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Is There a Possible Limit to an Insurer's Duty to Defend in Washington State?

Insurance Legal Update

In a recent decision, the U.S. Court of Appeals for the Ninth Circuit affirmed Western District of Washington Judge Ronald B. Leighton's decision finding no duty to defend negligence claims arising out of a murder-suicide. *Western Nat'l Assur. Co. v. Wipf*, ___ Fed. App'x. ___, 2017 WL 3169048 (9th Cir. July 26, 2017) (affirming *Wargacki v. Western Nat'l Assur. Co.*, 2015 WL 74111 (W.D. Wash. Jan. 6, 2015)).

In June 2010, Michael Erb shot Ann-Marie Wargacki, his pregnant girlfriend, instantly killing both her and her unborn child, then committed suicide by shooting himself in the head. Wargacki's Estate sued Erb's Estate for wrongful death, and the claim was tendered to Erb's homeowner's insurer, Western National. Western National refused to defend under the policy's exclusion for injury that is "expected by, directed by, or intended by an insured or that is the result of a criminal act of an insured."

After a jury awarded Wargacki's Estate more than \$7 million in damages, Western National sought a declaration of no coverage. Wargacki's Estate counterclaimed for coverage and bad faith. Applying the "four corners" rule to determine whether Western National had a duty to defend Erb, Judge Leighton observed that the allegations of the underlying complaint were "intentionally sparse," alleging only that Erb "may have" killed Wargacki and acted "negligently, intentionally or recklessly." The Estate argued that because no one witnessed the incident, it was "conceivable" that the shooting was not intentional and, therefore, the negligence allegations triggered the insurer's duty to defend. Judge Leighton rejected this argument, noting (in a statement that will likely be oft-quoted by insurers in future):

Whatever Erb's actual mindset or motive, the shooting was an intentional, criminal act, which is excluded from coverage as a matter of law. This was known to all from the very beginning, and no amount of spin, massage, speculation or sophistry can make it otherwise. *Wargacki*, 2015 WL 74111, at *4.

The Ninth Circuit agreed with this reasoning. Although recognizing “the facts alleged in the wrongful death complaint are sparse,” the Ninth Circuit emphasized that because “even a liberal construction of the complaint puts the reader on notice that the shooting was criminal, Western’s duty to defend was not implicated.” *Western Nat’l Assur. Co.*, 2017 WL 3169048, at *2.

While the outcome of this case seems logical, it is a departure from recent Washington state court decisions that often impose a duty to defend complaints alleging seemingly-intentional and/or criminal conduct (and find that the insurers’ failure to do so was bad faith). Whether Washington’s state courts will follow the common sense approach used by Judge Leighton and the Ninth Circuit is yet to be seen.