



(Un)ambiguous Policy Language, Triggering the Duty to Defend, and the Intentional Acts Exclusion

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In *Holloway v. Republic Indemnity Co. of Am.*, Civ. No. A123072 (Aug. 31, 2005), the Oregon Court of Appeals recently handed down an opinion which is unfavorable to the insurance industry in several areas. First, the Court interpreted as ambiguous the terms “rights” and “duties” and permitted an assignment of rights that was prohibited by the policy. Second, it greatly expanded an insurer’s duty to defend to cover claims which could have been asserted in the complaint. Finally, it limited the applicability of the intentional acts exclusion to those acts which were done with the subjective intent to cause bodily injury and held that merely knowing that act would cause injury is not enough. The *Holloway* case did re-affirm the principle that “bad facts result in bad law.”

Krystal Holloway was a sixteen year old server at Loree’s Chalet Restaurant. Throughout the month she was employed by Loree’s, Holloway was harassed by Loree’s manager, Zullig. Holloway claimed that Zullig made lewd and vulgar comments to her, made unwelcome sexual advances and physical contact, obtained personal information from her file and harassed her at her home, repeatedly entered her home in a drunken state and refused to leave when asked, kissed her against her will, and threatened to rape her. Holloway reported Zullig’s actions to Loree’s on multiple occasions, but the harassment continued. After one month of harassment, Holloway was forced to quit because her working environment was intolerable, and because she feared for her safety.

Holloway filed a Complaint against Loree’s, alleging claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. Loree’s tendered defense of the litigation to its insurer, Republic Indemnity, which concluded that it had no duty to defend Loree’s. Holloway and Loree’s then settled the matter for \$50,000, and in exchange for a payment of \$6,000 and an assignment of Loree’s rights under its policy with

Republic Indemnity, Holloway agreed to not execute on the judgment.

Under this assignment, Holloway then file suit against Republic Indemnity for breach of its duties to defend and indemnify. In response, Republic argued that three provisions of the policy precluded the assignment of rights to Holloway:

- “rights or duties under this policy may not be transferred without [Republic Indemnity’s] written consent;”
- “[t]here will be no right of action against [Republic Indemnity] under this insurance unless . . . [Loree’s has] complied with all the terms of this policy;” and
- “unless . . . [t]he amount [Loree’s] owe[s] has been determined with [Republic Indemnity’s] consent or by actual trial and final judgment.”

With regard to the first provision, the Court held that the phrase “rights or duties” was ambiguous – and could be read to apply to either pre-loss rights and duties or post-loss rights and duties – and therefore construed it against Republic Indemnity, the drafter, to prohibit only the assignment of pre-loss rights and duties. With regard to the second and third provisions, the Court found that Republic Indemnity had waived them under long-standing Oregon Supreme Court precedent holding that when an insurer denies a duty to defend, it waives any policy provision requiring the amount of loss to be determined after a trial and any provision prohibiting the insured from settling claims without the insurer’s consent.

Republic Indemnity also argued that, because the parties had agreed that Holloway would not execute the judgment against Loree’s, Republic Indemnity was insulated from any liability to Holloway. The court remanded to the trial court for further consideration the issue of whether, with regard to the duty to indemnify, Republic Indemnity was

liable only to the extent that the insured was legally obligated to pay.

As such, and finding that there was no prohibition on the assignment of claims regarding Republic Indemnity's duty to defend, the Court then turned to Republic Indemnity's second argument that certain coverage exclusions (concerning intentional acts, harassment, and termination) supported Republic Indemnity's denial of defense.

Recognizing that the duty to defend arises if the four corners of the complaint state a claim under the four corners of the applicable policy, the Court found that if any of the exclusions served to deny coverage, then Republic Indemnity had no duty to defend.

Initially, the Court found that the harassment and termination exclusions applied to each of Holloway's claims. It determined, however, that analysis of whether an insurer has a duty to defend is not limited to reviewing only identified claims, but also extends to all claims which are supported by the Complaint's allegations even if those claims are not plainly asserted.

Here, the Court found that Holloway's allegations supported a claim for battery and that none of the policy's exclusions applied. With regard to the intentional acts exclusion, it was not applicable because that exclusion applied only when the subjective intent of the insured was to cause a

battery. In contrast, Loree's/Zullig intended only to cause emotional distress, and it was insufficient that the Complaint alleged that the insured knew that physical distress and injury would result. The Court held, without adequate discussion, that "knowing" injury would result was different than subjectively intending the harm. If this opinion is not modified, this may mean for purposes of the duty to defend that the intentional act exclusion may never apply. With regard to the harassment exclusion, the Court found that because Holloway ultimately may be able to prove only one improper back rub, such a claim would not necessarily amount to harassment. Thus, the harassment exclusion was inapplicable.

Because the assignment was proper, and because none of the exclusions applied, the Court held that Republic Indemnity had breached its duty to defend Loree's in the underlying litigation. ❖

— *Full case available at www.publications.ojd.state.or.us/A123072.htm.*

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