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NEWS & EVENTS

March 13, 2020

Florida – Insured Forfeits Coverage for Failing to Obtain Allocated Verdict

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In *QBE Specialty v. Scrap Inc*., 2020 WL 1228648 (11th Cir. Mar. 13, 2020), the Eleventh Circuit, in an appeal from the Northern District of Florida, addressed the duties of insured and insurer to obtain an allocated verdict when a liability suit involves both covered and uncovered damages. Florida cases addressing this issue over the years have reached inconsistent results. The *Scrap* decision sheds some light on this issue.

QBE insured Scrap, a scrap-metal company, under a commercial general liability policy. Scrap was sued for nuisance by two families who alleged that Scrap's shredding operations created loud noises, offensive odors and fumes and caused vibrations to their homes and periodic explosions. The plaintiffs sought recovery for "annoyance, inconvenience, aggravation, discomfort, loss of use and enjoyment of property, mental anguish, pain and suffering, and actual physical damage to their properties." QBE defended Scrap under a reservation of rights, reserving the right to deny coverage based on the absence of property damage and bodily injury and application of the pollution exclusion.

Recognizing the possibility of both covered and uncovered damages, QBE, on five occasions, advised Scrap of the need to seek an allocated verdict if the liability case proceeded to trial. QBE also sought to intervene in the lawsuit on two separate occasions for the limited purpose of requesting special jury instructions and an allocated verdict. The trial court denied QBE's motion to intervene, and Scrap failed to request an allocated verdict. The jury entered a general, unallocated verdict against Scrap for $750,000 in "nuisance damages."

Following the trial, QBE filed a coverage action arguing that it had no duty to pay for the judgment because it consisted of both covered and uncovered damages and Scrap could not meet its burden of separating out those damages that were covered by the policy. The district court agreed with QBE and entered judgment in its favor, concluding that Scrap's failure to obtain an allocated verdict resulted in a forfeiture of coverage. The Eleventh Circuit affirmed the district court's ruling, noting:

Under Florida law, the party claiming insurance coverage has the initial burden to show that a settlement or judgment represents damages that fall within the coverage provisions of the policy. An insured's inability to allocate the amount of a judgment between covered and uncovered damages is therefore generally fatal to its indemnification claim. However, the burden of apportioning or allocating between covered and uncovered damages in a general jury verdict may be shifted to the insurer if the insurer did not adequately make known to the insured the availability and advisability of a special verdict.

The court found that QBE satisfied its burden by explicitly advising Scrap, in five separate letters, that Scrap needed to request a special verdict form differentiating between covered and uncovered damages and cautioned that its failure to do so could result in a forfeiture of coverage. The court also highlighted QBE's own attempts, albeit unsuccessful, to intervene in the liability case to obtain an allocated verdict. The court ultimately concluded: "QBE had a duty to inform Scrap of the availability of and advisability of a special verdict, lest the burden shift; QBE did so; the burden thus did not shift, but remained on Scrap, which is unable to meet it."

This decision underscores the importance of informing insureds of their obligation to obtain allocated verdicts in cases involving both covered and uncovered damages.

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