

Choinsky v. Employers Ins. Co. of Wausau: Wisconsin Supreme Court Addresses Appropriate Procedure To Follow in Cases Involving Duty to Defend Disputes

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In *Choinsky v. Employers Ins. Co. of Wausau*, 2020 WI 13, 390 Wis. 2d 209, 938 N.W.2d 548 the Wisconsin Supreme Court decided an insurance coverage duty-to-defend issue of first impression, ruling that an insurer which denies a claim and promptly follows the judicially-preferred procedure of filing a motion to intervene and stay pending a coverage determination (even if coverage is ultimately resolved in the insured's favor) does not breach the duty to defend its insured. *Choinsky*, 2020 WI 13, ¶ 3, 390 Wis.2d 209, 215. The court further observed that if a circuit court denies any part of the insurer's motion to bifurcate the coverage issue from the underlying merits lawsuit and stay the latter, the insurer must defend the insured in the merits lawsuit retroactive to the date of tender under a reservation of rights until a court decides the coverage issue(s). *Id.* See also, *id.*, ¶ 19. Because the insurer in *Choinsky* followed this procedure the court held that it did not breach its duty to defend and thus was not responsible for any of the attorney fees the insured paid to establish coverage.

Choinsky arose from a class action brought by retired Germantown School District employees contesting the district's decision to discontinue group long-term care insurance for employees. The district tendered the complaint to its insurer which denied the tender via a letter one week later. The insurer's letter asked the district to advise whether it agreed with its coverage determination and, alternatively, to withdraw the tender. After the district indicated to the insurer that it would not withdraw the tender, the insurer filed a motion to intervene in the lawsuit, to bifurcate the merits and coverage issues, and to stay the merits lawsuit until coverage could be resolved. The circuit court granted the insurer's motion to intervene and bifurcate, but denied the motion to stay the merits proceedings, which prompted the insurer to provide a full defense for the insured until coverage was resolved. The insurer agreed to pay the insured's defense fees retroactive to the date of the tender. Following a trial in the coverage lawsuit the jury concluded that the insurer had a duty to defend the insured against the allegations in the merits lawsuit. The merits lawsuit then proceeded to trial and the jury returned a verdict in favor of the district. The circuit court then denied the district's request for reimbursement of attorney fees expended in establishing coverage because the insurer followed a judicially-preferred approach to the coverage dispute. *Id.*, ¶ 12. The district appealed and the appellate court affirmed.

In affirming the decision of the court of appeals the supreme court rejected the district's claims that: (1) Its insurer's initial denial of coverage followed by a delayed decision to defend under a reservation of rights constituted a breach of its duty to defend; (2) The insurer's delay in paying merits fees and its failure to reimburse the district for the entire amount it paid its merits lawyer constituted a breach of its duty to defend; and (3) The circuit court's assessment of whether the insurer breached its duty to defend is subject to the four-corners rule. The court found that the four-corners rule does not prohibit the circuit court from considering the insurer's actions in attempting to obtain a coverage determination. *Id.*, ¶¶ 21, 42. Rather, "[o]nce a court concludes a duty to defend exists, the insurer's actions – unilaterally denying coverage, opting for a judicially preferred procedure to determine coverage, or something else – will be examined to decide whether the insurer breached its duty to defend." *Id.*, ¶ 42.

The court listed the following judicially preferred procedures for resolving coverage: (1) Defend under a reservation of rights; (2) Defend under a reservation of rights but seek a declaratory judgment on coverage; (3) Enter into a nonwaiver agreement under which the insurer defends the insured but the insured acknowledges that the insurer has the right to contest coverage; and (4) File a motion with the circuit court requesting a bifurcated trial on the coverage and merits aspects of the case, and a stay of the proceedings on merits, until coverage is determined. *Id.*, ¶ 18 (internal cite omitted).

The supreme court ultimately held: (1) The Insurer's initial denial of coverage did not breach its duty to defend because the Insurer promptly followed a judicially-approved method to resolve the coverage dispute; further, it defended the district upon denial of the stay motion, agreeing to reimburse the district for merits attorney fees retroactive to the date of the tender; (2) A delay in payment of merits attorney fees alone does not mean an insurer breached its duty to defend and an insurer is obligated to pay only *reasonable* attorney fees; and (3) The four-corners rule applies in determining whether a duty to defend exists but does not preclude a court's consideration of whether the insurer unilaterally denied coverage or whether it chose a judicially-preferred method of resolving a coverage dispute, in assessing whether an insurer breached its duty to defend. 2020 WI 13, ¶ 5, 390 Wis. 2d 209, 216–17, 938 N.W.2d 548, 551 (emphasis original).

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