PLUNKETT COONEY

Known Loss Doctrine, Intellectual Property Exclusion & Exhaustion of Policy Limits Insurance Coverage Update

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Expected or Intended Injury and Known Loss – Seventh Circuit (Indiana Law)

Greene v. Westfield Ins. Co.
--- F.3d ---, 2020 WL 3476959 (7th Cir. June 25, 2020)

The U.S. Court of Appeals for the Seventh Circuit held that an insurer did not owe coverage for a $50.56 million judgment in an environmental pollution class action because the insured knew of occurrences that could potentially result in claims prior to the inception of an insurer's policies. Three underlying cases were filed by a group of neighbors against Westfield Insurance Company's (Westfield) insured, VIM Recycling (VIM), alleging bodily injury and property damage caused by pollution that resulted from VIM's wood recycling operations, which began in 2000. Westfield issued insurance policies to VIM from 2004 through 2008. Westfield denied coverage for the lawsuits, the first of which was filed in 2009, in part, because VIM knew of complaints regarding the pollution prior to the inception of the Westfield policies. The district court agreed with Westfield, and the appellate court affirmed.

The appellate court held that the known loss doctrine, as well as the Westfield policies' expected or intended injury exclusion, applied to preclude coverage because VIM's owner received letters from the Indiana Department of Environmental Management regarding VIM's violation of emissions standards prior to the inception of Westfield's policies in 2004. The appellate court held that these letters, as well as certain actions taken by VIM in response to pollution complaints, established that any damages claimed in the underlying lawsuits "were both known claims and expected injuries." In so finding, the appellate court rejected VIM's and the underlying plaintiffs' contention that coverage was available because VIM's owner was unaware that the pollution claims could have resulted in *covered* claims prior to 2004. The appellate court found that the insured's knowledge regarding whether the claims were covered was irrelevant. Instead, the expected or intended injury exclusion and the known loss doctrine applied so long as the insured knew of underlying activities that caused harm. Accordingly, the appellate court found that Westfield did not owe coverage for any portion of the $50.56 million judgment against its insured.

Intellectual Property Exclusion – Second Circuit (New York Law)

Spandex House, Inc. v. Hartford Fire Ins. Co.
--- Fed. Appx. ---, 2020 WL 3263340 (2d Cir. June 17, 2020)

In a summary order, the U.S. Court of Appeals for the Second Circuit upheld the trial court's ruling that Hartford Insurance Company (Hartford) did not owe a duty to defend or indemnify its insured, Spandex House, Inc. (Spandex House) in a copyright lawsuit. The underlying plaintiff, Rex Fabrics, alleged that Spandex created, sold, and distributed its copyrighted designs. The trial court granted summary judgment for Hartford, finding that it had met its burden of proving the intellectual property exclusion applied, and Spandex House had failed to prove the applicability of the advertising exception.

On appeal, Spandex House argued that the placement of the commas in the phrase "[i]nfringement, in your 'advertisement' or on 'your web site', of …" rendered the advertising exception to the intellectual property exclusion ambiguous. Specifically, Spandex House asserted that the commas made the phrase non-restrictive such that it could "be omitted from the text of the Advertising Exception entirely, or else read descriptively as illustrating a type of infringement that results in coverage." The appellate court disagreed, however, recognizing that the language was "well-established." The advertising exception plainly applied when "the sole allegation pertaining to intellectual property rights in the underlying suit is limited to enumerated types of infringement or copying that are causally linked to the insured's advertising or web site."

Additionally, the appellate court rejected Spandex House's argument that the commas rendered the exception ambiguous, noting that under New York law, "[p]unctuation in a contract may serve as a guide to resolve an ambiguity that has not been created by punctuation or the absence therein, but it cannot, by itself, create ambiguity." Because the underlying complaint was replete with allegations that "foreclosed" the possibility of coverage, and Spandex House had failed to demonstrate a possibility of coverage, the appellate court ruled that Hartford did not owe coverage under the circumstances.

Exhaustion – Illinois

John Crane Inc. v. Allianz Underwriters Ins. Co.
No. 1-18-0223, 2020 WL 3127340 (Ill. App. 1 Dist. June 12, 2020)

The Appellate Court of Illinois affirmed the trial court's denial of John Crane Inc.'s (Crane) request for a new trial and found that Crane had not proved exhaustion of its primary insurance policies by paying numerous underlying injury claims.

Crane, a manufacturer of gaskets and other products, used asbestos fibers in its manufacturing process prior to 1986. As a result, Crane was named as a defendant in thousands of lawsuits alleging bodily injury resulting from exposure to asbestos. Crane sought coverage under numerous primary and umbrella policies, and the resulting declaratory judgment action spanned many years and multiple trials.

In a bench trial on the issue of exhaustion of certain primary policies, the trial court found that Crane had failed to prove exhaustion, in part, because Crane's proffered expert's methodology in calculating payments made was problematic. Crane requested a new trial, which was denied, and Crane appealed. Crane also appealed the trial court's decision that the per-occurrence limits of one of its policies were not annualized over the three years of the policy.

The appellate court agreed with the trial court's determination that the expert's methodology at trial was problematic, in part, because he extrapolated data from reviewing only a portion of the pertinent complaints, rather than reviewing all the information that was available to him. The appellate court agreed with the trial court's finding "that, given the wealth of information provided to [the expert], a case-by-case analysis using all the documents would produce more accurate determinations." The trial court's denial of Crane's request for new trial was correct because "[a] motion for a new trial cannot be used by [Crane] to get a third bite of the apple, to try again with the knowledge of strategies that did not succeed at trial."

The appellate court also affirmed the trial court's finding that the per-occurrence limits of one of Crane's policies were annualized over the three-year policy term. Crane argued that an endorsement to the policy provided that the aggregate limits of the policy were annualized over the 38-month policy period, but was silent as to the per-occurrence limits, meaning that the $20 million per-occurrence limit applied over the life of the policy. The appellate court rejected this argument, finding: "Endorsement 3, which the parties agree amended the original policy, sets forth three distinct, consecutive periods, consisting of approximately one year each, and clearly states that the 'limits of the company's liability shall apply separately to each such consecutive period.' Endorsement 3 makes no distinction between the two types of limits." Accordingly, a separate per-occurrence limit applied to each policy term.