

# Insurer Must Assume Defense to be Liable for Failure to Settle Under Tyger River Doctrine

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03.12.2019

Recently, the United States District Court in South Carolina, 2019 WL 689545, dismissed a claim seeking a declaratory judgment that an insurer failed to settle an underlying tort claim. Briefly, plaintiff Church Creek Construction, LLC incurred a substantial judgment in state court. Church Creek assigned its bad faith claims to the tort plaintiffs, and the tort plaintiffs initiated an action against Church Creek's insurers. After some procedural realignment, the insurers moved to dismiss several causes of action, including a claim for a declaratory judgment that the insurer negligently failed to settle the underlying claim within the policy limits.

In support of their motion to dismiss, the insurers argued they were not liable under the doctrine first announced in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.E. 346 (S.C. 1933), for failure to settle because they never agreed to defend the insured.

According to the district court, the *Tyger River* doctrine "***arises when the insured plaintiff suffers a loss because the insurer 'took exclusive control and management of all negotiations for compromise and settlement' of the claim and 'negligently, recklessly, willfully, contumaciously, and in bad faith, with a view to its own interests alone, and in disregard of plaintiff's rights and interests, neglected and refused to settle the claim.'***"

Because the *Tyger River* doctrine creates a tort action, the district court first held it cannot be pled as the basis for a declaratory judgment action. Responding to the plaintiffs' argument that *Tyger River* holds an insurer "must protect its insured" and therefore cannot refuse to defend and then benefit from that refusal, the district court simply ruled plaintiffs failed to address the declaratory judgment/tort distinction.

Next, the district court addressed the merits of the tort claim advanced by plaintiffs. Recognizing no South Carolina court has found the *Tyger River* doctrine applicable when an insurer failed to undertake the

defense of the insured, the district court noted the case law assumed the insurer accepted the defense of the insured. Citing *State Farm Mut. Auto. Ins. Co. v. Arnold*, 276 F. Supp. 765 (D.S.C. 1967), the district court reaffirmed a distinction between a claim for refusing to defend an insured and a *Tyger River* claim; in the first instance, the insurer has denied coverage, while in the second, the insurer conceded coverage. 276 F. Supp. at 766.

Building on this distinction between refusing to defend and failure to settle, the district court held an insurance company must (1) concede coverage and (2) assume the defense of its insured before it can be liable under the *Tyger River* doctrine. Because the insurers did not assume the defense of Church Creek, the court dismissed the action under *Tyger River*.

Notably, the insurers did not move to dismiss the plaintiffs' claim for bad faith failure to defend at this stage. Rather, the insurers tested the improperly pleaded claims, affording the district court an opportunity to affirm the distinction between a declaratory judgment claim and a tort claim. The insurers' motion also allowed the district court to analyze which causes of action arise based on an insurer's specific actions. While it is not clear a refusal to defend will avoid *Tyger River* liability under all circumstances, insurers should be prepared to challenge any failure to settle claims where the insurer did not assume the defense of the underlying claim.

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*Bruce Wallace practices with Nexsen Pruet's business and consumer litigation group in Charleston, South Carolina. He represents a variety of banking and financial institutions in real estate litigation, commercial litigation and mortgage foreclosures. He also represents insurers and corporate clients in bad faith and coverage issues, professional liability, business litigation (including disputes involving partnerships, limited liability companies and closely held companies) and probate litigation matters (including trusts and estates).*