Consumer & Commercial Law State Bar of Texas

Duty of Good Faith, Self-Insured Retention Coverage Update

USA | August 15 2022

Duty of Good Faith – Sixth Circuit (Michigan Law)

Trident Fasteners, Inc. v. Selective Ins. Co. of South Carolina No. 21-1439, 2022 WL 3088238 (6th Cir. Aug. 3, 2022)

The U.S. Court of Appeals for the Sixth Circuit upheld the federal district court's decision granting judgment on the pleadings under Fed. R. Civ. P. 12(c) in favor of defendant Selective Insurance Company of South Carolina (Selective) and against Trident Fasteners, Inc. (Trident) in a case in which Trident sought damages in excess of $1.3 million. The appellate court ruled that Trident did not obtain Selective's consent before settling an underlying product liability claim, and that Selective did not have a duty of good faith to investigate and pay claims because a lawsuit against Trident had not been filed.

Trident manufactures customized screws, bolts and other fasteners. In June 2018, it began receiving complaints from its customer, Tenneco, about defective fasteners. The fasteners were used in truck struts by General Motors Co. After two separate recalls of the fasteners, Tenneco demanded that Trident reimburse it for costs and expenses it incurred. Trident reached out to its insurer, Selective, in October 2018, but Selective did not respond. In February 2019, Trident contacted Selective again about potential participation in a resolution with Tenneco. Selective responded by assigning a new adjuster. In April 2019, Trident contacted Selective again. Selective asked for additional information before it would consent to Trident entering into a settlement. In May 2019, Selective denied consent for Trident to engage in settlement negotiations with Tenneco. On June 28, 2019, Trident did not heed those instructions and settled the dispute.

Trident then filed a lawsuit against Selective, alleging breach of contract and bad faith. Trident claimed Selective, among other things, unreasonably delayed its investigation and communications, refused to participate in resolution of the claim, and unreasonably withheld consent to participate in settlement negotiations. The U.S. District Court for the Western District of Michigan granted Selective's motion for judgment on the pleadings, finding that the "voluntary payment" and "no action" clauses in the policy were enforceable and that Selective did not waive those provisions.

On appeal, Trident argued that it was entitled to coverage because Selective acted in bad faith by breaching three duties: (1) its duty to investigate, (2) its duty to process the insurance claim, and (3) its duty to negotiate settlements. The appellate court rejected these arguments, finding that Selective's duty to act in good faith and investigate, settle, or otherwise process a claim did not arise until a suit was filed against the insured, and a lawsuit was never filed against Trident. Instead, because the policy precluded Trident from voluntarily making a payment without Selective's consent, the appellate court held that Trident breached the policy for voluntarily settling with Tenneco, and the insurance claim was precluded.

Selective was represented in this matter by Plunkett Cooney attorneys Drew Block and Jeff Gerish.

Self-Insured Retention – Seventh Circuit (Illinois Law)

N. Am. Elite Ins. Co. v. Menard, Inc. No. 21-1813, --- F.4th---, 2022 WL 3095976 (7th Cir. Aug. 4, 2022)

A Menard, Inc. (Menard) employee hit a customer with a forklift, and the customer subsequently brought a negligence suit against Menard and its employee in Illinois state court.

At the time of the accident, Menard had a self-insured retention (SIR) of $2 million per occurrence. After the $2 million SIR, Greenwich Insurance Company (Greenwich) covered up to $1 million of liability. Any liability exceeding $3 million, consisting of Menard's $2 million SIR and Greenwich's $1 million limit of liability, fell under an umbrella policy issued by North American Elite Insurance Company (North American), which covered additional liability of up to $25 million per occurrence.

Upon receiving a jury verdict in the negligence suit, and after rejecting the plaintiff's $1,985,000 settlement offer, Menard was found liable for $6 million. North American did not participate in Menard's defense, indemnified Menard for liability in excess of $3 million, and reserved its right to seek reimbursement. North American subsequently brought an action against Menard in federal court. The trial court dismissed the case.

On appeal to the U.S. Court of Appeals for the Seventh Circuit, North American contended that the SIR made Menard an insurer, and therefore, Menard was subject to additional responsibilities. The appellate court rejected this argument, however, finding that Menard cannot be an insurer where the first $2 million in liability was Menard's own responsibility and, in essence, the SIR was a deductible that Menard must pay and was not "insurance."

North American also argued that Menard violated its duties under the Greenwich policy by rejecting the plaintiff's settlement offer. The appellate court found that although the Greenwich policy required Menard to "act in good faith during litigation and try to reach settlements below $2 million," Menard owed that duty to Greenwich, not North American. The appellate court reasoned that had North American wanted to incorporate the same terms in both primary and secondary layers of insurance (i.e., the Greenwich and North American policies) it could have issued a "follow form" provision. For these reasons, the appellate court affirmed the lower court's holding.

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