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Direct Path To Connecticut Insurer May Not Be The Shortest

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by Robert D. Helfand

Plaintiff A sues tortfeasor B, who is insured by carrier C. When B tenders the suit to C, C either denies coverage entirely or defends under a reservation of rights. In many such cases, A has a lot to gain from forcing a resolution of the coverage dispute between B and C. Recently, in *Veilleux* v. *Progressive Northwestern Insurance Co*., No. 3:16-CV-02116 (D. Conn. Jan. 18, 2018), a Connecticut federal court reminded us that important questions about A's right to do so remain unsettled in America's insurance capital.

Two Suits

Eric Veilleux was seriously injured while in the bucket of an aerial lift that was being unloaded from a tractor. When he sued the lift's owner, Central Auto & Transport LLC, that company's insurer denied coverage. The parties then settled the tort action on the following terms: (i) Central stipulated to its liability for Mr. Veilleux's injuries; (ii) the parties stipulated to entry of a judgment, in the amount of $3.75 million; and (iii) Central assigned to the plaintiff all of its rights under its insurance policy.

Mr. Veilleux then sued the insurer to enforce Central's right to indemnification under the insurance contract. The suit was brought under Connecticut's direct action statute, which permits certain judgment creditors of insured defendants to sue the defendants' carriers, provided that the judgment remains unsatisfied. Conn. Gen. Stat. § 38a-321. In separate counts of his complaint, Mr. Veilleux also pursued his indemnification claim under two other theories: as an assignee of Central's insurance policy, and as a "third-party beneficiary" of that contract. The plaintiff contended that he could recover attorneys' fees and expenses in connection with these common-law claims.

"There Is No Alternative"

The insurer moved to dismiss the common-law counts, asserting that the direct action statute creates an exclusive cause of action: According to that argument, there is no other method by which an injured plaintiff may establish that a defendant's insurer is obligated to pay a claim. The insurer acknowledged that the statute does not expressly abrogate common-law remedies, and that no court has, as yet, applied the statute in that way. Nevertheless, it contended, an intent to "displace ... common law causes of action against the

insurers of defendants" may be "inferred" from both the language of the statute and the language of certain cases that applied it.

The insurer quoted passages from several cases that appeared to support this position, albeit under different circumstances. For example, in *Ducharme v. Gaines*, No. CV 02-00816516 (Conn. Super. Ct., Dec. 20, 2002), a Connecticut court stated that "Section 38a-321 is the exclusive remedy to determine the obligation to pay between an injured plaintiff and the defendant's insurance carrier." The court made that statement in the course of refusing to allow an insurer to intervene in the underlying suit between a tort plaintiff and an insured defendant. Without elaboration, the court in *Veilleux* found that the disposition of the parties made a crucial difference. It acknowledged that the "rights accorded ... under the direct action statute" might be the "sole remedy" for an *insurer* when it is sued by the judgment creditor of a policyholder; but, according to the district court, that statute does not "provide[] the sole cause of action for the [*injured] plaintiff* to pursue such a claim."

In the absence of authority it found persuasive, the court declared itself bound by the general rule that "[n]o statute is to be construed as altering the common law, farther than its words import." *State v. Havican*, 213 Conn. 593 (1980). It found that the language of both the direct action statute and the cases that have construed it is insufficient to support a ruling that the statute "supplanted every common law claim that could otherwise be brought against insurers ... ." The insurer's dismissal motion was denied.

So What?

One of the cases the insurer cited in *Veilleux* observed that, in light of the plaintiff's rights under the direct action statute, the assignment given by the insured defendant was "superfluous." *Peck v. Public Service Mut. Insurance Co*., 114 F.Supp. 2d 51 (D. Conn. 2000). That observation might justly be applied to *Veilleux*. Although the plaintiff there asserted that the common-law theories give him a right to pursue attorneys' fees, that assertion is true only to the extent that he will be able to prove the insurer acted in "bad faith, vexatiously, wantonly or for oppressive reasons." *ACMAT Corp. v. Greater New York Mut. Insurance Co*., 282 Conn. 576 (2007). Such proof would also support claims for breach of the covenant of good faith and fair dealing, which Mr. Veilleux asserted in additional counts of his complaint. As a practical matter, therefore, it does not appear that his rights as an assignee and third-party beneficiary extend any farther than his rights under the direct action statute.

But what about a plaintiff who (unlike Mr. Veilleux) has not yet settled her underlying case against the insured defendant — and who, therefore, has no statutory right to sue the insurer? *See Skut v. Hartford Accident & Indemn. Co*., 142 Conn. 388 (1955). Where there is doubt about the defendant's ability to satisfy a judgment, it can be very much in the plaintiff's interest to learn whether insurance coverage will ultimately be available. Such information can reduce the risk of conducting a lengthy litigation, and it can correspondingly strengthen the plaintiff's settlement posture.

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For the most part, Connecticut's trial courts have refused to allow plaintiffs to sue their defendants' insurers, absent some kind of special circumstance. But because the principal issues in those cases have largely gone unaddressed by the state's appellate courts, there is still considerable room for argument.

Ripeness? Standing?

Many cases of this type turn on issues that were not presented in *Veilleux*. For example, where an insurer is defending the underlying case subject to a reservation of rights, the plaintiff generally may not bring a declaratory judgment action to determine the insurer's obligation to *indemnif*y the insured defendant. The insurer's duty to indemnify attaches only after the plaintiff wins a judgment against the insured. Therefore, the determination of the insurer's liability depends on the resolution of the underlying claim, and the issue is not yet ripe. *Hamilton v. United Services Automobile Assn*., 115 Conn.App. 774, cert. denied, 293 Conn. 924 (2009). This was the reasoning behind *Hartford Accident & Indemnity Co. v. Williamson*, 153 Conn. 345 (1966), which was the principal basis for the decision in *Ducharme, supra*.

On the other hand, where the insurer refuses to defend the claim, courts often focus on whether the plaintiff has *standing* to allege a breach of the duty to defend. That issue can turn on the question of whether the plaintiff has suffered "classical aggrievement": whether the defendant's conduct has had a "special[] and injurious[]" effect upon "a specific, personal and legal interest in the subject matter of the" controversy. *Pinkham v. State National Insurance Co.,* No. KNLCV166027740S (Conn. Super. Ct., Jan. 20, 2017).

Like *Veilleux, Pinkham* involved a personal injury claim against an insured defendant. The court in *Pinkham* found that the plaintiff in such a case is not "classically aggrieved":

> While he might prefer having the business ... he is suing be backed by an insurance company able to pay a sizable judgment or settlement, that is a litigation strategy, not a right ... . Also, if it is a cognizable interest, it is an interest that goes to the duty to indemnify issue which is not ripe ... .

But that reasoning has not been followed by every trial court. *See, e.g., Gomes v. R.P. Floors Solution LLP*., No. DBDCV136014098S (Conn. Super. Ct., May 12, 2014) (personal injury plaintiffs had standing to sue defendant's insurer for breach of duty to defend). Courts have also identified exceptions to *Pinkham's* rule. Some injured plaintiffs, for example, need information about a defendant's insurance to ascertain whether they can get uninsured motorist coverage under their own policies. Courts have allowed those plaintiffs to sue defendants' insurers, even over the issue of the duty to indemnify. *E.g., Wynn v. Commercial Union Insurance Co*., 12 Conn.L.Rptr. 51 (1994).

Third-Party Beneficiaries?

An alternative way to establish a plaintiff's standing would be to show that he is a third-party beneficiary of

the contract the insurer is charged with having breached. For the most part, Connecticut's trial courts have agreed that

> the mere fact that a contract of liability insurance exists between the tortfeasor and insurance company does not somehow make the injured party a third-party beneficiary to the contract. ... [A]n injured party is not, without more, a third-party beneficiary of the insurance contract between a tortfeasor and the insurance company.

Cholewa v. Hill, No. CV156025338 (Conn. Super. Ct., Oct. 25, 2017).

But here, too, there are exceptions. In *Seeley v. State Farm Fire & Cas*. Co., 62 Conn.L.Rptr. 263 (2016), the court held that condominium owners had "at least a colorable claim to be third-party beneficiaries" of a policy issued to the condominium association. On that basis, it denied the insurer's motion to dismiss. In *Alexander v. W.F. Shuck Petroleum Co*., 48 Conn.L.Rptr. 365 (2009), a gas station's liability policy included a medical payments provision, which (like the medpay provisions in an auto policy) obligated the insurer to pay for the treatment of persons who were injured at the station, regardless of fault. The plaintiff in Alexander was injured in a slip and fall at the gas station, and the court held that this plaintiff (unlike a person whose claim is based on the liability of the insured defendant) was "a direct rather than incidental beneficiary" of the insurance contract.

What Just Happened?

In *Veilleux*, the insurance carrier contended that the direct action statute supplanted common law grounds for suing insurers, and its motion to dismiss the plaintiff's common law claims was based solely on that argument. Because the district court rejected that theory, it held that the plaintiff had stated a claim as a third-party beneficiary of the insurance policy — even though he alleged no more than "the mere fact that "a contract of liability insurance exist[ed]" between his judgment debtor and the defendant insurer.

In other words, the court might unwittingly have broadened the scope of plaintiffs' access to defendants' insurers. Until Connecticut's appellate courts weigh in on these issues, *Veilleux* could turn out to be a widely cited opinion.

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