PLUNKETT COONEY

Anti-Assignment Clause, Pollution Exclusion, Post-Judgment Interest, Late Notice Coverage Update

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Coverage Cases
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Anti-Assignment Clause – New Jersey

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.
--- A.3d ---, 2017 WL 429476 (N.J. Feb. 1, 2017)

The Supreme Court of New Jersey, as a matter of first impression, held that "once an insured loss has occurred, an anti-assignment clause in an occurrence policy may not provide a basis for an insurer's declination of coverage based on the insured's assignment of the right to invoke policy coverage for that loss." The named insured was Givaudan Corporation, but the party seeking insurance coverage was Givauden Fragrances Corporation (Fragrances). The assignment clause at issue provided that "[a]ssignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. …" The Supreme Court disagreed with the insurers' argument that Fragrances had no right to insurance coverage because it was not the corporate successor of the named insured and the named insured could not validly assign its claim under the policy to Fragrances. Regarding the assignment clause at issue, the Supreme Court stated that "[a]n anti-assignment clause is not a barrier to the post-loss assignment of a claim." In other words, "that general rule recognizes that anti-assignment clauses in insurance contracts 'apply only to assignments before loss, and do not prevent an assignment after loss.'" The Supreme Court concluded that, because the right to insurance coverage was assigned to Fragrances after the occurrence-based policies had expired and the loss event had occurred during the policy periods, this was an assignment of a post-loss claim and, therefore, the anti-assignment clause did not apply to preclude insurance coverage.

Pollution Exclusion – Eighth Circuit (North Dakota Law)

Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA
--- F.3d ---, 2017 WL 405645 (8th Cir. Jan. 31, 2017)

The U.S. Court of Appeals for the Eighth Circuit ruled that the pollution exclusion in a commercial general liability policy barred coverage for an underlying lawsuit against a gas processing facility when

one of its tanks overflowed and sparked an explosion that seriously injured a worker. The policy excluded from coverage bodily injuries or property damage "arising out of the ... discharge, dispersal, seepage, migration, release or escape of pollutants." The policy also defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The appellate court ultimately ruled that hydrocarbon condensate "is a contaminant due to its flammable, volatile, and explosive properties." The appellate court further held that because the "injuries were the result of an explosion, the nature of the harm here is directly related to the nature of the contaminant." The appellate court, therefore, concluded that the insurer had no duty to defend or indemnify against the underlying lawsuit based on the pollution exclusion.

Post-Judgment Interest – Massachusetts

Anderson v. Nat'l Union Fire Ins. Co. of Pittsburgh PA
--- N.E.3d ---, 476 Mass. 377 (Mass. Feb. 2, 2017)

The Supreme Judicial Court of Massachusetts held that post-judgment interest should not be factored into punitive damages awarded against insurers in a dispute with the victim of a bus accident. The insurers, which insured the bus owner and driver, engaged in conduct that included suppressing unfavorable evidence and offering fictitious evidence. The injured parties initiated a statutory action against the insurers for unfair practices, arguing that post-judgment interest should be factored into the amount to be trebled under the statute. The appellate court, however, disagreed. It ruled that the relevant statutory language clearly provided that post-judgment interest is not part of the judgment, but is instead calculated against the judgment. The appellate court ultimately ruled that plaintiffs "advanced no reason other than further punishing a defendant whose violation was willful or knowing. …" The appellate court "decline[d] to read into the statute an additional measure of punishment that the Legislature did not set forth explicitly."

Late Notice – Texas

League City v. Texas Windstorm Ins. Ass'n
No. 01-15-00117-CV, 2017 WL 405816 (Tex. Ct. App. Jan. 31, 2017)

The Texas Court of Appeals held that the insurer established that the insured's failure to comply with the policy's notice requirement resulted in prejudice to the insurer, which precluded recovery to the insured. The appellate court noted that "[o]nly a material breach of a 'timely notice' provision will excuse an insurer's performance under the policy" and that "[a]n insurance company seeking to avoid coverage under an 'occurrence' policy must show that (1) the insured failed to comply with the timely-notice provision and (2) the insurer suffered prejudice as a result of this failure." The appellate court

determined that the insured's notice of "Wind Damage to Various Locations" was insufficient to give the insured prompt written notice as it did not identify the affected property. The insurer was prejudiced by the notice because the notice prevented the insurer from conducting a reasonable investigation and promptly paying a covered loss.

No Private Cause of Action for Insurance Regulatory Violations – Washington

Peres-Crisantos v. State Farm Fire and Cas. Co.
--- P.3d ---, 2017 WL 448991 (Wash. Feb. 2, 2017)

The Washington Supreme Court ruled that a policyholder cannot maintain a claim against an insurance company under the state's Insurance Fair Conduct Act (IFCA) based solely on an alleged violation of insurance regulations. The Supreme Court stated that the IFCA "creates a cause of action for first party insureds who were 'unreasonably denied a claim for coverage or payment of benefits.'" The Supreme Court noted that the IFCA "does not state it creates a cause of action for first party insureds who were unreasonably denied a claim for coverage or payment of benefits or 'whose claims were processed in violation of the insurance regulations [listed in the statute],' which strongly suggests that IFCA was not meant to create a cause of action for regulatory violations."

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