PLUNKETT COONEY

Accident, Pollution Exclusion Coverage Update

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California, Missouri Coverage Cases
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Accident – California

Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.
--- Cal. Rptr. 3d ---, 2017 WL 5119167 (Cal. Ct. App. Nov. 6, 2017)

The California Court of Appeals held that an insurer had no duty to defend its insured against lawsuits alleging misleading marketing of painkillers that fueled the nation's opioid addiction and spiked heroin use because accidental conduct was not alleged and the products exclusion applied. The appellate court observed that the underlying lawsuits asserted that the insured "engaged in 'a common, sophisticated, and highly deceptive marketing campaign' aimed at increasing sales of opioids and enhancing corporate profits[.]" According to the appellate court, however, there was nothing unexpected or unforeseen in a massive marketing campaign promoting the use of opioids allegedly leading to increased opioid addiction and overdoses. Nor was it unexpected or unforeseen "that promoting the use of opioids would lead to a resurgence in heroin use." Rather than accidental conduct, the appellate court held that such acts could only be described as deliberate and intentional, which do not constitute an accident under a liability policy. The appellate court also examined the products exclusion in the policies, which excluded coverage for bodily injury arising out of or that results from either "'[a]ny goods or products ... manufactured, sold, handled, distributed or disposed of by [you,]'" or "'[w]arranties or representations made at any time, or that should have been made, with respect to the fitness, quality, durability, performance, handling, maintenance, operation, safety, or use of such goods or products.'" The appellate court found that this causal language is interpreted broadly to require only a minimal causal connection or an incidental relationship, which was satisfied in this case such that the products exclusion applied.

Pollution Exclusion – Missouri

The Doe Run Resources Corp. v. Am. Guar. & Liab. Ins.
--- S.W.3d ---, 2017 WL 5078078 (Mo. Oct. 31, 2017)

The Missouri Supreme Court held that a pollution exclusion was unambiguous and was to be applied as written, precluding coverage for a lawsuit alleging environmental contamination. The Doe Run Resources Corporation (Doe Run) was sued by several individuals who alleged that Doe Run released

harmful substances, such as lead, arsenic, cadmium and sulfur dioxide into the environment. Doe Run tendered the claim to its insurer, which denied coverage on the basis of the policy's pollution exclusion. That exclusion defined a pollutant as "any solid, liquid, gaseous, or thermal irritant or contaminant, including[ ] smoke, vapor, soot, fumes[,] acids, alkalis, chemicals[,] and waste." Recognizing that the terms "irritant" and "contaminant" were undefined, the Supreme Court turned to dictionary definitions and determined an irritant was "'something that irritates or excites' or 'an agent by which irritation is produced,'" and "contaminate" means "'to soil, stain, corrupt, or infect by contact or association' or 'to render unfit for use.'" The Supreme Court determined that the underlying "claims certainly allege the existence of an irritant or contaminant under the ordinary meanings of the words; these emissions could be understood to both 'produce irritation' and 'corrupt' the breathable air, making it 'unfit for use.'" As a result, the Supreme Court entered judgment in favor of Doe Run's insurer.

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