Failure to Allocate Between Covered and Non-covered Damages Bars Indemnity

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Insurance and Reinsurance Disputes Blog

- Insurance Reinsurance & Surety
- Litigation / Trial Practice
- 11th Circuit (incl. bankruptcy)

Friday, March 13, 2020

Insureds often face lawsuits where the claimant is seeking a broad array damages some of which may be covered by insurance and some of which are not covered by insurance. Because the duty to defend is very broad, insurance companies will typically defend under a reservation of rights concerning the allocation between covered and non-covered damages. In a recent case, the Eleventh Circuit examined the duties between the policyholder and the insurance company concerning liability for an unallocated jury verdict.

In *QBE Specialty Insurance Co. v. Scrap Inc.*, Nos. 18-13926 & 19-13894 (11th Cir. Mar. 13, 2020) (Do Not Publish), a scrap company was sued for nuisance by neighbors complaining of all sorts of damages. The policyholder had several commercial general liability insurance policies. The policyholder’s insurance company defended under a reservation of rights.

Periodically, throughout the case, the insurance company told the policyholder, through its defense and personal counsel, that special jury instructions and special-interrogatory verdict forms were needed to allocate between covered and non-covered damages. The insurance company even tried to intervene to obtain the jury instructions and verdict form, but was rebuffed. Ultimately, no special instructions were given and the jury issued a general verdict. The insurer refused to pay and
sought a declaratory judgment that it did not have to indemnify the policyholder for the verdict.

The district court granted the insurance company’s motion for summary judgment that it did not have to pay. On appeal, the circuit court affirmed.

Ia affirming, the court discussed the roles each party plays when there are covered and uncovered damages. Citing cases, the court noted that an “insured’s inability to allocate the amount of a judgment between covered and uncovered damages is therefore generally fatal to its indemnification claim.” But, “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 the insurance company met its responsibilities by asking numerous times for the insured to request the special instructions and verdict sheet and by trying to intervene to make it happen. Notably, the insured resisted the motion to intervene and defense counsel, appointed by the insurer, claimed a conflict over what is really a coverage issue. But, the court found, the insurance company communicated with the insured’s personal counsel about this and, nevertheless, no special instructions or verdict sheet was requested.

The court found that, absent an allocated verdict, the policyholder never provided the district court with a plausible method for separating the damages awarded by the jury between covered and uncovered damages. This left the policyholder with an impossible burden to overcome. The court held that the policyholder had ample time to prepare a strategy to accommodate the need for allocation.

The court held that the insurance company had the duty to inform the policyholder of the need to allocate and did so, leaving the burden to provide a basis to allocate on the policyholder, which it did not meet. Therefore, the insurance company was relieved of its obligation to pay the unallocated verdict.

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