PLUNKETT COONEY

Additional Insureds, Pollution Exclusion, Earth Movement Exclusion Coverage Update

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New York, West Virginia Coverage Cases
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Additional Insureds – New York

Burlington Ins. Co. v. NYC Transit Auth.
--- N.E.3d ---, 2017 WL 2427300 (N.Y. June 6, 2017)

The Court of Appeals of New York held that where an insurance policy limits additional insured status to liability for bodily injury or property damage that was caused, in whole or in part, by the named insured, and the named insured was not at fault, then there is no coverage for the purported additional insureds. In this case, the named insured entered into a contract with the New York City Transit Authority (NYCTA) and the MTA New York City Transit (MTA) to provide tunnel excavation work on a New York City subway construction project. After a NYCTA employee was injured, NYCTA and MTA sought insurance coverage as additional insureds under the named insured's policy. The policy provided that NYCTA and MTA were additional insureds "only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused,in whole or in part, by … [y]our acts or omissions … or … [t]he acts or omissions of those acting on your behalf." The insurer disclaimed coverage on the basis that NYCTA and MTA did not qualify as additional insureds because the acts or omissions of the named insured were not a proximate cause of the injury.

The Court of Appeals agreed, stating that the policy's extension of "coverage to an additional insured 'only with respect to liability' establishes that the 'caused, in whole or in part, by' language limits coverage for damages resulting from [the named insured's] negligence or some other actionable 'act or omission.'" In other words, the phrase "'caused, in whole or in part' as used in the endorsement, requires the insured to be the proximate cause of the injury giving rise to liability, not merely the 'but for' cause." Accordingly, because the employee's injury was due to NYCTA's sole negligence, NYCTA and MTA did not qualify as additional insureds under the policy.

Pollution Exclusion – Second Circuit (New York Law)

Cincinnati Ins. Co. v. Roy's Plumbing, Inc.
--- Fed. Appx. ---, 2017 WL 2347562 (2d Cir. May 31, 2017)

The U.S. Court of Appeals for the Second Circuit held that an insurer had no duty to defend or indemnify a plumbing company in litigation over chemical contamination stemming from sewer repair work, as the pollution exclusion barred coverage. The underlying plaintiffs alleged that the plumbing company negligently exposed a substantial amount of contaminated sediment, which then migrated to their homes and caused physical injuries and property damage. The policy, however, precluded coverage for "'[b]odily injury or property damage which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release, escape or emission of pollutants at any time" and defined "pollutant" as both "'substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment'" and "'any solid [or] liquid ... irritant or contaminant, including ... waste.'" In finding that the pollution exclusion barred coverage, the appellate court ruled that the definition of "pollutant" encompassed all of the contaminants at issue, even sewage. It also rejected the plumbing company's fears of an overly-broad construction of the pollution exclusion, as New York courts limit the exclusion "to 'those cases where the damages alleged are truly environmental in nature, or where the underlying complaint alleges damages resulting from what can accurately be described as the pollution of the environment.'"

Earth Movement Exclusion – West Virginia

Erie Ins. Prop. and Cas. Co. v. Chaber
--- S.E.2d. ---, 2017 WL 2415333 (W. Va. June 1, 2017)

The West Virginia Supreme Court ruled that the "earth movement exclusion unambiguously precludes coverage for earth movement caused by either natural or man-made events." The insureds operated a motorcycle shop that was damaged when soil and rock slid down a hill located behind the motorcycle shop. The insureds submitted a claim for property damage to their insurer, which the insurer denied based on the policy's earth movement exclusion. The exclusion provided that loss or damage caused by a "[l]andslide," among other identified methods of earth movement, "applies regardless of whether [the earth movement] is caused by an act of nature or is otherwise caused." The Supreme Court determined that the exclusion "clearly and unambiguously excludes coverage for a landslide resulting from a natural event or otherwise," and that "whether the event was triggered by natural forces or improper excavation of the hillside at the rear of the property, the exclusion applies."

Hazardous Materials Exclusion – New York

Hillcrest Coatings, Inc. v. Colony Ins. Co.
--- N.Y.S.3d ---, 2017 WL 2491075 (N.Y. Sup. Ct. June 9, 2017)

The New York Supreme Court ruled that the insurer "did not meet its heavy burden of establishing as a matter of law that the hazardous materials exclusion" applied to preclude coverage. Hillcrest Coatings, Inc. (Hillcrest) operated a recycling facility, which allegedly caused "a malodorous condition to be created in the surrounding neighborhood." The residents surrounding the facility sued Hillcrest for operating the facility in a negligent fashion as a result of the malodorous condition. Hillcrest's insurer denied coverage for the underlying lawsuit on the basis of the hazardous materials exclusion, "which provided that the insurance would not apply to bodily injury, property damage or personal and advertising injury 'which would not have occurred in whole or [in] part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time.'" In the subsequent coverage action, the Supreme Court determined that the insurer had a duty to defend Hillcrest because "there [was] a reasonable possibility of coverage" because "foul odors are not always caused by the discharge of hazardous materials.

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