PLUNKETT COONEY

Notice, Collapse, Material Misrepresentation, Computer Fraud Coverage Update

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Florida, Washington, New Jersey, Georgia Insurance Coverage Update
The e-POST

Notice – Eleventh Circuit (Florida Law)

Steadfast Ins. Co. v. The Celebration Source, Inc.
--- Fed. Appx. ---, No. 17-11115, 2018 WL 2095664 (11th Cir. May 7, 2018)

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's ruling that Steadfast Insurance Company (Steadfast) owed no duty to defend its insured, The Celebration Source, Inc. (Celebration), in an underlying tort action that involved alleged injures to a minor while he was riding on a piece of recreational equipment, called the "Psycho Swing," which was operated by Celebration. Steadfast issued a commercial general liability policy to Celebration that included an "Equipment Schedule," which identified each piece of equipment covered under the policy and provided that "there is no coverage for any equipment not indicated[]" on the equipment schedule. The policy also included a Newly Acquired Recreational Apparatus (NARA) Endorsement that established a "limitation of coverage" for newly-acquired equipment if certain conditions were met, including that "[y]ou [Celebration] tell us [Steadfast] within 30 days after you 'acquire' the amusement device and/or recreational apparatus that you want us to cover it for Commercial General Liability." The Psycho Swing was not identified in the endorsement. The appellate court held that the policy provides unambiguously that no coverage exists for equipment not listed in the equipment schedule. Consistent with the express terms of the policy, the NARA Endorsement then sets forth the means by which newly-acquired equipment may be added to the policy. Because it was undisputed that "Celebration failed to satisfy the conditions set forth in the NARA Endorsement for adding newly- acquired equipment, no coverage existed under the policy for bodily injuries arising out of ownership, maintenance, or use of the 'Psycho Swing.'" Accordingly, the appellate court upheld the district court's order and concluded that, as a matter of Florida law, Steadfast had no duty to defend or indemnify Celebration.

'Collapse' – Ninth Circuit (Washington Law)

Am. Econ. Ins. Co. v. CHL, LLC
--- Fed. Appx. ---, No. 16-35606, 2018 WL 2140444 (9th Cir. May 9, 2018)

The U.S. Court of Appeals for the Ninth Circuit Court affirmed a district court ruling that American Economy Ins. Co. (American Economy) had no obligation to cover apartment complex owner CHL LLC's (CHL) costs to repair damage to an apartment building because it did not suffer a "collapse." CHL carried six consecutive policies with American Economy from 1999 to 2005. The first three policies did not define "collapse," but each policy from 2002 onward defined the term as an "actual falling down" of at least part of the apartment building. In 2014, CHL renovated the apartments and discovered significant decay in several structural components. An engineer retained by American Economy found that the components had reached a point of "substantial structural impairment" sometime between 1999 and 2002, and concluded that the apartment building could be classified as dangerous unless it was repaired. American Economy denied coverage for CHL's repair costs and filed a declaratory judgment action, saying its expert had determined that CHL's damages were caused by faulty construction in 1988, outside of the earliest policy period. American Economy also argued that to the extent any structural damage began between 1999 and 2001, that damage is not covered because it does not constitute an imminent threat of collapse. CHL pointed to the statements of American Economy's engineer as evidence that its apartment building was in a state of collapse beginning in 1999.

The Washington Supreme Court previously defined "collapse" to require an impairment "so severe as to materially impair a building's ability to remain upright." The district court noted that the building remained standing without renovation until 2014 and held that the use of the word "unsafe" in the Washington Supreme Court's Queen Anne Park decision was merely a "gloss on the first definition it had given for a building in a state of collapse: a building suffering from a 'severe impairment' of its 'ability to remain upright.'" In avowing the district court's reasoning, the appellate court noted that where the evidence showed that the framing of CHL's building was still capable of supporting weight prior to the repairs, CHL's arguments ignored a crucial part of the "collapse" definition, which requires that the damage to a structure be so severe that it impairs the building's "ability to remain upright." The appellate court affirmed the summary judgment ruling in favor of the insurer.

Material Misrepresentation – New Jersey

Ironshore Indem. Inc. v. Pappas & Wolf LLC
No. A-0959-16T1, 2018 WL 2012009 (N.J. Super. Ct. App. Div. May 1, 2018)

The Superior Court of New Jersey, Appellate Division affirmed a trial court decision that found there was no coverage under a legal malpractice policy for an underlying malpractice suit stemming from a firm's representation of a defunct investment firm because of a material misrepresentation made by the law firm. The law firm completed a policy renewal application in 2011, which indicated that no partner was aware of any potential professional liability claim that could be asserted against the firm. However, as early as two years before this application was made, one of the partners was concerned that a claim could be brought against him because of a state administrative action taken against a client investment

firm. The appellate court noted that a subjective standard applies to determine whether the insured had prior knowledge of a potential claim and found that this standard was overcome by the evidence. In particular, the appellate court relied not only on 2010 deposition testimony by the partner in which he testified that he was concerned about potential claims, but also on other actions by the partner, including resigning as in-house counsel in 2009 and writing a letter to the client's principal acknowledging "some potential legal issues pertaining to the operation of the company." The appellate court specifically rejected the appellant's argument that the trial court had improperly found that the subjective standard was met, and held that Ironshore Indemnity Inc. properly denied coverage under the policy.

Computer Fraud Coverage – Eleventh Circuit (Georgia Law)

Interactive Commc'ns Int'l Inc. v. Great Am. Ins. Co.
--- Fed. Appx. ---, No. 17-11712, 2018 WL 2149769 (11th Cir. May 10, 2018)

The U.S. Court of Appeals for the Eleventh Circuit held that a computer fraud policy issued by Great American Insurance Company (GAIC) to Interactive Communications International Inc. (InComm) did not cover certain fraudulent debit card transactions. InComm's service allows consumers to purchase a "chit" at a retailer, then call InComm and, through InComm's automated phone line, transfer the value of a chit to a debit card. Fraudsters exploited InComm's automated phone line (controlled by computer software) to redeem the same chit multiple times, causing over $11 million in losses to InComm. The insurance policy at issue provided coverage for "loss of … money, securities and other property resulting directly from the use of any computer to fraudulently cause a transfer of that property. ..." The appellate court disagreed with the district court's ruling that the fraud was not committed through "use of a computer," saying that "use" of a computer did not have to mean that the fraudster knows or intends to use a computer to commit the fraud. However, the appellate court sustained the district court's holding that the fraud did not "result directly" from the use of a computer, because InComm retained control over the funds affected by the fraud for some time. The appellate court concluded there was no coverage under the GAIC policy because, under the clear terms of the policy and the normal definition of "directly," the fraud did not result directly from the use of a computer.

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