PLUNKETT COONEY

Reservation of Rights, Allocation, Breach of Contract Insurance Coverage Update

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Reservation of Rights – Pennsylvania

Selective Way Ins. Co. v. MAK Servs. Inc.
--- A.3d ---, 2020 WL 1973964 (Pa. Super. Ct. Apr. 24, 2020)

The Superior Court of Pennsylvania held that an insurer's letter to an insured agreeing to provide a defense subject to a reservation of rights must include details relating to any potentially applicable exclusions under the policy.

The insurer, Selective Way Ins. Co. (Selective Way), informed the insured, MAK Services Inc. (MAK Services), that it would defend it in connection with the claim under a reservation of rights to deny coverage in the future. The reservation of rights letter did not include notice of a potentially applicable snow-and-ice exclusion despite the fact that MAK Services was exclusively in the business of snow and ice removal. One and a half years later, Selective Way filed a declaratory judgment action against MAK Services seeking a declaration that the snow-and-ice exclusion barred coverage for the claim.

The 2-1 split decision of the appellate court held that Selective Way should have informed MAK Services of the snow-and-ice exclusion when it agreed to defend it subject to a reservation of rights. The appellate court noted that "[a]ny complete review of the Policy would have immediately revealed the existence of this exclusion" and that Selective Way's investigation was "deficient." As a result of the "deficient investigation," the appellate court ultimately ruled that MAK Services was prejudiced to the point that Selective Way should not have been allowed to rely on the exclusion.

Allocation – Ohio

Lubrizol Advanced Materials, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA.
--- N.E.3d ---, 2020-Ohio-1579, 2020 WL 1943212 (Ohio Apr. 23, 2020)

The Ohio Supreme Court answered a certified question from the U.S. District Court for the Northern District of Ohio that requested clarification of Ohio law on the issue of whether an insured may seek complete indemnity from one insurer whose policy provides coverage for "those sums ... that the

insured becomes legally obligated to pay" for injury or damage that took place during the policy period, where the damage occurred over multiple policy periods. The Supreme Court found that under the facts of the case before it, the insured could not choose to recover all of its costs from one insurer when multiple insurance policies were triggered because the damage at issue occurred at a discernable time.

Lubrizol Advanced Materials, Inc. (Lubrizol) was a manufacturer that sold allegedly defective resin between 2001 and 2008 to IPEX Inc. (IPEX), which used it as a component of a product that was sold to end users. The product failed, resulting in numerous product liability claims by those end users against IPEX. IPEX brought claims against Lubrizol seeking, among other things, indemnification from Lubrizol.

Lubrizol commenced a lawsuit against its insurer, National Union Fire Insurance Company of Pittsburgh, PA. (NUFIC), which issued an umbrella policy to Lubrizol effective Feb. 28, 2001 to Feb. 28, 2002. Lubrizol argued that "all of its triggered insurance policies should be treated as establishing joint and several liability, such that Lubrizol could recover under the policy of its choice."

The Supreme Court examined the "those sums" language in NUFIC's policy as compared to the "all sums" language that was at issue in prior precedent and noted that "generally, 'those sums' may indicate a subset of 'all sums.'" However, the Supreme Court stated that it will not "engage in a hypertechnical grammar analysis to determine whether the phrase 'those sums' is always more limited than 'all sums' and would always lead to a different allocation." The Supreme Court declined to set a bright line rule based on the use of "those sums" instead of "all sums," recognizing that the applicability of this language could depend, in part, on the nature of the damages for which coverage is sought.

The Supreme Court noted that the injuries for which Lubrizol sought coverage were distinguishable from those at issue in Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 and other prior decisions regarding allocation. Ultimately, the Supreme Court did not apply Goodyear and an all sums approach because the injury or damage for which Lubrizol sought coverage occurred at a discernable time – 2001 to 2008 – and it was possible for the parties to trace the allegations of injury or damage to certain products and, in turn, to certain transfers of the defective resin from Lubrizol to IPEX. The Supreme Court concluded "that there is no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time."

Breach of Contract – Eighth Circuit (Arkansas)

Murphy Oil Corp. v. Liberty Mut. Fire Ins. Co.
--- F.3d ---, 2020 WL 1921951 (8th Cir. Apr. 21, 2020)

The U.S. Court of Appeals for the Eighth Circuit upheld the district court's ruling that coverage was precluded for a $25 million lawsuit. The plaintiff in the underlying action had purchased a refinery from the insured. A few months after the purchase, a fire occurred at the property causing extensive damage, and the plaintiff sued the insured, demanding indemnification for its losses pursuant to an indemnity clause in the purchase agreement. The insured tendered the lawsuit to Liberty Mutual Fire Insurance Company (Liberty), its CGL insurer and Liberty denied coverage. In response, the insured brought a declaratory judgment action against Liberty. The district court granted summary judgment in favor of Liberty, finding "no possibility of coverage under the Policy" for the underlying lawsuit.

On appeal, the insured asserted that the indemnity claim was actually a claim for property damage due to the allegations that referenced the damage from the fire. The appellate court rejected this argument, stating "even if the breach-of-contract claim involves property damage, it does not change the nature of the claim into one for covered property damage." Instead, the appellate court ruled that the underlying action was one for solely economic loss from a breach of contract, which was not "property damage" and, thus, not within the scope of the policy's insuring agreement. The appellate court further held that, even assuming there was a possibility of coverage, the contractual liability exclusion would apply to preclude coverage for the underlying action.

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