PLUNKETT COONEY

Duty to Defend, Self-Insured Retention Coverage Update

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Duty to Defend – Second Circuit (New York and Texas Law)

Employers Ins. Co. of Wausau v. Harleysville Preferred Ins. Co.
--- Fed. Appx. ---, 2018 WL 1612212 (2d Cir. Apr. 4, 2018)

The U.S. Court of Appeals for the Second Circuit reversed, in part, the district court's order, holding that neither Harleysville Preferred Insurance Company (Harleysville) nor The Travelers Indemnity Company and Travelers Property Casualty Company of American (together Travelers) had a duty to defend. The coverage issue arose out of a lawsuit that alleged that Hellman Electric Corporation (Hellman), the Metropolitan Transportation Authority (MTA) and Triborough Bridge and Tunnel Authority (TBTA) negligently caused the death of Nicholas Cavataio (Cavataio), an employee of Hellman, who died at a construction site after being stuck by a 2,700 pound battery. Harleysville and Travelers both relied upon the mechanical device exclusion and employer's liability exclusion in their respective commercial auto policies, which were substantially similar, to deny insurance coverage to Hellman, MTA and TBTA.

The policies' mechanical device exclusion precluded coverage for "'[b]odily injury' … resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered 'auto.'" The appellate court determined that, under either New York or Texas law, Harleysville and Travelers had a duty to defend Hellman, MTA and TBTA because "[t]he allegations in the complaint and bill of particulars raise a reasonable possibility that Mr. Cavataio's death did not 'result[] from the movement of property by a mechanical device … [un]attached to the covered 'auto' (as required to trigger the mechanical device exclusion), but was 'caused by an 'accident' and result[ed] from the ownership, maintenance or use of a covered 'auto' (as required to trigger coverage under the Harleysville [and Travelers] polic[ies])."

The policies' employer's liability exclusion precluded coverage for bodily injury to "[a]n 'employee' of the 'insured' arising out of and in the course of: (1) Employment by the 'insured;' or (2) Performing the duties related to the conduct of the 'insured's' business. … This exclusion applies: (1) Whether the 'insured' may be liable as an employer or in any other capacity; and (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury." With respect to Harleysville, the appellate court disagreed with Harleysville's argument that the employer's liability exclusion did not apply to Hellman (Cavataio's employer) because it was "reasonable to read 'the insured' to refer solely to whichever insured is seeking coverage: in this instance, the MTA and the

TBTA." With respect to Travelers, the appellate court agreed with Travelers that the employer's liability exclusion applied to Hellman because Hellman was "an 'insured' who employed Mr. Cavataio and, accordingly, falls within the reach of the employer's liability exclusion, but Hellman is not the named insured and thus is outside the reach of the exception for tort liability assumed from another under contract." The appellate court reversed the district court's judgment in favor of Harleysville and held that Harleysville had a duty to defend Hellman, MTA and TBTA. The appellate court also affirmed the district court's judgment that Travelers' had no duty to defend Hellman, but reversed the remainder of the judgment, holding that Travelers had a duty to defend MTA and TBTA.

Self-Insured Retention – Ninth Circuit (Arizona Law)

City of Phoenix v. First State Ins. Co.
--- Fed. Appx ---, 2018 WL 1616011 (9th Cir. Apr. 4, 2018)

The U.S. Court of Appeals for the Ninth Circuit held that the insurer for the City of Phoenix (City) did not owe defense or indemnity costs arising out of an underlying lawsuit seeking recovery for a pipe worker's asbestos-related death because the settlement was within the Self-Insured Retention (SIR) of the excess policies. The City settled the underlying action for $500,000, and then sought recovery of the settlement amount, as well as $1.4 million in defense costs from its insurer, which had issued numerous excess and umbrella policies. The excess liability policies at issue each had a SIR of $500,000, and provided that "[s]hould any claim arising from such occurrence be adjusted prior to trial court judgment for a total amount not more than the retained limit, then no loss expenses or legal expenses shall be payable by the Company(s)." The appellate court ruled that "because the City settled its claim within the retained limit, the plain language of the [excess] policy precludes it from receiving" indemnity or defense costs from the insurer. Regarding the umbrella policies, the appellate court held that because the City's asbestos liability fell within the scope of the excess policies, the umbrella policies would only apply to the "ultimate net loss in excess of the underling limit." The appellate court found that because "the City did not exhaust the underlying limit[,]" the City was "not entitled to indemnity under the Umbrella Policies." The appellate court declined to review the City's bad faith claim since the insurer was justified in refusing to defend or indemnify the City.

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