Judge Makes Decision on the Necessity and Reasonableness of Fees And Costs In Lead Paint Toy Claims

Posted on June 8, 2009 by David J. McMahon

Federal Judge William Hart ruled that a liability insurer owed a defense to a seller of toys that were manufactured in China in *ACE American Insurance Co. v. RC2 Corp. Inc. et al.*, 568 F. Supp. 2d 946 (N.D. Ill. 2008). The allegedly harmful toys involved, contained lead paint which gave rise to claims for bodily injury. In a subsequent ruling involving components of the claim for reimbursable defense costs, the court made reductions for voluntary payments and work it characterized as "non-legal." *ACE American Insurance Co. v. RC2 Corp. Inc. et al.*, 2009 WL 1137904 (N.D. Ill., April 23, 2009).

ACE insured RC2 under four consecutive liability policies in effect from 2004 to 2007. ACE argued there was no defense obligation based on the policy "coverage territory clause" and the fact that the lawsuits against RC2 and Learning Curve alleged harm to people or property in the United States. The argument raised the question of the construction of the occurrence language, with regard to the policies coverage territory provisions.

Ruling on cross motions for summary judgment, Judge Hart interpreted the relevant policy language. He construed the policy term "occurrence" as referring to the *cause* of the harm, reasoning that the *resulting* harm was not included in the definition of occurrence. He further concluded that the policies required only that the occurrence take place in the coverage territory, not that the harm also occur outside of the United States to trigger coverage.

In the subsequent ruling, Judge Hart examined the related question of reimbursable defense costs. The judge held that certain costs incurred in defending two retailers that were named in underlying lawsuits were not owed because the insured did not obtain the prior consent of the carrier prior to assuming the obligations of the retailers. The court noted that the retailers were not insureds under the policies and the insured was obligated to tender to ACE documentation relating to defending the retailers prior to assuming their defense. The judge stated that: "Even if the insurer had denied a duty to defend and is not providing representation while pursuing a declaratory action, the insured still must comply with any additional notice requirements or other obligations under the policy."

The court also held that certain work appearing to relate to press releases was not compensable defense costs and should not be reimbursed. The judge also reduced numerous block-billing time entries by 10 percent on the basis that entries were unreliable. Other work related to reviewing press releases for inclusion of privileged communications did not constitute defense costs. Finally, the court ruled that an attorney's time spend reading newspaper articles and Consumer Product Safety Commission (CPSC) publications was legal work, not public relations in nature and should be reimbursed.

The court's ruling on compensable defense costs is generally in line with other case law construing the scope of an insurance carriers' obligation to reimburse certain categories of legal

work. An important lesson from this case is that an insured shall always promptly tender a claim for the carrier, prior to assuming the defense of a third party.