PLUNKETT COONEY

Defense Costs Allocation, Property Extension, Prior Publication Exclusion Coverage Update

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Allocation of Defense Costs – Wisconsin

Steadfast Ins. Co. v. Greenwich Ins. Co.
--- N.W.2d ---, 2019 WL 323702 (Wis. Jan. 25, 2019)

The Wisconsin Supreme Court ruled that an insurer that breached its duty to defend did not have to repay the full $1,550,000 that another insurer expended in defending the insured. In June 2008, a torrential rain in Milwaukee caused hundreds of plumbing back-ups, which ultimately resulted in several lawsuits being filed against the Milwaukee Metropolitan Sewerage District (MMSD). MMSD tendered the lawsuits to its two insurers, Greenwich Insurance Co. (Greenwich) and Steadfast Insurance Co. (Steadfast). Steadfast agreed to defend MMSD, but Greenwich refused on the grounds that its policy was excess over Steadfast's. Steadfast paid $1,550,000 in defense costs to MMSD and subsequently filed suit against Greenwich for that amount.

The trial court held that Greenwich breached its duty to defend MMSD and ordered Greenwich to repay the full amount of defense costs to Steadfast, and the intermediate appellate court affirmed. The Wisconsin Supreme Court agreed with the lower courts that Greenwich had breached its duty to defend MMSD because Greenwich's unilateral determination that its policy was excess over Steadfast's policy was erroneous. However, the Supreme Court held that awarding Steadfast the full amount of defense costs improperly "relieved Steadfast of its contractual obligation for defense costs, without recognition of the windfall that Steadfast received from what amounted to a judicial forgiveness of Steadfast's duty to defend MMSD." Thus, the Supreme Court allocated a proportional share of defense costs to each insurer based on the limits of liability of each policy. Ultimately, Greenwich was ordered to pay Steadfast $620,000 of the total defense costs, plus interest.

Newly-Acquired Property Extension – Virginia

Erie Ins. Exch. v. EPC MD 15, LLC
--- S.E.2d ---, 2019 WL 238168 (Va. Jan. 17, 2019)

The Virginia Supreme Court ruled that an endorsement in a commercial property policy which extended coverage to newly-acquired property did not apply where a named insured acquired a subsidiary that owned certain real property. The Supreme Court's ruling overturned the lower court's ruling that the acquisition of the subsidiary satisfied the endorsement.

EPC MD 15 (EPC) purchased an insurance policy from Erie Insurance Exchange (Erie) with an effective date in June 2013. EPC was the only named insured and the policy did not define "named insured" to include subsidiaries of EPC. The declaration page of the policy listed only one property owned by EPC as a covered property. The policy contained an extension of coverage for buildings newly acquired after the policy was issued, as well as other coverages connected to newly-acquired buildings. Several months after the effective date of the policy, EPC acquired Cyrus Square, LLC (Cyrus Square), which owned a building in Virginia. When the Virginia building sustained fire damage, EPC made a claim for coverage under the policy, which Erie denied. The circuit court held that the newly-acquired property extension applied to the Virginia building because the term "acquired" was ambiguous.

The Virginia Supreme Court rejected the circuit court's ruling, finding that the newly-acquired property extension was not ambiguous. The Supreme Court found that the circuit court stretched the definition of the term "acquired" to include control by EPC of the subsidiary. Instead, the Supreme Court held that the acquisition of Cyrus Square did not equal acquisition of real property because an LLC is a legal entity unto itself and title to any property held by the LLC is held only by the LLC, not its members or parent companies. The Supreme Court noted that "[i]f control of a mere membership interest were enough, every named insured owning a controlling interest in an LLC could be said to have acquired the controlee's property for purposes of a similar coverage-extension provision – even though the insurer had no underwriting information necessary to make a risk assessment and established no premium rating on the de facto insured that actually owned the newly acquired property."

Prior Publication Exclusion – Idaho

Scout, LLC v. Truck Ins. Exch.
--- P.3d ---, 2019 WL 347471 (Idaho Jan. 29, 2019)

The Idaho Supreme Court ruled that an insurer does not have to cover a pub's costs to defend a lawsuit alleging that the pub infringed a brewery's trademarks. In the underlying complaint, Oregon Brewing Company (OBC) accused the Boise-based pub owner, Scout, LLC (Scout), of infringing on OBC's federally registered trademarks. Scout posted an image of the allegedly infringing logo on Facebook in October 2012, approximately one month prior to acquiring its liability policy from Truck Insurance Exchange (Truck Insurance). Truck Insurance invoked its policy's prior publication exclusion, and refused to defend Scout in the OBC lawsuit.

Scout ultimately resolved the OBC lawsuit by agreeing to stop using the allegedly infringing material and re-branding its restaurant. Scout subsequently sued Truck Insurance, claiming that the coverage denial amounted to breach of contract and bad faith. However, the Idaho Supreme Court agreed with Truck Insurance and found that Scout's October 2012 Facebook post constituted a prior publication within the meaning of the exclusion. The Supreme Court found that the prior publication exclusion is unambiguous and "clearly indicates that if an injury arises after coverage is purchased, it will not be covered if the material was published prior to coverage." Therefore, the Supreme Court held that Truck Insurance's denial of coverage was not improper.

Consequential Damages – New York

D.K. Prop., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA.
--- N.Y.S.3d ---, 2019 WL 237454 (N.Y. App. Div. Jan. 17, 2019)

A New York appellate court rejected the notion that there is a heightened pleading requirement for consequential damages claims arising out of an insurer's alleged failure to pay a property damage claim. Instead, the appellate court held that a consequential damages claim is properly plead when the claimant specifies the types of consequential damages claimed and that such damages were reasonably contemplated by the parties prior to contracting.

D.K. Property Inc. (D.K. Property) sought coverage under a National Union Fire Insurance Co. of Pittsburgh, PA.'s (National Union) commercial property policy for structural damage to its building allegedly resulting from construction work in an adjoining building. National Union neither paid the claim nor denied coverage and failed to provide a coverage determination, despite making allegedly unreasonable and burdensome requests to D.K. Property for information. D.K. Property filed suit against National Union for breach of contract and breach of implied covenant of good faith and fair dealing, which included claims for consequential damages for building repairs, lost rent and legal fees incurred to sue both the insurer and the company allegedly responsible for the property damage.

National Union moved to dismiss the consequential damages claims on the basis that the factual allegations underpinning them were insufficiently detailed. The trial court granted summary judgment in favor of National Union, dismissing all consequential damages claims except for those relating to legal fees. But the appellate court reversed the lower court's ruling, noting that D.K. Property was not required to explain the basis for those claims at a granular level of detail at the pleading stage. According to the appellate court, D.K. Property met New York's pleading requirement by laying out the types of consequential damages sought and stating why National Union should have foreseen that such damages could possibly result if it failed to provide coverage.

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