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9th Circ. Gets It Right On Molestation Insurance Coverage

By **Adam Fleischer** (March 12, 2019, 5:45 PM EDT)


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A recent Law360 guest article, **"A Regrettable Insurance Decision From The 9th Circ.,"** criticized the Ninth Circuit's recent ruling in Westport Insurance v. California Casualty Management, published Feb. 20, 2019. However, when the proper context of the case and its history is taken into account, the Ninth Circuit decision not only is strong, sound and stable, but it provides both insurers and their policyholders the proper predictability and incentive to resolve even the most difficult of molestation claims efficiently and collaboratively, as explained below.

Post-Settlement Allocation

In the California Casualty matter, former students of the Moraga School District sued four defendants: three administrators who allegedly failed to act on warnings regarding a certain teacher, and the school district itself that employed the three administrators. California Casualty did not insure the school district itself, but issued excess insurance only to the three administrators through a policy written to the Association of California School Administrators.

After California Casualty participated in the underlying settlement process, but refused to contribute anything at all to a settlement, the three molestation claims then settled for $15.8 million. Once the settlements were completed, years after California Casualty had first been notified of the claims and urged to participate, California Casualty then raised the thought that it should be able to retroactively investigate how the fault should be apportioned between the three administrators and the school district.

Both the district court and the Ninth Circuit agreed that no such relitigation of fault was proper, and that the settlements should simply be treated as having been paid 25 percent on behalf of each of the four defendants. "A Regrettable Decision" posits that this allocation decision "exacts an untoward toll" on California Casualty, because there should be no 'public policy' foisting post-trial settlement allocation onto an excess insurer who had bona fide coverage concerns.

This criticism lodged against the Ninth Circuit's decision ignores that the decision does not create public policy beyond the particular facts of the case, and it also ignores the practical realities surrounding the typical options and obligations of excess insurers.

First, both primary and excess insurers are frequently faced with combined covered and noncovered claims in an underlying dispute. Case precedent does allow for carriers in such a position to roll up their sleeves and advise the relevant parties of the need to discuss, investigate and allocate covered versus noncovered exposure before resolving a dispute.[1] Here, the record before the Ninth Circuit demonstrated that California Casualty was repeatedly urged to voice its opinion prior to settlement, assist, contribute and be heard, but steadfastly refused to do so.

Second, the particular facts at issue in this case lent themselves obviously and equitably to an even share of liability among the four defendants. The allegations were that the four defendants collectively failed to act on available information. There was no allegation or evidence that the harm at issue was caused by any one defendant over the other. Thus, the default post-settlement allocation here (25 percent to each of four defendants) would not necessarily apply in every case, particularly ones in which unrelated defendants are accused of independent acts of harm, which was not the case here.

Third, the suggestion that a post-settlement reallocation of fault must take place is a particularly hard pill for the defending insurers and their policyholders to swallow in the case of molestation claims. The privacy concerns, trauma and drama of molestation litigation is a driving factor in the litigation and exposure analysis, and the efforts to leverage all disparate interests to bring the matter to finality. The suggestion

that a side-line spectator such as California Casualty can later retroactively reopen the litigation costs, expenses and emotions, is not a practical solution for insureds or insurers.

Per Occurrence Limits

The California Casualty excess policy and the Westport primary policy had different "per occurrence" limits, which "A Regrettable Decision" somehow argues is the fault of the Ninth Circuit decision. That is wrong. The California Casualty policy provided that its per occurrence limit ($150,000) would apply to each insured administrator. By contrast, the Westport per occurrence limit ($1 million) would apply regardless of the number of insureds at issue for a particular occurrence.

With this difference in policy language in hand, the Ninth Circuit found that the Westport primary policy would be exhausted when $1 million was paid for any student who alleged a covered occurrence in any single policy period, while the California Casualty policy could only be exhausted when $150,000 was paid for each administrator with respect to a claim by any student that alleged a covered occurrence in any single policy period.

Contrary to the inference in "A Regrettable Decision," there was no suggestion whatsoever in the California Casualty policy that the "per occurrence" limits in the primary policy would need to apply per "administrator," as is the case with the California Casualty limits. In fact, the California Casualty policy simply specified that it would incept over a $1 million policy issued pursuant to Sections 35208 and 72506 of the California Education Code, and the Westport policy explicitly stated that it was indeed a $1 million policy issued pursuant to this statute. It is wrong to suggest that the Ninth Circuit did anything here other than enforce the policy language as written.

Other Insurance

"A Regrettable Decision"'s last misfire seems to take aim at the "other insurance" issue by arguing that the Ninth Circuit relied on nothing other than its own "dubious" conclusion that there was a difference between the other insurance clauses at issue. In reality, there is nothing "dubious" about a court applying an insurer's policy language with common sense as written.

In this case, the California Casualty policy promised to pay once "the required $1 million limit of liability afforded the insured by such other insurance or self-insurance is exhausted." The California Casualty policy also explicitly stated that its coverage "shall not be construed to be pro rata, concurrent or contributing with any other insurance or self-insurance which is available to the Insured."

This language used by California Casualty was contrasted with a different coverage in its own policy, wherein California Casualty promised to pay "excess over and above any plan … available to the insured." The Westport excess policy at issue promised to pay, not upon exhaustion of the specified $1 million primary, but upon exhaustion of all "other collectible insurance."

Therefore, with the California Casualty policy promising to incept over the exhaustion of $1 million, and specifically refusing to pro rate or share with any other insurance, and the Westport excess policy promising to incept upon exhaustion of "other collectible insurance," the Ninth Circuit enforced those clauses as countless courts across the country have done, finding that the Westport excess policy should indeed only incept after all other insurance, which is not what was written in the California Casualty policy. There is nothing "dubious" about enforcing both traditional policy wording and precedent.

Conclusion

Importantly, the issues attacked in "A Regrettable Decision" were all retroactive, after-the-fact, side issues raised by California Casualty. The main issue raised by California Casualty was that its policy, issued to school administrators, should never have to pay a claim because California law requires the public servant's employer to pay any such liability, with a prohibition against then seeking contribution from the administrators or their insurer; i.e. California Casualty.

This contorted and confusing foundational argument was illuminated through the record testimony of California Casualty's corporate designee, who testified she could not describe an instance when California Casualty would ever pay a claim.

Therefore, it was against this backdrop that the Ninth Circuit decided that California Casualty could not simply be permitted to thrust the entirety of the heavy burden of negotiating and resolving serious molestation claims onto other policies, under a "never pay" premise. In effectuating the coverage intent,

the Ninth Circuit gave meaning to the specific language in the California Casualty policy, and the differing language in the Westport policies.

In applying the policies as written, the court created a precedent for carriers like California Casualty to consider the malleability in their "never pay" stance, and to assist participating insurers in resolving the most difficult of claims with collaboration and finality. There is nothing "regrettable" about the Ninth Circuit's decision, other than the years of litigation that preceded it.

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[1] See, e.g., Remodeling Dimensions, Inc. v. Integrity Mutual Insurance Company , 819 N.W.2d 602 (Minn. 2012).
