RECENT COURT DECISIONS

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Regulatory and Insured versus Insured Exclusions Construed

Finci v. American Casualty Co. of Reading, Case No. 81 (Md. Ct. of App. 1991) (Lexis, state lib., Md. file).

Under Maryland law, exclusions in a directors and officers' policy precluded coverage of savings and loan losses resulting from the failure to follow regulatory requirements. After the state declared First Maryland, a state savings and loan association, insolvent, the state insurance fund successfully pursued claims against the association's officers. The officers assigned their interests to insurance policies to the state insurance fund. The fund then sued to collect the proceeds of the policies. The policies provided coverage for losses and for indemnification of directors' losses. One of the policies contained a regulatory exclusion that prevented recovery for claims of regulatory institutions such as state insurance funds. Another policy excluded coverage of claims between insureds. The trial and intermediate appellate courts held that the exclusions were not enforceable because they were against public policy. The state's highest court reversed but also held that the insured versus insured clause did not preclude coverage under one of the policies.

The court first considered the regulatory exclusion. After concluding that the exclusion was not ambiguous, the court then addressed the public policy argument. The state insurance fund argued that the insolvent association could not bargain away the rights of the state insurer to the disadvantage of the public. The court, however, could not find a basis in public policy to invalidate the regulatory exclusion. First, there was no statutory requirement for the savings and loan to have directors' and officers' insurance or a requirement that the insurance not have an exclusion for regulatory actions. The court also felt that the general requirement of the insurance fund to collect assets did not demonstrate a public policy to invalidate contractual provisions unless the provisions were plainly against the public interest. The court could not see a principled way in which to strike down the regulatory clause and protect any other limitation in the insurance contract if the policy, maximizing nonpublic money for paying off claims of the savings and loan, were argued to its full extent.

The insurance fund also argued that an insured versus insured exclusion was invalid for the same public policy reasons that invalidated the regulatory exclusion. The court upheld the clause for the same reasons it upheld the regulatory exclusion clause.

Nonetheless, the insured versus insured exclusion did not prevent the state from suing. The court found that the clause was ambiguous because it did not define a state-appointed receiver as as an insured. To interpret the clause, the court then looked to its purpose. The court stated that the purpose of the clause was to prevent collusive law suits. Although the insurance fund sued under the rights it received from the insolvent savings and loan when it entered into receivership, there was very little opportunity for collusion to occur. As a result, the insured versus insured clause did not prevent the suit.

Parent May Recover Consortium Losses for Injuries to Adult Child

Clymer v. Webster, Case No. 88-631 (Vt. Sup. Ct. 1991) (Lexis, State Lib., Vt. file).

Vermont has joined several other states in finding that parents have a claim for loss of consortium for the death of an adult child. In this case, the plaintiffs were parents of an eighteen year woman killed by a drunk driver. Suing under a wrongful death statute and a dram shop act, the parents alleged claims against the driver and the bar. The trial court refused to consider the claim for a parent's loss of consortium. The state supreme court reversed.

The case presented a novel interpretive problem since the state wrongful death act provided that a parent could recover for the emotional losses suffered due to the death of a minor child but said nothing about the death of an adult child. The court began its analysis by stating that the remedial purpose of the statute required a liberal construction. Because of the liberal construction, the failure to cover a parent's loss of consortium was not an indication that consortium damages should not be available. The court then concluded that extending the scope of damages was consistent with the remedial purpose of the wrongful death statute.

The court then addressed the question whether the loss of the parents was pecuniary within the meaning of the wrongful death statute. The court noted that pecuniary loss historically was limited to the financial contribution provided by the child to the family. The modern trend, however, was to recognize loss of companionship as a pecuniary loss. The court concluded that "the loss of the comfort and companionship of an adult child is a real, direct and personal loss that can be measured in pecuniary terms. Children have an intrinsic value to their parents regardless of who is supporting whom at the time of death. Whether the decedent child is an adult or a minor, society recognizes the destruction of the parents' investment in affection, guidance, security and love."

The court went on to explain that deciding whether damages were available and the amount were factual questions for the jury. The jury would decide the degree of loss to the parents by hearing evidence about strength of the family