BY: Craig Rokuson

On April 9, 2020, the United States Court of Appeals for the Second Circuit in *Brooklyn Center for Psychotherapy v. Philadelphia Indemnity Ins. Co*., 2020 WL 17777211 (2d Cir. 2020), certified a question to the New York State Court of Appeals as to whether an insurance carrier owes a duty to defend an insured in an action alleging discrimination under a failure-to-accommodate theory. The insurance policy at issue covers bodily injury or property damage caused by an occurrence, defined to mean an accident. The allegations in the underlying suit were that plaintiff, a deaf woman, was refused an accommodation by the Brooklyn Center for Psychotherapy (the "Center") when the Center allegedly refused to schedule an appointment for her seven-year-old son and refused to provide an interpreter. Plaintiff claimed these acts were intentional.

The district court determined that the complaint alleged only intentional acts, dismissing the case, and the Center appealed. The Second Circuit reserved and certified the question of coverage to the New York Court of Appeals, finding that the Court of Appeals had not yet addressed whether a commercial general liability policy covers an action alleging discrimination under a failure-to-accommodate theory.

The Second Circuit noted that within the meaning of a commercial general liability policy, an intentional act could be found to constitute an occurrence if the insured did not intend the damages. Within the context of discrimination claims, disparate treatment claims, in which a person or entity treats some people less favorably than others because of their race, are found to constitute intentional acts and there is no coverage for such claims. On the other hand, at least one court, and the New York Superintendent of Insurance, have held that insurers must cover disparate impact claims, in which practices are facially neutral in their treatment of different groups but fall more harshly on one group than another and cannot be justified by business necessity.

However, neither New York courts nor the Superintendent have provided guidance whether a failure-to-accommodate claim, which does not require discriminatory intent and involves allegations that a disability makes it more difficult for a plaintiff to access benefits to which she is legally entitled, is covered under an accident. The Second Circuit concluded that the policy was ambiguous as to whether these claims were covered, and certified the following question to the Court of Appeals: "Must a general liability insurance carrier defend an insured in an action alleging discrimination under a failure-to-accommodate theory?"

The Court of Appeals' answer to this certified question bears monitoring, as the Court could find that because the Center believed that hiring interpreters to accommodate the hearing disability was unreasonable or would have imposed undue hardship on the business, the failure-to-accommodate claim is akin to a disparate impact claim and thus covered. On the other hand, the Court could find that the failure to accommodate the disability, which led directly to the alleged harm, is more akin to a disparate treatment claim and thus not covered.