PLUNKETT COONEY

Unregistered Securities Exclusion, Professional Liability Policy/ Sanctions, Claims in Progress Exclusion Coverage Update

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Unregistered Securities Exclusion – Sixth Circuit (Michigan Law)

Saoud v. Everest Indem. Ins. Co.,
No. 21-1621, 2022 WL 2758274 (6th Cir. Jul. 14, 2022)

The U.S. Court of Appeals for the Sixth Circuit upheld the district court's holding that Everest Indemnity Insurance Company (Everest) had no duty to defend or indemnify its insured, a financial advisor, where the professional liability policy excluded coverage for unregistered securities.

Everest issued a professional liability policy to William Saoud (Saoud) and Bill Saoud Financial LLC containing an unregistered securities exclusion that precluded coverage for claims "[b]ased upon, attributable to, or arising out of the use of or investment in any security that is not registered with the Securities and Exchange Commission." Saoud was named as a defendant in several lawsuits by customers alleging that he had offered clients an investment product called the 1 Global Memorandum of Indebtedness, had misrepresented the security of that investment product and had improperly sold an unregistered security. Saoud notified Everest and its agent of the lawsuits and, when Everest did not defend, Saoud commenced a declaratory judgment lawsuit in July 2019 against Everest.

The trial court granted summary judgment in favor of Everest, holding that the unregistered securities exclusion applied. Saoud appealed the trial court's decision to the federal appellate court.

On appeal, the appellate court affirmed the trial court's finding that the unregistered securities exclusion applied to preclude coverage for Saoud and finding that Everest had no duty to defend or indemnify Saoud. In upholding the grant of summary judgment to Everest, the appellate court dismissed Saoud's arguments that the 1 Global Memorandum of Indebtedness was not a security and that the exclusion applied only to securities required to be registered with the SEC.

The appellate court also rejected Saoud's argument that Everest should be estopped from relying on the unregistered securities exclusion because Everest failed to deny coverage on that basis timely. The appellate court refused to invoke an exception to the general rule that the doctrines of waiver and estoppel "usually cannot 'broaden the coverage of a policy to protect the insured against risks that

were not included in the policy or that were expressly excluded from the policy.'" The appellate court concluded, "Everest never represented the Saouds in the underlying litigation and therefore never controlled the Saouds' litigation strategy to their detriment. Nor have the Saouds provided any evidence of actual prejudice from Everest's delay in informing the Saouds that it would neither defend nor indemnify them." Therefore, waiver and estoppel did not apply, and the appellate court concluded that the exclusion precluded coverage.

Everest was represented by Steven Brown at the trial level and Jeffrey Gerish at the appellate level, both partners of Plunkett Cooney.

Professional Liability Policy/Sanctions – Sixth Circuit (Ohio Law)

Wesco Ins. Co. v. Roderick Linton Belfance, LLP
39 F.4th 326 (6th Cir. Jul. 1, 2022)

The U.S. Court of Appeals for the Sixth Circuit held that, under the Individuals with Disabilities Education Act (IDEA), an award of attorney fees constituted "sanctions" within the meaning of a professional liability policy that explicitly excluded "sanctions" from the definition of covered "damages" arising out of the provision of legal services.

An insurer that issued a professional liability policy filed a declaratory judgment action against the insured law firm and the firm's attorneys seeking a judgment that it owed no duty to defend or indemnify the firm and its attorneys in an underlying suit to recover an award for reasonable attorneys' fees. In the underlying suit, the firm and its attorneys brought claims against multiple school districts under IDEA. The suit was unsuccessful, and the school district sought attorney fees from the firm and its attorneys under IDEA's fee-shifting provisions. The firm sought defense and indemnity from its insurer. The insurer argued that it had no duty to defend or indemnify because "the policy defined 'damages' to exclude an award of 'sanctions' under 'federal' law." The district court granted summary judgment in the insurer's favor.

On appeal, the appellate court affirmed the district court's ruling that the insurer had no duty to defend or indemnify. In its analysis, the appellate court compared the IDEA clauses to other statutes or rules that are traditionally considered "sanctions." The appellate court held that "the IDEA subclause that allows schools to seek fees for claims that are 'frivolous, unreasonable, or without foundation' mirrors the standard that the Ohio Supreme Court adopted for allowing prevailing defendants to seek fees under Title VII or § 1983." Additionally, the IDEA subclause that allows schools to seek fees for claims that are "presented for any improper purpose" mirrored a similar provision in Rule 11. The appellate court reasoned that "[b]ecause courts ordinarily describe fees under these other provisions as 'sanctions,' an ordinary lawyer would likewise describe a fees award under these IDEA subclauses as

'sanctions….'" Therefore, the appellate court found no duty to defend or indemnify because the suit fell within the "sanctions" exception in the policy.

By: Michael Hanchett

Claims in Progress Exclusion – U.S. District Court for the Northern District of Ohio (Ohio or Indiana Law)

James River Cas. Co. v. Unicontrol, Inc.
No. 1:21-cv-185, 2022 WL 2916867 (N.D. Ohio Jul. 25, 2022)

The U.S. District Court for the Northern District of Ohio granted summary judgment in favor of plaintiff James River Casualty Company (James River) and against defendant Unicontrol, Inc. (Unicontrol) in a case in which James River sought declaratory judgment regarding its duty to defend and indemnify Unicontrol in an underlying environmental contamination lawsuit. The district court ruled that the claims in progress exclusion in the James River policy excluded coverage because the property damage (i.e., the environmental contamination) occurred before the inception of the policy.

In 2020, Michigan City, Indiana and the Michigan City Redevelopment Commission filed a complaint against, among others, Unicontrol as alleged successor-in-interest to Hays Corporation for environmental contamination that occurred during the operation of a facility between 1918 and 1971. As successor-in-interest, Unicontrol was responsible for the contamination. James River issued five CGL policies to Unicontrol covering the period from June 28, 2015, to June 28, 2020. A claims in progress exclusion modified the policies and provided that coverage did not apply to property damage "which begins or takes place before the inception date of coverage … even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving, and even though the 'occurrence' causing such … 'property damage' may be or may involve a continuous or repeated exposure to substantially the same general harm."

James River denied Unicontrol's claim for coverage citing the claims in progress exclusion and the fact that the environmental contamination alleged in the underlying lawsuit occurred between 1918 and 1971. Soon after, James River filed a declaratory judgment action seeking a determination that it did not owe a duty to defend or indemnify Unicontrol. The parties filed cross-motions for summary judgment, and the district court ruled in favor of James River. The district court concluded that, whether applying Ohio or Indiana law, the language in the policy was unambiguous and that "James River does not have to indemnify or defend Unicontrol in lawsuits related to property damage that began to occur before 2015, even if damage continues into the Policies' coverage periods." Because the property damage stemmed from activities at a facility between 1918 and 1971, the exclusion precluded

coverage.

By: Joshua LaBar