PLUNKETT COONEY

Intentional Loss Exclusion, Bad Faith, Contamination Exclusion Coverage Update

July 15, 2022

Intentional Loss Exclusion – Tenth Circuit (Kansas Law)

Taylor v. LM Ins. Corp.
No. 20-3166, 2022 WL 2662080 (10th Cir. July 11, 2022)

The U.S. Court of Appeals for the Tenth Circuit upheld the federal district court's grant of summary judgment in favor of LM Insurance Corporation (LM), ruling that no coverage was afforded under a homeowner's policy for property damage caused by a fire. The fire was deliberately set by the 18-year-old daughter of the insureds, who intended to damage a bedspread, but did not intend to damage the rest of the house.

The appellate court applied the standard for evaluating an intentional acts exclusion set forth by the Kansas Supreme Court in *Thomas v. Benchmark Ins. Co*., 179 P.3d 421 (Kan. 2008). Under *Thomas*, an intentional acts exclusion applies when the insured intended an action to cause injury or damage, which intention can be actual or inferred from the insured's actions. Relying on *Thomas*, the appellate court reasoned that the insureds' daughter intended to start the fire and damage the bedspread. While she did not intend to damage the house, under *Thomas*, the intended injury or damage does not need to be of the same character or magnitude as the resulting damage.

Bad Faith – Eleventh Circuit (Florida Law)

Potter v. Progressive Am. Ins. Co.
No. 21-11134W, 2022 WL 2525721 (11th Cir. July 7, 2022)

The U.S. Court of Appeals for the Eleventh Circuit held that, under Florida law, a final judgment stemming from a consensual settlement can qualify as an "excess judgment" to prove a bad faith claim.

The plaintiffs brought a third-party bad faith insurance action, alleging that Progressive American Insurance Company (Progressive) acted in bath faith in its handling of a bodily injury claim that the plaintiffs asserted against Progressive's insured, Ronald Evans (Evans), arising from an automobile accident. Evans was insured under a Progressive policy that provided bodily injury liability coverage for

up to $10,000. The plaintiffs initially sued Evans and offered to the settle the claim for $125,000. Evans' attorney, who was hired by Progressive, recommended the settlement to Evans and told Evans that accepting would not waive any claims against Progressive for negligence or bad faith. Evans accepted, and the plaintiffs filed an action for bad faith against Progressive.

In granting summary judgment in Progressive's favor, finding that there was no excess judgment as a matter of law, the district court relied on the appellate court's unpublished decision in *Cawthorn v. Auto-Owners Ins. Co.*, 791 F.App'x 60 (11th Cir. 2019). In *Cawthorn*, the appellate court held that a consent judgment is not an excess judgment for third-party bad faith claims. The plaintiffs appealed, arguing that *Cawthorn* was inconsistent with Florida law on bad faith insurance claims.

The appellate court agreed with the plaintiffs, stating that it had already resolved the issue in its recent decision in *McNamara v. Government Emp's Ins. Co.*, No. 8:17-CV-3060-T-23CPT, 2020 WL 5223634 (M.D. Fla. July 29, 2020), rev'd and remanded, 30 F.4th 1055 (2022). In *McNamara*, the appellate court held that *Cawthorn* misinterpreted Florida law and that a consent judgment can qualify as an excess judgment. *Id.* The appellate court looked to various Florida state court decisions noting that third-party bad faith claims should not be limited to judgments acquired after trial.

In the current case, the appellate court looked to the fact that the plaintiffs accepted a proposal for settlement and the judge entered a final judgment in the underlying action that exceeded the policy limits. Based on this, the appellate court concluded that the final judgment qualified as an excess judgment and the district court erred by granting summary judgment in favor of Progressive on the issue. The appellate court reversed and remanded for further proceedings.

By: Michael Hanchett

Contamination Exclusion – Sixth Circuit (Ohio Law)

Dana Inc. v. Zurich Am. Ins. Co.
No. 21-4150, 2022 WL 2452381 (6th Cir. July 6, 2022)

The U.S. Court of Appeals for the Sixth Circuit upheld the federal district court's dismissal in favor of defendant Zurich American Insurance Company (Zurich) and against Dana Incorporated (Dana) in a case in which Dana sought to recoup losses and expenses attributable to the COVID-19 pandemic. The appellate court ruled that Dana failed to state a claim because the contamination exclusion in the Zurich policy precluded coverage.

Dana provides power-conveyance and energy-management solutions for vehicles and machinery. It suffered financial effects from the COVID-19 pandemic and sought coverage under its policy with Zurich. When Zurich, denied coverage, Dana filed a lawsuit against Zurich in state court, which the court then removed to federal court. The federal district court held that the contamination exclusion precluded coverage and dismissed the complaint.

On appeal, Dana argued that it was entitled to coverage under the "Time Element" provision in the policy, which provides coverage for business interruption expenses. Dana contended that the contamination exclusion: (1) did not apply to this time element provision, (2) did not apply to the type of loss Dana sought to recover, (3) was limited to traditional environmental contamination, and (4) created a factual dispute.

The appellate court first explained that the contamination exclusion applied to the time element provision for business interruption expenses. It then held that the actual or suspected presence of a virus like COVID-19 on the property constituted contamination under the definition in the policy. The appellate court also disagreed that prior Ohio Supreme Court precedent limited the contamination exclusion to traditional environmental pollution. Lastly, the appellate court held that there was no factual dispute regarding whether an endorsement removing "virus" from the definition of contamination was required to be in the policy. For these reasons, the appellate court affirmed the dismissal of Dana's lawsuit.

By: Joshua LaBar