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Reminder to Policyholders: Cooperate and Consent!

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In *HDI Global Specialty SE v. PF Holdings LLC*, the Eleventh Circuit recently affirmed a district court ruling that the insurers of two apartment management companies did not have to cover a $54 million arbitration award against the companies for their alleged mismanagement of government-subsidized apartments. The Eleventh Circuit held that management companies' failure to cooperate breached general liability insurance policies issued by the insurers.

After the management companies provided notice to the insurers of a claim by their residents for substandard living conditions, the insurers eventually agreed to defend the management companies as additional insureds, under a reservation of rights. The management companies disagreed with the insurers' coverage position and, contrary to the insurers' decision to appoint different defense counsel, continued to retain the defense attorney they had selected to defend them in the underlying action.

Eventually the arbitrator issued a $54 million award against the management companies, which was comprised of compensatory and punitive damages, as well as attorneys' fees. While the arbitration was pending, the insurers filed a declaratory judgment action, seeking a declaration that it did not have to indemnify the management companies for the arbitration award or related defense costs. In the declaratory judgment action, the insurers argued that they did not have to cover the arbitration award because the management companies hadn't cooperated with the insurers and had subjected the insurers to possible liability for the arbitration award without the insurers' consent, thereby violating the policy.

The management companies argued that the insurers' delay in responding to its request for a defense was a refusal to defend the management companies; therefore, the insurers had breached the policy, relieving the management companies of their duty to cooperate with the insurers.

The district court agreed with the insurers and the Eleventh Circuit affirmed. The District Court held that while a delay in responding can be considered a refusal, the "slight delay" here was not prejudicial to the management companies. Further, the court held that the management companies breached the policies by "clearly" failing to cooperate with the insurers when they moved the counsel hired by the insurers "to the sidelines during the arbitration hearings." The court also held that the management companies had breached the policy by subjecting the insurers to possible liability, specifically by failing to seek the insurers' consent to enter into a binding arbitration award.

The district court also rejected the management companies' contention that the insurers had acted in bad faith by failing to accept pre-arbitration settlement offers within the limits of their policies. The court reasoned that although the insurers likely had sufficient information to determine that the management companies were liable,

they did not have any specific information regarding damages, and that therefore no reasonable jury would find the insurers had acted in bad faith.

Although there are reasons a court could have gone the other way on these issues, this decision serves as reminder that a policyholder should attempt to work with its insurers even after the policyholder believes the insurer has breached the policy. If nothing else, such efforts can serve as evidence in a coverage action to show that the policyholder acted reasonably, or conversely that the insurer did not. Furthermore, policyholders and coverage counsel should remember to provide insurers sufficient information so that they can make informed decisions regarding settlements. If not, policyholders can be on the hook for millions of dollars that would otherwise be covered.

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