PLUNKETT COONEY

Bad Faith Claim, Antitrust Exclusion, Coverage for Fraud, Improper Means Coverage Update

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Illinois, New York, California, Missouri Insurance Coverage Update
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Bad Faith Claim – Illinois Law

Dominick's Finer Foods v. Indiana Ins. Co.
--- N.E.3d ---, 2018 WL 1137510 (Ill. App. Mar. 1, 2018)

The Illinois Court of Appeals affirmed the trial court's ruling that section 155 of the Illinois Insurance Code (a statutory claim for bad faith) did not apply because the insurer, which denied a defense and indemnity to its insured for an underlying claim, did not act vexatious or unreasonably. The appellate court stated that "[w]hether conduct is vexatious and unreasonable is determined by examining the totality of the circumstances." The appellate court further noted that even though it disagreed with the insurer's interpretation of the policy language at issue, "[t]here is a difference between disagreeing with a party's position and finding that position so untenable as to be unreasonable and evidence of bad faith." Thus, while the court found that the insurer's "position was too narrow to be the only reasonable construction of the policy … it does not follow that … [the insurer]'s position was, itself, unreasonable."

Antitrust Exclusion – New York

Carfax, Inc. v. Illinois Nat. Ins. Co.
--- N.Y.S.3d ---, 2018 WL 1093911 (N.Y. App. Div. Mar. 1, 2018)

The New York Supreme Court held that an insurer had no duty to defend Carfax against a $50 million lawsuit alleging that Carfax monopolized the Vehicle History Report (VHR) market, as the underlying lawsuit's references to disparagement were solely tied to the antitrust claims that were excluded under the specialty risk protector policy. While the policy contained an antitrust exclusion, the media content insuring agreement covered loss "'resulting from a Claim alleging a Wrongful Act,'" and defined "Wrongful Act" as "'any act, error, omission, ... misstatement or misleading statement by an Insured ... that results solely in ... defamation, libel, slander, product disparagement or trade libel or other tort related to disparagement or harm to character or reputation; including, without limitation, unfair competition.'"

The first allegation at issue asserted that "'[b]y contractually committing ... two websites to include hyperlinks to Carfax VHRs and to exclude VHRs of any other provider, Carfax has stigmatized any listing without such a link in the eyes of consumers who infer that the absence means that the car has a blemished history.'" The second relevant allegation asserted that "'Carfax also utilizes its inflated revenues to disparage and falsely malign dealers in order to mislead consumers into believing its VHRs are necessary and accurate.'" The appellate court, however, ruled that these allegations were merely "passing references to disparagement," which did not amount to a "Wrongful Act" as "[t]hey were made 'only in the context of the anti-trust claims, i.e., as legal jargon pertinent to anti-trust and not as a means of even arguably alleging a separate claim for libel, slander or product disparagement.'" The appellate court ultimately concluded that coverage under the policy was barred by the antitrust exclusion.

Coverage for Fraud – California

Doyle v. Fireman's Fund Ins. Co.
--- Cal.Rptr.3d ---, 2018 WL 1177929 (Cal. App. March 07, 2018)

A wine collector (Doyle) filed a breach of contract action against Fireman's Fund Insurance Company (Fireman's Fund) following denial of coverage under a "Valuable Possessions" property insurance policy for losses he sustained from his purchase of $18 million in counterfeit wine. The California Court of Appeals agreed with the trial court and Fireman's Fund, holding that Doyle's financial loss from the purchase of counterfeit wine did not constitute a covered peril. Specifically, the appellate court held that "Doyle indeed suffered a financial loss, but there was no loss to his covered property." The appellate court reasoned that Fireman's Fund was insuring against losses "to" the wine, not against losses "to" Doyle's finances or "to" his unrealized investment expectations. The court cited *State Farm Fire and Cas. Co. v. Superior Court*, 215 Cal. App.3d 1435, 1444, 264 Cal.Rptr. 269 (1989), for the proposition that diminution in value is a measure of a loss, but not a covered peril. "Doyle suffered a diminution in value – he lost the money he had invested in his wine collection – because of the fraud committed by [the convicted wine counterfeiter]. But Doyle's financial loss was not a covered peril, it is simply a measure of his damages." The appellate court further rejected Doyle's argument that his policy did not list fraud as an exclusion, and it should, therefore, be covered, because the burden is on the insured to establish that fraud, or any other basis for a claim, is within the scope of the coverage.

"Improper Means" – Eighth Circuit (Missouri Law)

Captiva Lake Investments, LLC v. Fidelity Nat. Title Ins. Co.
--- F.3d ---, 2018 WL 1076745 (8th Cir. Feb. 28, 2018)

The U.S. Court of Appeals for the Eighth Circuit reversed a $9 million verdict against Fidelity National Title Insurance Co. (Fidelity) for failing to defend a real estate developer against mechanics' liens, determining that the trial judge misinterpreted the law on a policy exclusion, and Fidelity's decision to litigate mechanics' lien claims and its refusal to settle them did not constitute "improper means" in seeking to further its own interests under Missouri law. National City Bank (NCB) wrote a loan to fund a marina project in Missouri and obtained the Fidelity title insurance policy with the loan. The marina project eventually failed, and Captiva bought the foreclosed property from NCB and inherited Fidelity's policy. Captiva submitted claims to Fidelity for coverage for a number of mechanics' liens, which Fidelity ultimately denied. Captiva filed suit, alleging that Fidelity stalled the case, resulting in the loss of a potential buyer of the property.

At trial, the district court precluded Fidelity from presenting to the jury testimony that NCB caused the mechanics' liens to be filed by continuing to fund the project despite signs it was failing, therefore, excluding the liens from coverage. The jury concluded that Fidelity engaged in extended litigation of the mechanics' liens for the purpose of supporting its denial of coverage. The appellate court said the district court incorrectly barred testimony that the liens fell under an exclusion for liens "created, suffered, assumed or agreed to" by the insured and improperly ruled that the exclusion only applied if Fidelity could show the liens were the result of intentional misconduct. The panel noted that, while "intentional conduct" is required for the exclusion to apply, "intentional misconduct" is not. "Under the appropriate standard, Fidelity was entitled to present to the jury its defense that National City had 'created, suffered, assumed or agreed to' the mechanics' liens."

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