BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

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Wisconsin Appeals Court Puts The *End* In Defend: Insurer Can Settle The Only Covered Claim And Then Withdraw From The Defense

Thank you to all who have inquired about the state of *Binding Authority*. Several readers have contacted me of late to ask things like: Hey, where's *Binding Authority* been? Did I fall off the list? You didn't stop writing that thing, did you? No. No. No. *BA* is doing just fine. In fact, it just got a Jack Lalanne Power Juicer and has been doing P90X. There has simply been a dearth of cases that meet the demanding criteria for serving as the basis for an issue. So to the reader that expressed Hallelujah about no more spam clogging up his In box – Sorry dude.

***Binding Authority* Contest Results** – The May 19th issue of *BA* had this contest – Give me your best idea for a talent or attribute that is so unusual or unique that it would be advisable for an insurance policy to be taken out on it. I noted that a really good entry would involve a policy covering something unusual or unique about the insurance industry itself. And the winners are:

The GEICO gecko's accent

--*Anonymous Gen Re claims professional*

Insurance coverage – The art of turning black and white into grey

--*Anonymous*

To Anonymous: Congratulations. Oxford University Press will be sending you a copy of the 2nd Edition of "General Liability Insurance Coverage- Key Issues In Every State."

The guy who handles this at Oxford is super efficient so look for it soon. Thank you to all who entered.

Hey, speaking of the 2nd Edition of **"General Liability Insurance Coverage -- Key Issues In Every State,"** there are just a few copies left on **Amazon.com.**

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Overture, curtain, lights!
This is it. We'll hit the heights!
And oh, what heights we'll hit!
On with the show, this is it!

Consider this - An insurer is defending its insured in a case that has both covered and uncovered claims. The insurer settles the covered claims. So with only uncovered claims remaining, the insurer now withdraws its defense. After all, the duty to defend only attaches if there is the potential for coverage. And because of the settlement, there is no longer any potential for coverage. This seems simple enough. But, needless to say, this is unlikely to sit well with the insured, who will likely scream *bad faith*, and a few other choice words that are not suitable for a family insurance publication.

This is exactly what the insurer did in *Society Ins. v. Bodart*. And the Court of Appeals of Wisconsin had no trouble concluding that the insurer's conduct was appropriate.

The case is as straightforward as they come. Bodart Landscaping was named in a civil action in Michigan alleging five claims. The Wisconsin appellate court didn't even say a single thing about the underlying claims -- as is was not relevant to the coverage dispute. All that matters is this:

Society Insurance filed an action in Wisconsin seeking a declaration regarding its duty to defend Bodart in the Michigan action. The trial court concluded that Bodart's policy with Society provided at least arguable coverage for one of the five claims in the Michigan action and that Society therefore had a duty to defend. *Bodart* at 2. So Society assumed the defense. It then settled three of the five claims, including the only claim that the trial court had concluded was at least arguably covered. *Id.* at 3.

"Society sent Bodart a letter informing him that, in light of the settlement and dismissal, it would withdraw its defense as to the remaining two claims. Society's letter stated: 'Since, according to the [duty-to-defend order], Society has now settled the only covered claim against you, together with two other claims which were not covered, Society will no longer be furnishing a defense to you in the Michigan action.' In response, Bodart filed a motion for contempt in this action, asserting that Society's unilateral decision to withdraw its defense violated the duty-to-defend order." *Id.*

There you have it. That's the entire factual scenario. The Wisconsin appellate court then set out to answer this single question: "[W]hether Society had a continuing duty to defend Bodart after the only arguably covered claim against Bodart was settled and dismissed,

leaving only non-covered claims." *Id.* at 4. The court held that the insurer did not.

In answering this question the court noted that it needed to consider two sources of authority: any relevant policy terms and any rules which, while not stated in the policy, are well established in case law.

Turning to the terms of the Society policy, the court focused on the provision that "gives the insurer discretion to settle claims and provides notice to the insured that the insurer 'will have no duty to defend the insured against any 'suit' ... to which this insurance does not apply.'" *Id.* at 5.

The court's conclusion with respect to the policy language was this:

It is true that this provision does not expressly address the particular question of whether Society's duty might continue when the only arguably covered claim has been settled and dismissed. In this respect, the policy language could be said to be silent on that question. We conclude, however, that a reasonable insured would understand this language as Society does, to mean that Society has no duty to defend an insured in a suit once it has become clear that the suit no longer involves any claim that is even arguably covered. Stated another way, once all at least arguably covered claims are settled and dismissed, those claims are no longer part of the suit, and the insurance no longer applies to that suit.

Id.

Now turning to case law for guidance, the parties agreed that no Wisconsin case had decided whether an insurer has a continuing duty to defend remaining claims after all at least arguably covered claims are settled and dismissed. However, the court concluded from the parties' briefing and its own research [case law and secondary sources that the court addressed] "that the general rule consistently reflected in persuasive authority is this: An insurer's duty to defend ends after all at least arguably covered claims are settled and dismissed." *Id.* at 6.

The *Bodart* court capped its decision by noting that this general rule, from this persuasive authority, was consistent with several well-established duty to defend rules under Wisconsin case law, such as the following:

- An insurer's duty to defend is determined based on the allegations in the underlying complaint, construed liberally.

- Any doubt regarding the duty to defend is resolved in favor of the insured. Consistent with this rule, once all covered (and arguably covered) claims have been settled and dismissed, all doubt has been resolved against the insurer's duty to defend.

- The insurer is under an obligation to defend only if it could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint.

- The duty to defend extends to the "entire suit" against an insured, even if only one claim in the suit is covered. Consistent with this rule, once all covered (and arguably covered) claims have been settled and dismissed, there is no longer even one covered claim in the suit.

- We do not construe insurance policies to cover risks that the insurer did not contemplate and for which the insurer has not received a premium.

Id. at 7-8.

Lastly, the *Bodart* court "hastened to add:" "[T]he persuasive authority on which we rely includes exceptions to that rule. At a minimum, these sources suggest that the rule may not apply when the insurer's withdrawal from the action would prejudice the insured's defense of the remaining, non-covered claims, (citation omitted) or when the insurer has purported to 'settle' claims out of a case but has done so in bad faith[.]" *Id.* at 9. Prejudice may come from withdrawal at a time or under circumstances that undermine the ability of the insured to produce a material witness or to otherwise adequately prepare his or her defense to the remaining claims. *Id.*, n.4. The bad faith example that the court cited was so unique as to make it devoid of guidance on such point. [These exceptions are likely to be what the dispute is all about. The *Bodart* court did not provide any real guidance on these issues as they did not see them as applicable.]

A copy of the Court of Appeals of Wisconsin's June 7th decision in *Society Ins. v. Bodart* (recommended for publication) can be accessed here:

http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=83437

Please let me know if you have any questions.

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