

Notice, Assault/Battery & Personal and Advertising Injury Exclusions Coverage Update

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Notice – Eleventh Circuit (Florida Law)

Crowley Mar. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA
--- Fed.Appx. ---, 2019 WL 3294003 (11th Cir. July 23, 2019)

The U.S. Court of Appeals for the Eleventh Circuit held that an insurer was not obligated to cover approximately \$2.5 million in costs that its insured paid to defend a subsidiary's vice president against antitrust allegations. In the underlying matter, the U.S. Department of Justice (DOJ) commenced an investigation against Thomas Farmer and several other individuals accused of setting artificially high prices for shipping between Puerto Rico and the United States. Crowley Maritime Corporation (Crowley), the parent company of Farmer's employer, sought to recover the defense costs it had paid on Farmer's behalf from its insurer, National Union Fire Insurance Company of Pittsburgh, PA (National Union). National Union initially denied Crowley's request for coverage in 2008 on the grounds that none of the warrants or subpoenas issued by DOJ mentioned Farmer by name. However, a 2008 affidavit mentioning Farmer was uncovered in 2015, two years after an arbitration panel had initially ruled in favor of National Union.

After discovery of the affidavit, Crowley again sought coverage from National Union for Farmer's defense costs. However, the trial court dismissed Crowley's complaint on the basis that Crowley's claim for coverage was untimely. The appellate court agreed with the trial court's determination on the issue of timeliness and stated that "[e]ven assuming that the Claim based on the Affidavit was 'first made against' Farmer during the Policy Period or the Discovery Period, Crowley failed to timely report that Claim to National Union as required by section 7(a) of the Policy." On that basis, the appellate court concluded that National Union was not required to reimburse Crowley for the defense costs incurred on Farmer's behalf.

Assault and Battery Exclusion – Third Circuit (Pennsylvania Law)

Nautilus Ins. Co. v. Motel Mgmt. Servs. Inc.

--- Fed. Appx. ---, 2019 WL 3283221 (3d Cir. Jul. 22, 2019)

The U.S. Court of Appeals for the Third Circuit affirmed the U.S. District Court for the Eastern District of Pennsylvania's grant of judgment on the pleadings to Nautilus Insurance Company (Nautilus), finding that there was no coverage for allegations of sexual assault occurring at a motel operated by Nautilus's insured, Motel Management Services Inc. (MMS). MMS sought coverage from Nautilus for a lawsuit brought by a minor female, who alleged that she was forcibly required to engage in sexual acts and the commercial sex trade, including at a motel owned and operated by MMS. Specifically, she alleged that "MMS facilitated her exploitation by knowingly renting rooms at its motel to the traffickers ... failed to intervene or to report the traffickers' illegal conduct; and ... financially profited from (the minor's) exploitation."

MMS sought coverage for the lawsuit from Nautilus, which brought an action seeking a declaration that there was no coverage under its policy. The district court granted judgment on the pleadings and declared that Nautilus had no duty to defend or indemnify MMS for the minor's lawsuit. The appellate court agreed, noting that the assault and battery exclusion in the Nautilus policy provided that Nautilus "will have no duty to defend or indemnify any insured in any action or proceeding alleging damages arising out of any assault or battery," regardless of culpability, intent, or relationship of the perpetrator of the assault or battery to the insured, or whether the damages occurred at premises owned or operated by the insured." The minor's lawsuit did not allege negligence on the part of MMS, but rather alleged that MMS failed to report the assaults and financially profited from them. Therefore, the assault and battery exclusion applied to preclude coverage.

Personal and Advertising Injury Exclusions – Ninth Circuit (Nevada Law)

Cohen v. Berkley Nat'l Ins. Co.

--- Fed. Appx. ---, 2019 WL 3235076 (9th Cir. Jul. 18, 2019)

The U.S. Court of Appeals for the Ninth Circuit affirmed the District of Nevada's dismissal of a claim by Bradley S. Cohen and his company (Cohen) against Berkley National Insurance Company (Berkley), finding that coverage was excluded under the policy issued by Berkley for a defamation claim made by Cohen against Berkley's insured, which was a commercial tenant in a building owned by Cohen. The insured allegedly created multiple websites that contained disparaging remarks against Cohen, including comparing him to the infamous New York ponzi scheme perpetrator Bernie Madoff. The suit resulted in a verdict against Berkley's insured for \$38 million. Cohen then sought to recover the judgment from Berkley, which refused to pay the judgment because coverage was excluded under the

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exclusions for knowing violation of the rights of another and material published with knowledge of falsity.

In dismissing the lawsuit, the district court noted that the jury in the underlying defamation suit found that Berkley's insured acted with "fraud, oppression and malice" in creating the websites and publishing the material in question. The district court concluded that the exclusions were unambiguous and completely precluded coverage for the alleged defamation. The appellate court agreed that the exclusions were unambiguous and reasoned that, based on "the underlying complaint and the verdict and judgment, which found that the conduct of [the insured] and other defendants amounted to fraud, [and thus] the 'knowledge of falsity' exclusion plainly applied."

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