PLUNKETT COONEY

Allocation of Settlement Amounts, Personal and Advertising Injury, Occurrence Coverage Update

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Texas, Florida, Illinois Coverage Update
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Allocation of Settlement Amounts – Fifth Circuit (Texas Law)

Satterfield and Pontikes Constr., Inc. v. U.S. Fire Ins. Co.
--- F.3d ---, 2018 WL 3671370 (5th Cir. Aug. 2, 2018)

The U.S. Court of Appeals for the Fifth Circuit affirmed the trial court's ruling that U.S. Fire Insurance Company (U.S. Fire), the excess insurer for Satterfield and Pontikes Construction, Inc. (S&P), was not required to cover certain damages arising out of faulty construction of a courthouse because S&P failed to specify whether contributions from S&P's subcontractors were allocated to damages covered under the U.S. Fire Policy. The U.S. Fire policy purchased by S&P was an excess policy with a $25 million limit, was triggered after the underlying insurance was depleted, and contained certain exclusions for mold and bacteria and legal costs. Out of a total award of over $8 million, $2.8 million was allocated to mold remediation, $1.5 million was allocated to attorney's fees, and over $230,000 was allocated to interest and arbitration fees. S&P collected over $4.4 million from its subcontractors. However, these contributions were not allocated to specified damages, and as U.S. Fire argued, if the contributions went toward damages covered by the U.S. Fire policy, S&P would be recovering twice.

The appellate court held that, under "the plain language of the policy," recovery from subcontractors through their agreements to indemnify S&P constituted "other insurance" as that term was defined in the U.S. Fire policy. The appellate court rejected S&P's argument that these subcontractor indemnification agreements are meant to merely fill gaps in the general contractor's insurance coverage. The appellate court affirmed the trial court's ruling that it was ultimately up to the party settling with other entities to allocate said settlements between covered and non-covered damages (here, S&P) because S&P was in the best position to know the settlement amounts and to know the damages to which the settlements could be allocated. The mere fact that U.S. Fire consented to a "reasonable settlement" did not give U.S. Fire superior knowledge of the settlement process or a say in how the proceeds would be allocated. As a result, the appellate court found that S&P had not sufficiently shown that the settlement proceeds were allocated to non-covered damages and that U.S. Fire was not required to contribute any amount to the outstanding portion of the judgment.

Personal and Advertising Injury – Eleventh Circuit (Florida Law)

Land's End at Sunset Beach Cmty. Ass'n, Inc. v. Aspen Specialty Ins. Co.
--- Fed. Appx. ---, 2018 WL 3795312 (11th Cir. Aug. 9, 2018)

The U.S. Court of Appeals for the Eleventh Circuit affirmed the trial court's grant of Aspen Specialty Insurance Co.'s (Aspen) motion for judgment on the pleadings, holding that Aspen did not have a duty to defend Land's End at Sunset Beach Community Association, Inc. (Land's End) in a lawsuit filed by the owner of an Alaska hotel, alleging that Land's End infringed on a trademarked "Land's End" moniker. The appellate court concluded that the intellectual property exclusion in the Aspen policy applied to bar coverage for the entire underlying complaint because all of the Alaskan company's claims were dependent on its allegations of trademark infringement. The Alaskan company issued a cease-and-desist letter to Land's End in 2015, asking it to stop infringing on its "Land's End" mark. Land's End sought a declaratory judgment of noninfringement, and the Alaskan company brought counterclaims of infringement, unfair competition and false designation of origin, claiming that Land's End's advertisements "create[d] a likelihood of confusion" with the company's trademark.

Land's End requested that Aspen provide a defense against the counterclaims, but Aspen denied the request. Land's End filed suit against Aspen, seeking coverage under the "personal and advertising injury" coverage part and argued that the claims related to the "use of another's advertising idea in your 'advertisement'" and "infringing upon another's … slogan in your 'advertisement.'" The trial court disagreed, holding that Aspen's duty to defend was not implicated because Land's End failed to prove that any one of the counterclaims fell within the scope of the insurance policy and was not clearly excluded. The appellate court affirmed this finding, noting that the counterclaims for false designation of origin and unfair competition fell under the intellectual property exclusion because they both arose out of the alleged infringement of the "Land's End" mark. The appellate court also rejected Land's End's alternative argument that the exception to the exclusion for slogan infringement claims applied because the "Land's End" mark served as a product identifier rather than an attention-getting phrase typical of a slogan.

Occurrence – N.D. Illinois (Illinois Law)

Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp.
17-cv-3513, 2018 WL 3819109 (N.D. Ill. Aug. 10, 2018)

The U.S. District Court for the Northern District of Illinois ruled that an insurer had no duty to defend or indemnify the insured lumber company in three underlying lawsuits alleging that the insured sold fire-resistant wood that did not comply with industry standards because the underlying actions did not allege accidental conduct. The underlying lawsuits alleged that the insured provided a variety of fire-

retardant wood that did not comply with building code requirements, which resulted in significant rip and tear costs. The insurer declined coverage on the basis that the underlying lawsuits did not allege an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The district court ultimately agreed, first recognizing that "merely casting a claim in terms of negligence is [not] enough to establish an occurrence." The district court further found that while one of the claims against the insured was "couched in negligence terminology, the thrust of" the complaints were that the insured "engaged in deliberate conduct – the shipping of the wrong lumber and the concealment of that fact – that caused the alleged property damage." Nowhere in the complaints, according to the district court, were "there allegations of an unforeseen or accidental event that produced property damage." Accordingly, the district court ruled that "there is no alleged occurrence and thus no potential coverage here[.]"

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