

Insurance Won't Pay To Defend Criminal Prosecution

The Michigan Court of Appeals recently upheld a trial court decision that Lloyds of London (Lloyds) need not reimburse one of its insureds for attorney fees defending against a federal indictment for knowingly discharging oil into waters of the United States.

A federal grand jury in the Western District of Michigan indicted Gregory J. Busch (Busch) for knowingly discharging oil into waters of the United States in violation of the Clean Water Act (CWA). A knowing violation of the CWA is a criminal offense for which a first offender may be fined between \$5,000 and \$50,000 per day of violation, imprisoned for up to three years, or both. A negligent violation of the CWA is subject to a criminal fine between \$2,500 and \$25,000 per day of violation, imprisonment of up to one year, or both.

Busch asked Lloyds, from whom he had purchased an Oil Pollution Insurance Policy, to defend him against the indictment. Lloyds declined to provide an attorney to defend Busch, but said that it might reconsider if the evidence at Busch's trial showed that the discharge had been accidental.

Busch hired an attorney to defend against the criminal charges, which were ultimately resolved by a plea bargain under which Busch pleaded guilty to negligently violating the CWA, agreed to pay a \$25,000 criminal fine, and agreed to a sixty day suspension of his coast guard license. Lloyds paid \$10,000 of the \$25,000 fine, but refused to pay any of Busch's \$157,350 attorney fees.

Busch sued Lloyds to recover his attorney fees. The trial court ruled before trial that the Lloyds policy did not cover the cost of defending a criminal prosecution, and denied Busch's claim.

Busch appealed to the Michigan Court of Appeals based on a long line of cases holding that an insurer's duty to defend against tort claims is broader than its duty to indemnify (reimburse) the insured for such claims. Those cases held that an insurer must defend claims that are "arguably" covered by the policy. The Court of Appeals held that those cases did not apply because the Lloyds policy did not include an agreement to defend, but only a requirement that Lloyds reimburse expenses incurred by the insured in defending against liabilities covered by the policy. The court apparently felt that a requirement that an insurer reimburse defense costs incurred by an insured is different from a requirement that an insurer provide a legal defense.

The Lloyds U.S. Oil Insurance Policy insured Busch against "expenses . . . defending against . . . any liability insured" by the policy. Liabilities insured by the policy included: liability under §1002 of the Oil Pollution Act (OPA) for the costs of removing discharged oil; liabilities under §1002 of the OPA for damages resulting from such discharges, including damages to natural resources and damages to real or personal property; liability under §1005 of the OPA for interest on claims for removal costs and damages; and equivalent liabilities under state law. The Court of Appeals observed that the indictment against Busch did not seek to impose any of the kinds of liabilities insured by the Lloyds policy, but instead sought to impose liability for criminal penalties under the CWA. Because the policy did not insure against claims for criminal liability, the policy provision that required Lloyds to reimburse costs of defending against insured claims did not apply to the cost of defending against a criminal indictment.

Busch claimed that the Confirmation of Insurance, a two-page document that supplemented the Lloyds policy, granted additional coverage of \$10,000 per incident for "fines and penalties as covered under the Oil Pollution Act"; this apparently was the provision under

which Lloyd reimbursed Busch for \$10,000 of his \$25,000 fine. Busch argued that the Confirmation of Insurance established a duty for Lloyd to cover Busch's legal defense costs. The Court of Appeals rejected this argument because, although the Confirmation of Insurance covered a limited amount of fines and penalties, it did not provide any coverage for associated legal defense costs.

Because the Court of Appeals agreed with the trial court that the Lloyds policy clearly did not provide coverage for the cost of defending against a criminal indictment, it considered it unnecessary to discuss whether the trial court had correctly decided that an insurer's agreement to do so would violate Michigan public policy.

Gregory J. Busch v. Stewart Arthur Holmes and Underwriters At Lloyds London
(Michigan Court of Appeals No. 235160, March 20, 2003).

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