DUTY TO DEFEND

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NO DUTY TO DEFEND WHEN INSURED FAILS TO GIVE TIMELY NOTICE

Food Market Merchandising vs. Scottsdale Indemnity,
857 F.3d 783 (8th Cir. 2017)

Facts of Food Market

- January 13, 2014: former employer Robert Spinner sues Food Market for unpaid commissions.
- Food Market hires defense counsel but does not notify Scottsdale.

- June of 2014: Court grants partial summary judgment awarding twice unpaid commissions and attorney's fees.

- August 22, 2014: Food Market notifies Scottsdale and tenders defense.

- September of 2014: Scottsdale "tentatively denies coverage."

- June of 2015: Food Market sues Scottsdale the following week, and Scottsdale formally denies coverage on two grounds: (1) notice was untimely; and (2) the claims were outside policy's scope.

- Scottsdale's policy included the following notification provision:

> The Insureds shall, as a condition precedent to their rights to payment under this Coverage Section only, give Insurer written notice of any Claim as soon as practicable, but in no event later than sixty (60) days after the end of the Policy Period.

Food Market's Defenses to Scottsdale's Motion for Summary Judgment

- Notice was given within the claim period.
- Whether notice was given as soon as practicable is a fact-dependent question for a jury.

- The trial court failed to consider:

  (a) whether the insurer's ability to investigate the claim was inhibited;
  (b) whether the underlying claim had yet been reduced to judgment; or
  (c) whether any facts in the underlying claim changed from when the insured knew of the claim until the insurer received notice.

- The phrase, "as soon as practicable" is ambiguous.

Applying Minnesota Law, the Court Affirmed Summary Judgment for Scottsdale

- It was not enough that Food Market provided notice within the claim period. The policy further provided that the notice had to be given as soon as practicable.

- Although the question of whether notice was given as soon as practicable is generally fact-dependent and for the jury, Food Market failed to explain its delay and failed to identify facts from which a jury could find notice was as soon as practicable.

- The trial court did not have to consider whether Scottsdale's ability to investigate was inhibited. That concerns prejudice which Scottsdale does not have to prove since notice is a condition precedent to coverage.

- The phrase, "as soon as practicable" is not ambiguous.

ALFORD PLEA DOES NOT NECESSARILY INVOKE A CRIMINAL ACT EXCLUSION

Johnson v. West Bend Mutual, 2018 WL 6596270 (Unpublished)

Facts of West Bend

- Five-month old DJ suffers a skull fracture, subdural hematoma and retinal hemorrhages while at Jewel Plocienik's in-home daycare.
- After DJ's parents sue Plocienik, she tenders her defense to West Bend.

- West Bend's business owners' liability policy includes:
  - A childcare endorsement which excludes violation of a statute. . . or a criminal act.
  - A physical abuse endorsement which provides coverage for physical abuse due to negligent supervision but excludes coverage for any person who commits abuse.

- Plocienik in her criminal case enters an *Alford* plea by which she maintains her innocence but acknowledges that there is enough evidence for a jury to find her guilty.

- During her *Alford* plea, Plocienik:
  - said she heard a loud thump while she was in the bathroom;
  - said she saw no signs of injury to DJ; and
  - denied harming DJ.

In reversing the trial court's summary judgment for West Bend, the appellate court stated:

> Without a clearer admission of her conduct or of her guilt, or additional evidence from some other source, Plocienik's equivocal plea statements leave open the possibility that D.J. was injured by negligent supervision that did not amount to a criminal act or involve a statutory violation.

WHAT ATTORNEY'S FEES CAN INSURED RECOVER?

- Insured can recover its attorney's fees to defend itself in a third-party action if the insurer had a contractual duty to defend but refused to do so. *SCSC Corp. v. Allied Mutual*, 536 N.W.2d 305 (Minn. 1995).

- Insured can recover attorney's fees in a declaratory judgment action if the insurer breached its duty to defend. *Morrison v. Swenson*, 142 N.W.2d 640 (Minn. 1966).

- Insured cannot recover attorney's fees in a declaratory judgment action if the insurer provides a defense under a reservation of rights. *American Standard Insurance v. Le*, 551 N.W.2d 923 (Minn. 1996).

- Where the insurer pays for a defense, the insurer cannot recover attorney's fees in a subsequent suit by the insurer seeking recovery of additional deductibles. *National Union Fire Insurance v. Donaldson Company*, 272 F. Supp. 3d 1099 (D. Minn. 2017).

DEFENSE OBLIGATIONS REGARDING SUPERSEDEAS BONDS

Interlachen Properties v. State Auto Insurance,
275 F. Supp. 3d. 1094 (D. Minn. 2017)

- The issue in *Interlachen*: was insurer required to furnish, i.e. collateralize, a supersedeas bond?

Facts of Interlachen:

- A jury awarded $2,147,000 against Kuepers Construction for defective construction of homes.
- Since Kuepers Construction was on the verge of bankruptcy and could not qualify for the bond it asked its CGL insurer, State Auto Insurance, to furnish the bond.
- State Auto's CGL policy required it to pay "[t]he cost of bonds to release attachments," but it also stated that State Auto "do[es] not have to furnish these bonds." *Interlachen* at 1105.

- The court rejected the plaintiffs' argument that State Auto's contractual duty to defend implied a duty to collateralize a supersedeas bond. In so doing, the court stated the following:

> If [State Auto] were to post the bond, in the event of an unsuccessful appeal, [State Auto] would be "required to functionally indemnify [Kuepers] by forfeiting the bond for the trial judgment. Requiring insurers to assume a broader duty to defend on this topic, then, may result in an insurer having to indemnify an insured for a claim that the policy does not cover."

Interlachen at 1105 (quoting *James River Insurance v. Interlachen Propertyowners*, 2016 WL 3093383 (D. Minn. 2016).

- In other words, the court was unwilling to expand the defense obligations to furnishing a bond since it would have been the equivalent of forcing the insurer after an unsuccessful appeal to indemnify its insured for non-covered damages.