PLUNKETT COONEY

Occurrence and Pollution Exclusion, Other Insurance Coverage Update

July 6, 2022

Occurrence and Pollution Exclusion – Oklahoma

Crown Energy Co. v. Mid-Continent Cas. Co.
--- P.3d ---, 2022 WL 2128667 (Okla. Jun. 14, 2022)

The Supreme Court of Oklahoma found that an insurer was required to defend an oil and gas company in a suit alleging property damage stemming from an earthquake caused, in part, by the insured's operations, upholding the trial court's ruling and vacating the decision of the Oklahoma Court of Civil Appeals.

Mid-Continent Casualty Company (Mid-Continent) issued two commercial general liability policies to Crown Energy Company (Crown) effective October 2015 to November 2017. The policies provided coverage for "'property damage' [] caused by an 'occurrence'" and contained a pollution exclusion precluding coverage for property damage "arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants." Crown was named as a defendant in a class-action lawsuit alleging property damage caused by Crown's use of wastewater disposal wells, which allegedly caused increased underground pressure, resulting in seismic activity. Crown requested defense and indemnification for the class-action lawsuit from Mid-Continent under the two policies, but Mid-Continent denied the request. Crown then commenced a lawsuit seeking a declaration that coverage existed under the two Mid-Continent policies.

On Crown's motion for summary judgment, the trial court found that Mid-Continent was obligated to defend Crown. The appellate court affirmed the ruling, but reasoned that the pollution exclusion did not apply because the exclusion did not contemplate the injection of wastewater "under pressure" into the ground. The Supreme Court granted certiorari and affirmed the trial court ruling and vacated the appellate court ruling.

In its holding, the Supreme Court agreed that Mid-Continent was obligated to defend Crown in the underlying action because Crown's activities, as alleged in the class-action lawsuit, were not intentional

and constituted an occurrence. In so doing, the Supreme Court rejected Mid-Continent's argument that Crown's intentional injection of wastewater into disposal wells could not constitute an occurrence as defined in the policies: "The fact that there is *some risk* of seismic activity associated with Crown's waste water disposal activities does not mean that seismic activity is such a natural and probable consequence of those activities that it should be expected."

The Supreme Court further found that the policies' pollution exclusion did not apply to preclude coverage because its language was at least ambiguous with respect to allegations of property damage arising out of seismic activity relating to the injection of wastewater. Citing with favor an earlier case, *National Am. Ins. Co. v. New Dominion LLC*, the Supreme Court found that it was ambiguous whether the wastewater in question fell within the pollution exclusion's description of "pollutants." Moreover, even if the wastewater could be considered a "deleterious substance," "the property damage that prompted the [underlying] Lawsuit was not caused by the waste water's polluting nature and thus would not fall within the scope of the Pollution Exclusion."

By: Stephanie Brochert

Other Insurance – Missouri Court of Appeals

Nationwide Ins. Co. of Am. v. Six
--- S.W.3d ---, 2022 WL 2203238 (Mo. Ct. App. June 21, 2022)

The Missouri Court of Appeals upheld the trial court's judgment in favor of Nationwide Insurance Company (Nationwide) and against its insured Matthew Six (Six). Specifically, the appellate court ruled that the "other insurance" provision in the automobile insurance policy unambiguously applied, which precluded Six from receiving Underinsured Motorist (UIM) coverage.

Nationwide issued the policy to Six, which provided insurance on two vehicles that Six owned. The policy provided UIM coverage with a limit of liability of $250,000 per person. It contained an "other insurance" provision that applied when other applicable UIM coverage is available. In relevant part, the provision stated: "Any underinsured motorists coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist insurance providing coverage on a primary basis and will apply only in the amount that our limit of liability as stated in the Declarations exceeds the sum of the applicable limits of liability of all other applicable underinsured motorists coverage limits that have been paid."

Six was injured in an automobile accident in 2014 while driving his employer's vehicle. He obtained a $1.4 million judgment against the other driver. Six received $100,000 from the driver's insurer, and $1 million in UIM coverage from Six's employer's insurer. Six demanded the full limits of liability under the Nationwide policy. In response, Nationwide filed a declaratory judgment action and argued that the

"other insurance" provision precluded coverage because Six obtained $1 million pursuant to the UIM coverage provided by his employer's policy. The trial court held a bench trial and entered judgment in favor of Nationwide.

On appeal, Six argued that he is entitled to coverage under Nationwide's policy because the language in the "other insurance" provision is ambiguous and should be construed against Nationwide. Specifically, he argued that the phrase "with respect to a vehicle you do not own" is ambiguous. The appellate court disagreed and held that the language was clear. UIM coverage applied in two scenarios: when an insured suffers injury while in a vehicle he or she owns, or when an insured suffers an injury while in a vehicle he or she does not own. As to the second scenario, Nationwide only agreed to provide excess UIM coverage when other collectible UIM coverage applied on a primary basis. Because Six obtained UIM coverage from his employer's insurer on a primary basis, the "other insurance" provision precluded coverage because the $250,000 limit of liability in Nationwide's policy did not exceed the sum of the available other insurance, (i.e., the $1 million limit of liability in the employer's policy).

By: Joshua LaBar