PLUNKETT COONEY

Occurrence, Trigger of Coverage, Pollution Exclusion Coverage Update

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Occurrence – Wisconsin

Superior Water, Light & Power Co. v. Certain Underwriters at Lloyd's, London
--- Wis. 2d ---, 2019 WL 6121350 (Wis. Ct. App. Nov. 19, 2019)

The Wisconsin Court of Appeals ruled that a lower court applied too narrow of a definition of what constitutes an "occurrence" under three excess insurers' insurance policies. The appellate court's ruling revived Superior Water, Light & Power Co.'s (Superior) suit in which the company sought to hold Lloyd's of London (Lloyd's) liable for up to $20 million in coverage, which would cover the costs of cleaning up groundwater contamination at the former gas storage site at issue in the underlying action.

The dispute revolved around what constitutes a covered "occurrence" under the excess policies. The policies defined "occurrence" as a "happening or series of happenings arising out of or caused by one event" that takes place during the policy period. Lloyd's argued that the term "event" means a new spill or leak of toxins. Under this definition, coverage would not be available because the initial spill of toxins happened prior to the policy period. Superior, on the other hand, asserted that the term "event" could include the flowing of new groundwater into the site's already-contaminated subsoil, which in turn led to property damage. Under this definition of "event," there would be a covered occurrence during the policy period. After examining both of these arguments, the appellate court determined that the policy language was ambiguous, allowing Superior to continue its suit against Lloyd's.

Trigger of Coverage – Illinois

Sanders v. Illinois Union Ins. Co.
--- N.E.3d ---, 2019 WL 6199651 (Ill. Nov. 21, 2019)

The Illinois Supreme Court reversed the decision of the state's appellate court that found coverage under two general liability insurance policies for an alleged malicious prosecution, ruling that the event which triggered the coverage occurred well before the policy period of either of the policies at issue.

In December 1993, a robbery occurred in the city of Chicago Heights during which two people were shot, one fatally. The city's police investigated the crime and charged Rodell Sanders (Sanders), who was eventually convicted. Sanders later alleged that the Chicago Heights Police Department wrongfully charged him for the crime and manipulated the evidence to support the charge and ultimate conviction. Sanders' conviction was eventually vacated, and he brought a lawsuit against the city and the case settled. The city requested coverage under policies issued by Illinois Union Insurance Company (Illinois) and Starr Indemnity & Liability Co. (Starr), which had issued policies effective November 2012 through November 2014. When Illinois and Starr refused, both Sanders and the city brought the instant lawsuit against them.

The trial court found that there was no coverage under the Illinois and Starr policies because the city didn't engage in the covered offense of malicious prosecution during those policy periods – the allegedly covered conduct was the police officers' mistreatment of evidence and framing of Sanders in 1994. A divided appellate court panel reversed, holding that a falsely convicted individual cannot sue for malicious prosecution until he is exonerated. Here, Sanders was exonerated in 2014.

The Illinois Supreme Court reversed, stating that "a malicious prosecution neither happens nor takes place upon exoneration," but instead, the conduct giving rise to the alleged malicious prosecution claim is the original wrongful activity in the course of prosecuting the claim. For this reason as well, the Supreme Court rejected the argument that retrials in the criminal case constituted new instances of malicious prosecution. The Supreme Court ultimately held that "[i]f we were to deem exoneration the trigger for coverage of a malicious prosecution insurance claim, liability could be shifted to a policy period in which none of the acts or omissions giving rise to the claim occurred. That would violate the intent of the parties to an occurrence-based policy."

Pollution Exclusion – District of Massachusetts (Massachusetts Law)

Performance Trans., Inc. v. Gen. Star Indem. Co.
--- F. Supp. 3d ---, 2019 WL 6307227 (D. Mass. Nov. 25, 2019)

The U.S. District Court for the District of Massachusetts held that a pollution exclusion barred coverage for a fuel spill. The fuel spill at issue occurred when an employee of Performance Trans., Inc. (PTI) drove off the roadway and overturned a tanker truck. The accident resulted in approximately 4,300 gallons of fuel being spilled onto the road and into a nearby reservoir. PTI sought coverage from its insurer, General Star Indemnity Company (General Star), but General Star denied the claim, citing a Total Pollution Exclusion in PTI's policy. Thereafter, PTI brought suit against General Star, alleging a breach of contract and unfair business practices.

The court ultimately found in favor of General Star and held that the policy's Total Pollution Exclusion expressly barred coverage for the accident. The court also held that the policy's Special Hazards and

Fluid Limitation Endorsement, which excludes coverage for spills but contains an exception for fuel spilled as a result of an auto overturning, did not operate to create coverage. Specifically, the court stated that “an exception to an exclusion does not affirmatively create coverage. It just prevents an exclusion from applying under the specified circumstances.” Therefore, General Star was not required to provide coverage for the spill.

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