Additional Insured Exclusion, Late Notice Coverage Update

February 1, 2022

Additional Insured and Pollution Exclusion – Mississippi

Omega Protein, Inc. v. Evanston Ins. Co.
--- So. 3d ---, 2022 WL 178171 (Miss. Jan. 20, 2022)

The Mississippi Supreme Court held that Omega Protein, Inc. (Omega) could qualify as an additional insured under both the primary policy issued by the plaintiff Colony Insurance Company (Colony) and the follow-form excess policy issued by intervening plaintiff Evanston Insurance Company (Evanston). The Supreme Court further held that the pollution exclusion in Evanston's excess policy was ambiguous and would be construed in favor of coverage.

Omega hired Accu-fab to perform welding and other fabrication work on a large metal storage tank at Omega's plant used to store liquid composed of water, fish oil and fish solids. The welding and grinding on the tank resulted in an explosion that killed worker Jerry Lee Taylor, II, and injured several others. Accu-fab agreed in a master service contract to have commercial general liability insurance that named Omega as an additional insured. At the time of the explosion, Accu-fab had a $1 million primary policy issued by Colony and a $5 million excess policy issued by Evanston.

After Taylor's estate sued Omega, the company sought coverage under the Colony and Evanston policies. Colony filed a declaratory judgment action seeking a declaration of no coverage for bodily injury based on the pollution exclusion in its policy. Evanston intervened and denied coverage based on a similar pollution exclusion in its policy. Omega and Taylor's estate settled, and Colony contributed up to its $1 million limit. In turn, Omega filed a motion for partial summary judgment in the declaratory judgment action. Evanston again argued that the pollution exclusion precluded coverage and that Omega was not an additional insured under the Colony or Evanston policies.

The trial court found that Omega was an additional insured, but coverage was barred by the pollution exclusion. On appeal to the Supreme Court, Omega argued that the gasses that were emitted from the tank did not constitute "irritants" or "contaminants" under the policy's pollution exclusion. The Supreme Court concluded that the terms were susceptible to more than one reasonable interpretation and, thus, ambiguous. As a result, the Supreme Court concluded that the exclusion had to be construed in favor of coverage.

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The Supreme Court then acknowledged that under the Evanston policy, Omega could only qualify as an additional insured if there was a finding of negligence on the part of the named insured, Accu-fab. Because there had not yet been an adjudication of fault or negligence attributed to Accu-fab, the Supreme Court held that the trial court erred when it held that Omega qualified as an additional insured. Therefore, the Supreme Court reversed and remanded the case for further proceedings.

By: Joshua LaBar

Late Notice – Fifth Circuit (Mississippi Law)

Jordan v. Evanston Ins. Co.
--- F.4th ---, No. 20-60716, 2022 WL 141777 (5th Cir. Jan. 17, 2022)

The U.S. Court of Appeals for the Fifth Circuit found that a toy company had not timely and properly reported a claim under an excess policy of insurance by forwarding news reports relating to a child ingesting its toys, reversing the trial court's holding that such communications constituted timely notice.

Evanston Insurance Company (Evanston) issued a claims-made excess liability policy to Maxfield & Oberton Holdings (M & O) for the period July 2011 to July 2012. In April 2021, toddler Braylon Jordan (Jordan) ingested several small magnets that were manufactured by M & O and sustained serious injuries. A local news station published a story about Jordan's ordeal and M & O forwarded a copy of the story to its primary and excess insurers, including Evanston. Evanston opened an internal "Claim/ Occurrence file" noting that it had received a copy of the news story.

Eventually, in December 2012, M & O received a demand letter from counsel for Jordan and forwarded it to Evanston. Evanston denied coverage for Jordan's claim on the basis that M & O's submittal of the claim was not timely under the policy's reporting requirements, which required that a claim be made during the policy period.

In the declaratory judgment action that followed, Evanston moved for summary judgment on the basis that Jordan's family had not made a claim against M & O during the policy period and Evanston had "received no reported claim" during the coverage period. The trial court disagreed, saying "[i]f it looks like a duck, swims like a duck, quacks like a duck, and is prepared for dinner like a duck, it's probably a duck ... . Information received and recorded as a timely claim by the parties will be deemed a timely claim by the Court."

On appeal, the appellate court disagreed, finding that the trial court had "sidestepped" a threshold question of whether a claim was made against M & O during the policy period. The appellate court rejected the argument that the news articles regarding Jordan's injuries constituted a claim and that M & O's forwarding of the news articles constituted reporting that claim. Instead, the appellate court

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found, even if statements to news outlets about her son's injuries "constituted a 'claim' under Evanston's policy, Meaghin Jordan made the comments to a media outlet, *not to M & O or Evanston*. Her statements to CNN, while expressing an understandable sentiment, did not put M & O and its insurers in a position to defend against '[a] demand for money, property, or a legal remedy to which one asserts a right[.]'" Evanston's opening of a "claim file" was irrelevant because the news story was not a claim to begin with. Because no claim was made during the policy period, there was no coverage under the Evanston Policy.

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