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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Zurich Must Cover Dealer In Faulty-Car Suit, 10th Circ. Says

By **Juan Carlos Rodriguez**

Law360, New York (June 26, 2013, 10:14 PM ET) -- The Tenth Circuit on Wednesday ruled Zurich American Insurance Co. owes coverage to an Oklahoma City Hyundai dealership accused of selling a faulty car under false pretenses, reversing a lower court's ruling in favor of the insurer.

Zurich denied coverage to Automax Hyundai South LLC because the claims in the underlying suit were based on intentional conduct on the part of the dealership, but the appeals panel said the trial court erred in its agreement with that argument because there is a possibility Automax could have incurred liability accidentally.

In the underlying suit, the plaintiffs alleged Automax sold a car that was previously owned and had been in an accident as new. According to the appeals panel, the plaintiffs in the case said the car experienced steering problems on the highway, causing a crash. A jury found Automax liable and said it had acted intentionally.

"The duty to defend is triggered by the facts reasonably available at the time the defense is demanded, not by the outcome of the lawsuit," the appeals panel said in its order reversing and remanding the case to district court.

It said Automax's insurance policy with Zurich provides "occurrence" coverage for "an accident" that results in injuries "neither intended nor expected from the standpoint of a reasonably prudent person."

"Whether Automax's conduct constitutes an accident requires us to parse the facts of the Elantra purchase. The complaint indicates that Automax could incur liability for three types of behavior: (1) the sale of the used car as 'new,' (2) the sale of the car with undisclosed damage, and (3) the terms and manner of the financing," the panel said.

The panel agreed with Automax's contention that the sale of the car with undisclosed damage could constitute a covered accident, because the lawsuit contemplates the possibility that Automax did not know of the damage when it sold the car.

"We agree that the failure to detect damage in a car constitutes an 'accident' (and thus an 'occurrence') under the terms of the policy, because a dealership neither expects nor intends to cause injury to its customers when it sells a car that it believes is in perfect condition," the panel said. "Given Oklahoma's understanding of the duty to defend, we must conclude that the facts of the case triggered Zurich's duty to defend Automax under the occurrence provision."

And the panel shot down Zurich's argument that it did not have a duty to defend because the conduct alleged in the complaint was intentional.

"First, this argument fails to acknowledge that the underlying facts, and not the allegations in the [underlying plaintiffs'] complaint, are dispositive of the duty to defend," the panel said. "And, as already noted, the facts indicate that Automax may have been negligent in failing to discover preexisting damage in the Elantra. Nothing more is required to trigger the duty to defend."

The panel also found Zurich owes at least partial indemnity to Automax for the verdict, saying it is possible that conduct covered under the policy formed part of the basis of the jury's verdict.

"There is simply no way at this point to determine whether the jury's finding that Automax had acted intentionally and with malice applied to all the claims or only some of them. (The same goes for the punitive damages award.) Thus, it is possible there were both covered and noncovered claims in the final judgment," the panel said.

The panel said if Zurich cannot satisfy its burden of proof that the verdict was not premised on covered conduct, it must pay the full amount of Automax's \$300,000 settlement with the plaintiffs.

Finally, the panel reversed the trial court's granting of summary judgment on Automax's bad-faith claim, saying Zurich had a duty to defend Automax under the occurrence provision and Zurich may not have had a reasonable basis for denying coverage.

"We're obviously very pleased with the ruling and we think that the court did a good job of confirming fundamental principles of insurance law that have been around for a long time," Automax's attorney Randall K. Calvert of Calvert Law Firm said Wednesday.

Counsel for Zurich did not immediately respond to a request for comment Wednesday.

Judges Paul J. Kelly Jr., Michael R. Murphy and Timothy M. Tymkovich sat on the panel.

Automax is represented by Randall K. Calvert of Calvert Law Firm.

Zurich is represented by Brittan Lance Buchanan and Laura J. Grabouski of Van Osselaer & Buchanan LLP and Daniel K. Zorn of Collins Zorn & Wagner PC.

The case is Automax Hyundai South LLC v. Zurich American Insurance Co. et al., number 12-6161, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Jeremy Barker.

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