PLUNKETT COONEY

Anti-Indemnity Statute, Duty to Defend Coverage Update

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Oregon, New Jersey Insurance Coverage Update
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Anti-Indemnity Statute – Ninth Circuit (Oregon Law)

First Mercury Ins. Co. v. Westchester Surplus Lines Ins. Co.
--- Fed. Appx. ---, 2018 WL 3490668 (9th Cir. July 20, 2018)

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment, declaring that a subcontractor's insurers were not required to indemnify an additional insured for the additional insured's own negligence and, therefore, had no liability to the additional insured's assignee. Multnomah County, Oregon (the County) contracted to rehabilitate a bridge that it owned and operated. The contractor entered into a subcontract with ZellComp, Inc. (ZellComp), pursuant to which ZellComp was required to procure polymer decking for the bridge's construction. ZellComp then contracted with Strongwell Corporation (Strongwell) for the manufacture of the polymer decking. The ZellComp-Strongwell contract required Strongwell to have insurance that would cover ZellComp for ZellComp's own negligence. After the project was finished, the County encountered numerous problems with the bridge and sued several parties that worked on the project. The court in that underlying action found ZellComp 40 percent liable for the damage, and ZellComp sought indemnification from Strongwell and its insurers, assigning its rights under the contract to Multnomah County.

The appellate court ruled that Oregon's anti-indemnity statute (Or. Rev. Stat. §30.140(1)), which rendered void construction contract terms that required a party to indemnify another party for its own negligence, applied in this case, and that the requirement in the ZellComp-Strongwell contract fit squarely within the statute's prohibition. The appellate court expressly rejected the County's argument that the contract was one for the sale of goods, pointing out that the statute itself does not distinguish between contracts for the sale of goods and for services. As a result, the appellate court held that the insurer was not required to indemnify the additional insured (or its assignee) for damages arising out of the additional insured's own negligence.

Duty to Defend – New Jersey

Wear v. Selective Ins. Co.
--- A.3d ---, 2018 WL 3484163 (N.J. Super. Ct. App. Div. July 20, 2018)

The New Jersey Court of Appeals ruled that if an insurer's duty to indemnify the underlying claim is uncertain, it still may not have a duty to defend. A nurse and her husband sued her employer, Woodbury Medical Center Associates LLP (Woodbury), for damages stemming from a mold-related illness allegedly caused by toxic conditions in the medical center. Woodbury's insurer, Selective Insurance Co. (Selective), denied coverage based on an exclusion expressly precluding coverage for fungi and bacteria, "regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage." Woodbury filed for declaratory relief. The trial court ordered Selective to reimburse Woodbury for defense costs and also attorneys' fees in the declaratory judgment action. The underlying suit went to arbitration, and a consent judgment was entered, whereby Woodbury assigned its coverage rights under the Selective policy to the plaintiffs, who agreed to bear the burden of pursuing recovery from Selective. The plaintiffs then intervened as plaintiffs in the declaratory judgment action. The trial court held that the judgment was unenforceable against Selective and dismissed the declaratory complaint. It found the judgment devoid of good faith, where Woodbury and the plaintiffs knew of the Selective policy's mold exclusion.

Both Selective and the plaintiffs appealed. The appellate court held that the trial court prematurely ordered Selective to defend and indemnify against the suit, noting that it failed to examine whether the anti-concurrent and anti-sequential language in the exclusion would bar coverage. "Here, through our comparison of the averments in the complaint to the policy's exclusion, we conclude it was premature to order Selective to assume responsibility for the defense since it was unclear, based on the anti-concurrent and anti-sequential language in the exclusion, whether any claims would be covered." In remanding the case back to the trial court for a determination of coverage, the appellate court held "that the duty to defend should be converted to a duty to reimburse pending resolution of the coverage action." The appellate court reaffirmed its holding in *Polarome Int'l Inc. v. Greenwich Ins. Co.*, 961 A.2d 29 (N.J. App. Div. 2008), which held that "[i]f an insurer believes that the evidence indicates that the claim is not covered, the insurer is not always required to provide a defense."

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