PLUNKETT COONEY

Professional Services Exclusion, Arbitration Coverage Update

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Professional Services Exclusion – Second Circuit (New York Law)

Beazley Ins. Co., Inc. v. ACE Am. Ins. Co.
--- F.3d ---, 2018 WL 492693 (2d Cir. Jan. 22, 2018)

The U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling that the professional services exclusion in ACE American Insurance Company's (ACE) directors and officers liability policy applied to preclude insurance coverage to NASDAQ in an underlying action that alleged various technical failures by NASDAQ in executing the initial public offering of Facebook, Inc. caused retail investors to suffer losses. The professional services exclusion provided that ACE "shall not be liable for Loss on account of any Claim ... by or on behalf of a customer or client of the Company [NASDAQ], alleging, based upon, arising out of, or attributable to the rendering or failure to render professional services." The appellate court determined that upon consideration of "'the customs, practices, usages and terminology as generally understood in the particular trade or business,' the term 'customers' of NASDAQ unambiguously includes retail investors." The appellate court also confirmed that the allegations in the underlying complaint involved "the rendering or failure to render professional services" because the alleged "[f]ailure[] to properly execute orders and deliver timely order confirmations go[es] to the heart of NASDAQ's provision of professional services." Accordingly, the appellate court held that ACE's professional services exclusion applied to preclude insurance coverage.

Auto Exclusion – Second Circuit (New York Law)

Citizens Ins. Co. v. Risen Foods, LLC
--- Fed. 3d ---, 2018 WL 492695 (2d Cir. Jan. 22, 2018)

The U.S. Court of Appeals for the Second Circuit held that Citizens Insurance Company (Citizens) was not obligated to defend or indemnify a New York bakery with respect to a motor vehicle accident involving an owned auto based on the policy's auto exclusion. The insured had a businessowners policy and an umbrella policy with Citizens, and a commercial automobile policy with State Farm Insurance Company. The businessowners policy excluded coverage for "'[b]odily injury' or 'property damage' arising out of the ownership ... of any ... 'auto' ... owned ... by ... any insured." Because the accident at issue involved an owned auto, the appellate court held that the auto exclusion applied and

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that “timely disclaimer was not required because the policy provided no coverage for an owned vehicle.” The appellate court also held that “[b]ecause the underlying insurance, the businessowners policy, does not apply to an owned auto, the umbrella policy also does not apply.” Thus, neither Citizens businessowners policy nor the umbrella policy provided coverage for the accident.

Arbitration – Ninth Circuit (Federal Maritime Law)

Galilea, LLC v. AGCS Marine Ins. Co.
879 F. 3d 1052 (9th Cir. Jan. 16, 2018)

The U.S. Court of Appeals for the Ninth Circuit held that a policy’s arbitration provision applied in a case involving a yacht accident wherein the insurer denied coverage and instituted arbitration proceedings in New York. The relevant language in the policy provided: “This insurance policy shall be governed by and construed in accordance with well established and entrenched principles and precedents of substantive United States Federal Maritime Law, but where no such established and entrenched principles and precedents exist, the policy shall be governed and construed in accordance with the substantive laws of the State of New York, without giving effect to its conflict of laws principles, and the parties hereto agree that any and all disputes arising under this policy shall be resolved exclusively by binding arbitration to take place within New York County, in the State of New York, and to be conducted pursuant to the Rules of the American Arbitration Association.” The appellate court ultimately held that “the parties' insurance policy's arbitration clause concerns a maritime transaction falling under the [Federal Arbitration Act]” and that the parties “clearly and unmistakably indicated their intent to submit arbitrability questions to an arbitrator” by incorporating the AAA arbitration rules into their arbitration agreement.

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