PLUNKETT COONEY

Collusive Settlement Agreement, Intentional and Criminal Acts Exclusion, Allocation Coverage Update

December 1, 2016
Florida, West Virginia, Missouri Coverage Cases

Collusive Settlement Agreement – Eleventh Circuit (Florida Law)

Sidman v. Travelers Cas. and Sur.
--- F.3d ---, 2016 WL 6803034 (11th Cir. Nov. 17, 2016)

The U.S. Court of Appeals for the Eleventh Circuit held that an insurer that wrongfully refused to defend its insured, a homeowners' association (the association), was not bound by a settlement agreement between the association and a homeowner (the homeowner) because the settlement agreement was obtained through fraud and collusion. The appellate court recognized that, under Florida law, "an insurer who wrongly refuse[s] to defend its insured is bound by the insured's settlement agreement unless the agreement was obtained through 'fraud or collusion.'" In determining whether fraud or collusion existed, the appellate court looked to whether the settlement amount was unreasonable and whether the negotiations were conducted in bad faith. The appellate court concluded that the negotiations were conducted in bad faith because the association agreed to a judgment in an amount of the homeowner's choosing, as long as the homeowner would not execute the judgment against the association. Ultimately, the appellate court held that "an agreement in which an insured agrees to accept essentially any judgment amount that the injured party seeks in exchange for a promise to not execute against it is collusive … ."

Intentional and Criminal Acts Exclusion – West Virginia

Am. Nat. Prop. and Cas. Co. v. Clendenen
--- S.E.2d ---, 2016 WL 6833123 (W. Va. Nov. 17, 2016)

The Supreme Court of Appeals of West Virginia ruled there is no insurance coverage under a homeowners policy for a lawsuit against the parents of two teenage girls convicted of murdering their friend. The appellate court held that the exclusions for intentional and criminal acts applied even to claims against the parents, who were innocent co-insureds, as the exclusion applied to conduct of "any

insured" or "anyone ... protect[ed]." Although the claims against the parents were for negligent supervision and entrustment, the appellate court ruled that "[a]s all such bodily injury claims arise from the intentional and criminal conduct" of the teenage daughters, who were insureds under the policy, "the exclusions preclude coverage for all of the claims." The appellate court explained that the policies' "severability clause's command to apply the insurance separately to each insured does not alter the intentional/criminal act exclusions' plain meaning or create ambiguity in its application." Public policy also supported such a ruling, according to the appellate court, because the girls' parents "paid premiums that were commensurate with their coverage –which excluded coverage for all insureds caused by the intentional acts of any insured."

Allocation – E.D. Mo. (Missouri Law)

Zurich Am. Ins. Co.v. Ins. Co. of N. Am.
--- S.W.3d ---, 2016 WL 6696058 (E.D. Mo. Nov. 15, 2016)

A Missouri federal district court concluded that, under Missouri law, the court would allocate defense and indemnity costs on a pro rata basis determined by each insurer's time on the risk. Zurich American Insurance Company (Zurich) settled the underlying asbestos bodily injury suit and then brought an action against its insured and other insurers, seeking contribution. Zurich argued that a pro rata allocation should be applied to the defense and indemnity costs. The insured argued against pro rata allocation because it would result in the insured being responsible for a portion of the costs under certain deductible endorsements in its policies with the other insurer. Instead, the insured argued for an "all sums" approach, under which Zurich would be responsible for all defense and indemnity costs, regardless of its time on the risk. The insured further argued that pro rata allocation only applied to consecutive insurers, and not to an insured. The court, however, sided with Zurich and concluded that, under Missouri law, pro rata allocation applies, reasoning that the "'all sums' language of the insurance policy is limited by the policy period" and that "[t]he relationship of [Zurich and its insured] does not change the appropriate allocation method."

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