Ninth Circuit Dismisses $9 Million Claim Against Insurer That Refused to Cover Tongue Piercing Causing "Flesh Eating Bacteria"

On May 26, 2011 the Ninth Circuit affirmed dismissal of bad faith claims against Scottsdale Insurance Company. Ms. Filosa had sought to collect a $3 million judgment she obtained against Scottsdale's insured plus treble damages under the Insurance Fair Conduct Act because Scottsdale refused to defend its insured Mr. Burns against Ms. Filosa's claim that she had contracted "flesh eating bacteria" from Mr. Burns's tattoo parlor after having her tongue pierced. The decision dismissing the claims is a rare victory for the insurance industry in insurer friendly Washington.

Mr. Burns purchased a Commercial General Liability insurance policy to cover a building he owned personally. The policy provided coverage for the "conduct of a business" of which he was the "sole owner," but excluded coverage for liability "with respect to the conduct of" any limited liability company not shown in the policy declarations. Mr. Burns was sole owner of a limited liability company that ran a tattoo parlor on the premises.

Ms. Filosa had her tongue pierced at the tattoo parlor and contracted "flesh eating bacteria" incurring more than $400,000 in medical bills. She sued the tattoo parlor and later added Mr. Burns to the suit. Although Mr. Burns's broker had told him when purchasing the policy that it did not cover the tattoo parlor, he asked Scottsdale to defend him. Scottsdale refused because the policy did not cover liability with respect to the tattoo parlor. Ms. Filosa and Mr. Burns then settled for a $3 million judgment with an agreement that Ms. Filosa would collect from Scottsdale.

Ms. Filosa sued Scottsdale claiming that because Mr. Burns was the "sole owner" of the tattoo parlor he was covered and that the limited liability exclusion was ambiguous. Her argument was supported by Washington case law that ambiguities must be construed in favor of coverage and that insurers must defend their insureds if there is any conceivable basis under which there might be coverage.

Ogden Murphy Wallace PLLC attorneys Geoff Bridgman and Jaime Allen successfully moved for summary judgment arguing that the policy was unambiguous that the insured was not covered with respect to his tattoo parlor. Aside from the fact that this was a rare victory for an insurance company, the district court opinion that the Ninth Circuit affirmed is remarkable in several other respects.

The court considered the letter from the Mr. Burns's insurance broker and his testimony showing that he knew that the policy would not cover liability associated with the tattoo parlor. Typically, courts consider only the terms of the policy and do not consider such "extrinsic evidence" when it is offered to avoid coverage. Scottsdale convinced the court, however, that this evidence was admissible to understand the context in which the policy was issued, namely to provide coverage for the building, not for operations being run from the building.

The court also considered "extrinsic evidence" beyond the complaint that was filed against the insured in the underlying case – something courts normally only consider to find but not to deny

coverage. The district court considered the motion Ms. Filosa had filed in her suit against the tattoo parlor when she sought to add Mr. Burns as a party. In that motion, she claimed that she was not seeking to hold Mr. Burns "personally liable" by adding him to the lawsuit. Later, in the suit against Scottsdale, she claimed that Scottsdale should have defended Mr. Burns because he faced personal liability. The court considered Ms. Filosa's inconsistent positions and held that she was "judicially estopped" to claim that Mr. Burns faced liability even though this information was "extrinsic" to the complaint Ms. Filosa had filed against Mr. Burns.

Finally, the court found that tongue piercing is a "professional service" excluded from coverage. This is the first Washington case to address whether tongue piercing is a professional service.

Because the opinion is not binding on Washington State Courts and the question remains whether Washington State Courts will follow the lead set by the District Court or continue to follow the insurer friendly trend set by the Washington State courts.