PLUNKETT COONEY

Lost Policy, Appraisal Coverage Update

February 15, 2023

Lost Policy – Second Circuit (New York Law)

Cosmopolitan Shipping Co. v. Cont'l Ins. Co.
No. 21-2060, 2023 WL 1097781 (2d Cir. Jan. 30, 2023)

The U.S. Court of Appeals for the Second Circuit affirmed two decisions of the U.S. District Court for the Southern District of New York in an action by an insured against its insurer and its agent, stemming from a claim for coverage under an alleged lost policy issued in the 1940s.

Cosmopolitan Shipping Company (Cosmopolitan) operated different kinds of shipping vessels, including cargo and passenger ships during the mid-20th century. In the 1980s, Cosmopolitan was named as a defendant in multiple lawsuits filed by former seamen who had sailed on ships chartered by Continental, including those who had sailed between May 1946 and December 1948, who then sustained injuries from exposure to asbestos. Cosmopolitan settled 47 of the lawsuits by way of a consent judgment and commenced a lawsuit seeking coverage from Continental Insurance Company (Continental) for part of the consent judgment.

Cosmopolitan's claim for coverage from Continental was based on its allegations that Continental issued a policy to the aid organization United Nations Relief and Rehabilitation Administration (UNRRA) in the years following World War II. Specifically, Cosmopolitan alleged that it chartered vessels on behalf of the UNRRA during the time period at issue and, as a result, was entitled to coverage under the Continental policy issued to UNRRA (alleged policy). However, the alleged policy had been lost prior to Cosmopolitan's lawsuit.

The district court found that the insured failed to establish the terms of the lost policy. The proffered evidence included secondary evidence of policy forms and endorsements from years surrounding the dates in question, as well as expert testimony that the forms remained essentially unchanged during the dates in question. The district court held this evidence was insufficient to prove the terms and conditions of the alleged policy. Cosmopolitan appealed, arguing that the district court failed to give enough weight to the secondary evidence.

The appellate court affirmed the district court's finding, noting that "[w]hile it is not clear whether the applicable evidentiary standard for lost policy cases is preponderance of the evidence or clear and convincing evidence, Cosmopolitan's proffered secondary evidence fails even under the less demanding preponderance of the evidence standard." The appellate court ruled that the secondary

evidence in question did not have any direct connection to the missing policy, and the examples did not establish that certain language applied consistently over the relevant time period. The appellate court concluded, "this range of inconsistencies fails to shed light on what material terms were actually included in [the alleged policy]."

By: Stephanie Brochert

Appraisal – Florida

Parrish v. State Farm Fla. Ins. Co.
No. SC21-172, --- So.3d ----, 2023 WL 1830816 (Fla. Feb. 9, 2023)

State Farm Florida Insurance Company (State Farm) insured Jon Parrish under a homeowner's insurance policy. In September 2016, Hurricane Irma damaged Mr. Parrish's home, and he filed a claim with State Farm. Mr. Parrish hired Key Claims Consultants, Inc. (KCC) to assess the damage and the cost of repairs to his home (i.e., to provide public adjusting services). Mr. Parrish agreed to pay KCC a contingency fee equal to 10% of the amount he would recover from State Farm.

State Farm and KCC inspected and evaluated the damage to Mr. Parrish's home but did not agree upon the amount of loss. State Farm attempted to schedule a second inspection with KCC, while KCC demanded that the appraisal process set forth in the State Farm policy be initiated, indicating that the president of KCC would serve as Mr. Parrish's appraiser. The appraisal process in the State Farm policy stated that, "[i]f you and we fail to agree on the amount of loss, either party can demand that the amount of the loss be set by appraisal… Each party will select a qualified, disinterested appraiser …"

State Farm requested that KCC appoint an appraiser other than its president, reasoning that the president could not be considered a "disinterested" appraiser because his public adjusting firm was already serving as Mr. Parrish's public adjuster. State Farm, thereafter, petitioned a trial court to compel Mr. Parrish to enter appraisal with a disinterested appraiser. The trial court denied State Farm's petition, holding that KCC's president could serve as Mr. Parrish's appraiser because the two had disclosed their arrangement to State Farm and there was no confidential attorney-client relationship that would disqualify KCC's president from serving as an appraiser.

The intermediate appellate court reversed the trial court's decision, holding that the requirement that appraisers be "disinterested" clearly excluded KCC's president, who held an interest in the outcome of the appraisal process in the form of a 10% stake in Mr. Parrish's insurance payout.

On appeal, the Florida Supreme Court was tasked with determining what "disinterested" means in the context of the State Farm policy. In analyzing the meaning of "disinterested," the Supreme Court applied the word's plain dictionary meaning, holding that a "disinterested" person cannot have a

monetary interest in the appraisal matter. The Supreme Court reasoned that the contingency fee arrangement between Mr. Parrish and KCC gives the president of KCC a pecuniary interest in Mr. Parrish's claim, and as such, the president cannot be "disinterested." Therefore, the Supreme Court approved the intermediate appellate court's decision that KCC's president cannot be a "disinterested" appraiser pursuant to the terms of the State Farm policy.

By: Danielle Chidiac