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Ninth Circuit Affirms Use of Genuine Dispute Doctrine in D&O Coverage Cases

The genuine dispute doctrine has received much attention recently by the California courts. Although the doctrine first arose in the Ninth Circuit Court of Appeals, there has not been much recent activity by the Ninth Circuit or the federal district courts located in California relative to this doctrine. The Ninth Circuit jumped backed in the frey with its decision in *S.J. Amoroso Const. Co., Inc. v. Executive Risk Indem., Inc.*, 325 Fed. Appx. 548, 2009 WL 1154202 (9th Cir. 2009).

In *S.J. Amoroso Const. Co.*, the Ninth Circuit upheld a district court decision dismissing a claim of bad faith against an insurer for denying coverage under a Directors & Officers insurance policy ("D&O policy").

Paul Mason was an officer of S.J. Amoroso Construction Company ("Amoroso") and a covered individual under the D&O Policy issued by Executive Risk Indemnity Inc. ("Executive Risk"). Mason entered into a construction contract with Mauna Kea Properties, who later alleged negligent or intentional misrepresentation in connection with that contract. Litigation eventually ensued between the parties and a claim was made under the D&O policy. Executive Risk argued that Amoroso was not entitled to coverage under the D&O policy because coverage was excluded for claims arising from a contract or written agreement. Executive Risk also argued coverage should be excluded because Mason acted in his individual capacity and not on behalf of the company. The district court agreed granting summary judgment in favor of Executive Risk.

On appeal, the Ninth Circuit reversed the district court's decision holding that under California law, employees may be said to act within the scope of their employment, even when their actions are not authorized by their employer, so long as their actions are not so "unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." Here, the construction contract with Mauna Kea Properties was not so "unusual or startling" because it was in the same general business as Amoroso, namely construction. Moreover, the Ninth Circuit further held that "coverage clauses are interpreted broadly to afford the greatest possible protection to the insured, exclusionary clauses are construed narrowly against the insurer." Although the facts suggested that Mason executed a written assignment agreement, there was a genuine dispute as to whether that agreement was sufficient to implicate the policy's exclusionary clause. As a result, a triable issue of fact remained as to whether correspondence between Mason and Mauna Kea Properties created a separate contract or agreement which would be excluded by the policy.

Under the genuine dispute doctrine, if the insurer can show that a genuine dispute existed as to coverage, then it is entitled to summary judgment on the insured's bad-faith cause of action. The same facts that saved Amoroso's claim from summary judgment, also created a genuine dispute as to coverage. Relying on *Lunsford v. Am. Guar. & Liab. Ins. Co.*, 18 F.3d 653, 656 (9th Cir.1994), the court held that where there is a genuine issue

of liability, Executive Risk, as a matter of law, could not have acted in bad faith in denying coverage. Therefore, even though the reasonableness of Executive Risk is ordinarily a matter for a jury to decide, the genuine dispute doctrine entitled Executive Risk to summary judgment on Amoroso's bad faith claim.

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