

From The Bench

legal news of interest

September 2003

BRINEY & FORET
Attorneys at Law

413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505
337-237-4070
FAX 337-233-8719
www.brineyforet.com

Insurer's Obligation to Pay for Independent Counsel Retained by Its Insured

by Shannon J. Gremillion

Liability policies generally provide that the insurer has the *right* and the *duty* to defend the insured. When the policy clearly provides coverage for the damages allegedly caused by the insured, insurers are generally eager to defend the insured because of the insurer's exposure to liability for the amount of the judgment up to the policy limits.

Most insurers recognize they are obligated to provide a defense to their insured if the lawsuit discloses even a possibility of liability under the policy.¹ An insurer is obliged to defend its insured unless the allegations of the lawsuit *unambiguously* exclude coverage.² An insurer who breaches its obligation to defend its insured is liable for attorney's fees and other costs incurred by the insured in defending the suit.³

When an insurance company believes that it has a coverage defense, but recognizes its obligation to defend its insured, it generally retains an attorney to represent the insured and another attorney to assert the coverage defense. Under these circumstances, is the insurer obligated to pay for independent counsel retained by the insured?

This situation was addressed by the United States Fifth Circuit Court of Appeal in *Trinity Universal Insurance Company v. Stevens Forestry Services, Inc.*⁴ Stevens Forestry Service, Inc. was sued by its client for \$1.1 million dollars, alleging mismanagement of timberland. Stevens tendered the defense of this claim to Trinity, its liability insurer. Trinity agreed to provide Stevens with counsel and to begin investigating the claim. However, Trinity expressly reserved the right to "later deny coverage and to deny a defense pursuant to the policy's provisions."⁵

The attorney hired by Trinity represented Stevens throughout the course of the lawsuit. Stevens had retained independent counsel who also represented it through the course of the case. The case was tried and the jury found in favor of Stevens and against the plaintiff.

Stevens filed a motion for summary judgment seeking recovery of independent counsel's attorney's fees and expenses. Trinity also filed a motion for summary judgment arguing it had no duty to defend, or alternatively, it had discharged its duty to defend. The trial court ruled in Trinity's favor, and Stevens appealed.

Q. Is an insurer required to reimburse its insured for the fees and costs of the insured's independent counsel where the insurer has proffered the insured a defense under a reservation of rights?

a. Not when the defense provided is vigorous and adequate; and not where the insured accepts the defense provided.



The federal circuit court ruled that Trinity's reservation of rights did not negate the fact that it fulfilled its duty to provide Stevens with adequate counsel. The court observed what mattered was whether or not counsel provided by Trinity "vigorously and adequately" defended Stevens or was "objectively inadequate."⁶ Stevens did not contend that the attorney provided by Trinity failed to "vigorously" or "adequately" defend the case. Therefore, Trinity was not required to reimburse Stevens for the fees or costs associated with hiring of independent counsel.

The federal circuit court distinguished the facts of two Louisiana appeals court decisions. The courts in both *Belanger v. Gabriel Chems., Inc.*⁷ and *Smith v. Reliance Ins. Co.*⁸ found the insurer was required to pay for its insured's independent counsel. The federal court found those cases to be distinguishable because both involved an insured who wished to reject the insurer's proffered counsel. In *Trinity*, the insured accepted insurer's counsel, but also wished to receive reimbursement for independent counsel.⁹ In both *Belanger* and *Smith*, the insurer did not merely reserve its right to deny coverage, each expressly denied coverage.

¹ *Jensen v. Snellings*, 841 F.2d 600, 612 (5 Cir., 1988).

² *Employers Commercial Union Ins. Co. v. Bertrand*, 306 So.2d 426 (La.App. 3 Cir. 1975).

³ *Bossier Plaza Associates v. National Union Fire Insurance Company of Pittsburgh*, 35-471 (La.App. 2 Cir., 4/3/02); 813 So.2d 1114.

⁴ 02-30442 (5 Cir., 6/18/03); 335 F.3d 353.

⁵ *Trinity* at p. 354.

⁶ *Trinity* at p. 356 citing *National Union Fire Insurance Company v. Circle, Inc.*, 915 F.2d 986, 991 (5 Cir., 1990).

⁷ 2000-0747 (La.App. 1 Cir., 5/23/01); 787 So.2d 559.

⁸ 01-888 (La.App. 5 Cir., 1/15/02); 807 So.2d 1010.

⁹ *Trinity* at p. 356.



BRINEY & FORET
Attorneys at Law

413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505

Updates

EVIDENCE Act 1135 of the 2003 session of the Louisiana legislature has amended the "Original Writing Rule" found in the Louisiana Code of Evidence to classify a printout from a portable or handheld computer or electronic storage device as an "original."

UM COVERAGE - A vehicle owned by a qualified self-insured is not an uninsured motor vehicle within the meaning of La. R.S. 22:1406 (D)(3). *Plumb v. City of New Orleans*, 2003 WL 21954677 (La.App. 4 Cir., 8/6/03).

Briney & Foret

Patrick J. Briney	Shannon J. Gremillion
Charles J. Foret	Gary J. Delahoussaye
Katherine M. Loos	Richard R. Montgomery
Michael P. Corry	Matthew D. McConnell
Kevin S. Frederick	Stacy D. Saltzman

Christopher L. Zaunbrecher*
* of counsel

For additional information on the contents of this newsletter or if you would like to be on our mailing list, please contact Emily DeSalvo at (337) 237-4070 or desalvo@brineyforet.com. Previous newsletters are also available on-line at www.brineyforet.com

This publication is prepared as a source of information for our clients and other interested parties, and its contents should not be construed as legal advice.