PLUNKETT COONEY

Acceptance of Settlement Offer, Occurrence, Employer's Liability Exclusion Coverage Update

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Georgia, Illinois, New York, California Coverage Cases
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Acceptance of Settlement Offer – Eleventh Circuit (Georgia Law)

Grange Mut. Ins. Co. v. Woodard
--- F.3d ---, 2017 WL 2819729 (11th Cir. June 30, 2017)

The U.S. Court of Appeals for the Eleventh Circuit ruled that an insurance company did not properly comply with the terms of a settlement offer. The Dempseys and Woodards were involved in a car accident in which Boris Woodard was injured and his daughter Anna Woodard was killed. The Dempseys carried car insurance through Grange Mutual Casualty Company (Grange). The Woodards' attorney mailed Grange a settlement offer, offering a limited release of their claims against the Dempseys and Grange in exchange for the policy limit. The settlement offer contained 11 distinct conditions of acceptance, including written acceptance within 30 days and that payment must be made "within ten (10) days after your written acceptance of this offer to settle. Timely payment is an essential element of acceptance." Grange timely accepted the offer and issued, but did not deliver, the settlement payment with 10 days of accepting the offer. The appellate court determined that a reasonable interpretation of the requirement that payment must be made within 10 days of written acceptance required Grange to deliver the settlement checks within 10 days of written acceptance. Because Grange did not deliver the settlement checks within 10 days of written acceptance, Grange did not properly accept the settlement agreement and there was no binding settlement.

"Occurrence" – Seventh Circuit (Illinois Law)

Westfield Ins. Co. v. Nat'l Decorating Serv., Inc.
--- F.3d ---, 2017 WL 2979654 (7th Cir. July 13, 2017)

The U.S. Court of Appeals for the Seventh Circuit held that an insurer must defend several contractors and subcontractors that worked on a 24-story condominium building because the underlying complaint alleged "property damage" caused by an "occurrence." The named insured, National Decorating Service Inc. (National Decorating), was retained as a painting subcontractor for the condominium building and was tasked with painting the exterior of the building with a waterproof sealant. The

condominium association brought suit against the general contractor who, in turn, brought suit against National Decorating, asserting damages as a result of National Decorating's failure to apply a thick enough coat of paint to the exterior of the building. The insurer argued that National Decorating's alleged actions cannot constitute property damage caused by an occurrence. The appellate court disagreed, and held that "[u]nder Illinois law, negligently performed work or defective work can give rise to an 'occurrence' under a CGL policy" when there is "damage to something other than the project itself. ..." Because the scope of the project was National Decorating's work, and the underlying complaint sought "to recover for damages incurred to other portions of the building, not just the exterior," the appellate court determined there was "property damage" caused by an "occurrence."

Employer's Liability Exclusion – Second Circuit (New York Law)

Hastings Dev., LLC v. Evanston Ins. Co.
--- Fed. Appx. ---, 2017 WL 2923921 (2d Cir. July 10, 2017)

The U.S. Court of Appeals for the Second Circuit held that an employer's liability exclusion was ambiguous such that an insurer had a duty to defend and indemnify its insured against an underlying negligence action arising from on-the-job injuries suffered by a Universal Photonics, Inc. (UPI) employee. The exclusion at issue precluded coverage for "bodily injury to ... an employee of the Named Insured arising out of and in the course of employment by any Insured, or while performing duties related to the conduct of the Insured's business[.]" The insurer contended that this exclusion precluded coverage for claims arising out-of-bodily injury to an employee of any insured, including UPI and its subsidiary, Hastings Development LLC (Hastings). The appellate court, however, found there was "an ambiguity in the policy language as to whether" the exclusion "bars coverage for Hastings under the circumstances presented." The appellate court ruled that a fair reading of the exclusion is that it precluded coverage only "for injuries to 'an employee of the Named Insured,' and in light of the Separation of Insureds clause, 'the Named Insured' is Hastings." The appellate court then pointed out that "another reasonable reading ... is that 'an employee of the Named Insured' may refer to employees of any of the Policy's list [of] Named Insureds given the exclusion's broad definition of an 'employee.'" Because the policy language supported either interpretation, the appellate court construed the ambiguity in favor of the insured and found that "Hastings is covered by the Policy and entitled to indemnification" as well as defense. Nevertheless, the appellate court ruled that the insurer's unreasonable denial of defense did "not rise to the level of egregious conduct needed to establish" a claim of bad faith.

Professional Services Exclusion – California

Energy Ins. Mut. Ltd. v. ACE Am. Ins. Co.
2017 WL 2953677 (Cal. Ct. App. July 11, 2017)

The California Court of Appeals held that a professional services exclusion in a commercial umbrella liability policy was plain and unambiguous. In this case, a petroleum line owed by Kinder Morgan, Inc. (Kinder) was punctured and exploded, killing and injuring several workers. The underlying lawsuits alleged, in part, negligence on the part of Kinder and Comforce Corporation (Comforce), the staffing agency that provided workers to Kinder, in failing to properly identify and mark the pipeline. Thereafter, Kinder sought insurance coverage from ACE. ACE declined coverage to Kinder based on the professional services exclusion, which provided that "[t]his insurance does not apply to any liability arising out of the providing or failing to provide any services of a professional nature." The appellate court agreed that the professional services exclusion applied, stating that "California courts have defined 'professional services' as those 'arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.'" However, "it is the type of activity, rather than actual compensation, that controls whether the professional services ... exclusion[ ] appl[ies]." Based on this plain meaning interpretation, the appellate court found that "the activities involved in owning and operating a pipeline, including mapping and marking underground installations, are clearly analogous to other skilled services that have been held to be 'professional services.'" Thus, because "[t]he tasks assigned to construction inspectors and line riders reflect the professional nature of the services they were expected to render[,]" the appellate court held the professional services exclusion applied to preclude insurance coverage to Kinder under the ACE policy.

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