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IL APPELLATE COURT FINDS NO CONTROVERSY OVER DUTY TO DEFEND WHEN DEFENDING UNDER ROR

***Byer Clinic and Chiropractic, Ltd, et al. v. State Farm Fire & Casualty Co., et al.* (Ill.App. Mar. 12, 2013)**

Insurance companies should take note of a recent decision by the First District of the Illinois appellate court, in which the Court held that a declaratory judgment action filed by an injured party against an insurer is not ripe during the time the insurer is defending the insured tortfeasor subject to a reservation of rights. The decision is noteworthy because the Court adopted a standard that an actual controversy over insurance coverage does not arise until an insurer denies a defense or otherwise denies coverage, even if it is defending under a reservation of rights. This ruling will allow insurers to pick the forum for coverage fights because insurers in effect have been granted the authority to determine when a coverage dispute arises.

The underlying case involved a class action lawsuit under the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § (2006)). Byer Clinic & Chiropractic, Ltd. (Byer) filed a class action complaint against Eniva USA, Inc., Eniva International, Inc., Eniva Ic-Disc. (collectively Eniva), Kapraun, P.C., Dr. Michael Kapraun (collectively Kapraun), and John Does 1 through 10. Subsequently, Byer brought a declaratory judgment action against State Farm, Eniva and Kapraun seeking a declaration "concerning the rights and obligations under the commercial general liability policies issued by State Farm to Eniva."

In the trial court, State Farm filed a motion to dismiss based on the insurance policy which insured Kapraun, not Eniva, and that "no justiciable controversy existed as to Kapraun since State Farm was presently defending him subject to a reservation of rights." During a hearing on the motion to dismiss, Byer argued that a controversy did exist as to Kapraun's insurance coverage, because State Farm had filed a declaratory judgment action against Kapraun in Michigan, Kapraun's place of business. Nevertheless, the trial court granted State Farm's motion to dismiss, finding no justiciable controversy existed as to Kapraun "at this time," because State Farm was presently defending Kapraun under a reservation of rights, and it had not filed a declaratory judgment action contesting that defense. Byer filed a motion to reconsider, which was denied, and a timely appeal was filed.

On appeal, Byer argued that the trial court erred because there was a justiciable controversy between Byer and State Farm. The appeals court found no case law supporting "Byer's position than an injured plaintiff may file a claim seeking a declaration of coverage when the insurer is defending the tortfeasor subject to a reservation of rights." The appeals court was persuaded by the fact that "State Farm has not refused to defend the insured, nor has it dismissed the declaratory judgment action involving its insured." The appellate court rejected Byer's reliance on cases involving declaratory judgment actions which were allowed to proceed before liability against the policyholders had been determined, stating "these cases are inapposite because all involve insurers that initially accepted a tender of defense subject to a reservation of rights but subsequently filed a declaratory judgment action." Thus, the appeals court affirmed the trial court's decision

finding "[t]he controversy over State Farm's duty to defend in the class action suit will not arise until State Farm withdraws that defense."

Overall, the Illinois appellate court's decision is most noteworthy because it could have a broad impact on policyholders and insurers, in that it did not make an explicit distinction in its ruling between declaratory judgment actions brought by plaintiffs and those filed by policyholders. By doing so, the Court has provided insurers with a basis to dismiss declaratory judgment actions as long as they are defending under a reservation of rights.

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