Philadelphia Indemnity Insurance Co. v. Transit U, Inc.: Delaware court reaffirms the duty to request a MCS 90 is on the Motor Carrier, not the Insurer

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A recent ruling from the United States District Court for the District of Delaware addresses the issues of federal court abstention, standing to seek reformation of insurance policies, right of contribution/indemnification between insurers, and most critically, who has the duty to ensure a policy issued to an interstate motor carrier contains the federally-mandated MCS 90 endorsement. The decision is in line with prior authorities and therefore serves as an important re-affirmation of longstanding principles for insurance coverage disputes involving MCS 90 endorsements.

The case arises from an October 2016 motor vehicle accident involving a truck towing a homemade trailer, which overturned and injured numerous passengers. Several personal injury lawsuits were filed in Delaware state court, which were consolidated into a single action ("the Underlying Action"). The following were defendants in the Underlying Action: (1) Jolly Trolley Transportation Service, LLC ("Transport"), who owned the truck and homemade trailer; (2) Transit U, Inc. ("Transit"), the parent company of Transport and who leased the truck and trailer from Transport; (3) Jolly Trolley Limousine Service, LLC ("Limo"), who was a separate subsidiary of Transit but who did not own, lease, or operate the truck or trailer involved in the Accident; (4) Jolly Trolley School Bus, LLC ("Bus"), whose connection to the Accident is unclear from the opinion; (5) Thomas Dowd, an employee of Transit and the driver of the involved truck and trailer; and (6) the owners of the various companies.

Transit and Transport insured the truck and trailer under a commercial auto liability policy issued by National Indemnity Company (the "National Indemnity Policy"). The National Indemnity Policy had liability limits of $1 million and did not contain any MCS 90 endorsement.

Limo insured its vehicles under a commercial auto liability policy issued by Philadelphia Indemnity Insurance Company (the "PIIC Policy"). Limo was listed as the first-named insured on the PIIC Policy, but Transit was also listed as an insured on the PIIC Policy. The PIIC Policy contained a MCS-90B endorsement in the amount of $5 million, which listed Limo as the carrier for purposes of the endorsement.

After various procedural maneuvers in the Underlying Action, including PIIC withdrawing the courtesy defense it had previously been providing to Transit pursuant to a full reservation of rights, the parties in the Underlying Action moved for entry of final judgment in the Underlying Action against all defendants, including Limo. PIIC moved to intervene in the Underlying Action and shortly thereafter

filed a separate complaint in federal court against Transit, Transport, Limo, Bus, the owners of the companies, Dowd, and National Indemnity. In the federal action, PIIC allege a number of different causes of action, including as is relevant here: (1) a claim seeking declaratory judgment that the policies issued by National Indemnity to Transit, Transport, and Bus cover the accident up to $5 million under each policy ; and (2) contribution and indemnification from National Indemnity for any judgment PIIC is required to pay in connection with the Underlying Action. National Indemnity moved to dismiss various counts alleged against it.

I. *The Federal Abstention Doctrine did not preclude the court from deciding the issues*

As an initial matter, the court focused upon whether it should even take up the declaratory judgment action. It applied the Third Circuit's test for abstention, which included consideration of the following eight factors:

(1) likelihood a federal court declaration will resolve the uncertainty of obligation that gave rise to the controversy;
(2) the convenience of the parties;
(3) the public interest in settlement of the uncertainty of the obligation;
(4) the availability and relative convenience of other remedies;
(5) a general policy of restraint when the same issues are pending in a state court action;
(6) avoidance of duplicative litigation;
(7) prevention of use of federal DJ action as method of "procedural fencing" or as a means to provide another forum in a race for res judicata; and
(8) in the specific insurance context, any inherent conflict of interest between an insurer's duty to defend in a state court action and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion.

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[1] It appears there may have been three separate policies, as opposed to a single policy with each entity listed as an insured, issued by National Interstate to Transit, Transport, and Bus; this issue is not clear from the opinion but is not a critical fact for purposes of the holdings of the case.

After considering those factors, the court evidently held it need not abstain from exercising jurisdiction over the dispute, though the decision does not contain much analysis of this particular issue.

II. *PIIC's claims were ripe for adjudication*

The court next considered whether PIIC's claims were ripe for adjudication. National Indemnity argued PIIC's claims were not yet ripe, and therefore the court addressing them would constitute an impermissible advisory opinion because PIIC had not yet been required to satisfy any judgment in the Underlying Action. In rejecting National Indemnity's argument, the court applied the Third Circuit's three-factor test for ripeness: (1) the parties must have adverse legal interests; (2) the facts must be sufficiently concrete to allow for a conclusive legal judgment; and (3) the judgment must be useful to the parties.

As for the first element, the court rejected the party seeking redress must have suffered a "completed harm" but instead must only show "there is a substantial threat of real harm that remains throughout the course of the litigation." Under the facts, the court held the judgment and the assignment of rights to the underlying tort plaintiffs to sue for satisfaction of the judgment from the MCS 90 was sufficient. For the second prong, the court focused upon the fact that the insurance contracts were "not hypothetical insurance contracts" and any decision on the issues would help to establish actual (as opposed to hypothetical) insurance obligations. Finally, for the last prong, the court held that a decision in the declaratory judgment action would serve a useful purpose by establishing the insurers' respective obligations and resolve legal uncertainty. For each of these reasons, the court held the dispute was ripe.

III. *PIIC lacked standing to seek reformation of the National Indemnity Policy*

National Indemnity next argued PIIC lacked standing to allege a claim, which National Indemnity characterized as asking the court reform the National Indemnity Policy's coverage from $1 million up to $5 million. National Indemnity argued reformation of a policy may only be sought by a party to the

insurance contract.

In addressing this argument, the court pointed out that PIIC was not simply asking the court to interpret the National Indemnity Policy as it existed, but instead was asking the court to reform the policy up to the federal financial responsibility minimum of $5 million. Considering this, the court agreed with National Indemnity that PIIC did not have standing to seek reformation, which is only available to a party to the insurance contract. Importantly, the court explained "[PIIC] is not a party to the contract and does not point to any regulation or statute that would grant standing to a third-party insurer to rewrite a MCS 90B endorsement into a separate insurer's policy."

IV. *The duty is on the motor carrier, not insurer, to request MCS 90 endorsement*

Last, the Court further clarified who bears the burden of requesting the MCS 90 endorsement and otherwise complying with the federal financial responsibility requirements under the Federal Motor Carrier Safety Regulations. Citing Delaware and federal law, the court concluded both place "the burden on motor carriers, not insurers, to maintain minimum amounts of financial responsibility." Going further, the court explained the rule as follows: "insurers have no duty to include a MCS 90B endorsement in their motor carrier policies or otherwise satisfy minimum amounts of financial responsibility for motor carriers under federal or Delaware law . . . ." Accordingly, the Court dismissed PIIC's claim seeking a declaration that the National Indemnity Policy must provide $5 million in coverage to meet the federal financial responsibility minimums.

V. *PIIC had no claim for contribution or indemnification from National Indemnity*

Finally, the court addressed PIIC's claim for contribution and indemnification from National Indemnity. Finding no specific rules applicable in the MCS 90 context, the court applied Delaware state law, which limited the right to seek contribution in the insurance context to "two basic circumstances": (1) an insurer of a joint tortfeasor has paid all, or a greater than its share, of a loss; and (2) a single insured is covered by concurrent or double insurance and one insurer paid all of a greater share of the loss. Since the court had previously ruled the National Indemnity Policy would not be reformed to include a MCS 90B and/or up to the $5 million liability limits required under the federal financial responsibility regulations, and National Indemnity had previously tendered its full $1 million in liability limits, the court held PIIC's indemnification and contribution claims fail as a matter of law.