

Breach of Contract Exclusion, Suit Coverage Update

July 2, 2018

Texas, Kansas Insurance Coverage Update

The e-POST

Breach of Contract Exclusion – Fifth Circuit (Texas Law)

Spec's Family Partners, Ltd. v. Hanover Ins. Co.

--- Fed. Appx ---, 2018 WL 3120794 (5th Cir. June 25, 2018)

The U.S. Court of Appeals for the Fifth Circuit reversed the lower court's ruling that found applicable a breach of contract exclusion in a private company management liability insurance policy relating to claims between the insured retail store and its data processor because of a breach in the insured's credit processing system. The insured, Spec's Family Partners, Limited (Spec's), was a specialty retail chain that had a merchant agreement with First Data Merchant Services LLC (First Data), a company that processes credit and debit card transactions in exchange for a fee. Spec's credit card network was hacked by unknown cyber criminals, which caused First Data to reimburse issuing banks for costs tied to fraudulent transactions. First Data sent two demand letters to Spec's, demanding that Spec's help pay for the costs. The lower court ruled that those letters constituted a claim based on the merchant agreement, which did not trigger a duty to defend by virtue of an exclusion in the policy barring coverage for "[l]oss' on account of any 'Claim' made against any 'Insured' directly or indirectly based upon, arising out of, or attributable to any actual or alleged liability under a written or oral contract or agreement." The appellate court disagreed. It found that while the two demand letters did reference the merchant agreement, they also alluded to other potential sources of liability not rooted in the contract, such as Spec's alleged negligence in complying with the payment card industry's data security standards. Accordingly, the appellate court found that the lower court "erred in granting judgment on the pleadings and dismissing all counts of [the insured's] complaint against" the insurer.

'Suit' – W.D. of Missouri (Kansas Law)

Sunflower Redevelopment, LLC v. Illinois Union Ins. Co.

4:15-cv-00577, 2018 WL 3120641 (W.D. Mo. June 25, 2018)

The U.S. District Court for the Western District of Missouri granted summary judgment to an insured under an environmental policy, finding that a letter requiring the insured to undertake testing at its site was sufficient to trigger coverage. Sunflower Redevelopment, LLC (Sunflower) was the owner of certain real property that it had purchased from the Army, which had manufactured ammunition at the

site. Upon Sunflower's purchase of the real property in 2005, the state of Kansas ordered Sunflower to remediate certain pollutants and Sunflower submitted a plan to do so. In 2008, Sunflower purchased an insurance policy from Illinois Union Insurance Company (Illinois Union) that contained certain exclusions from coverage, including exclusions for some of the previous remediation. However, in December 2008 and January 2009, the state of Kansas requested that Sunflower conduct further testing for additional contaminants at different locations. Illinois Union denied coverage.

The district court found that the request for remediation was covered under the policy and no "claim" was required to trigger coverage, because the policy separately covered "remediation costs." In addition, the district court found that the letter did constitute a "claim" because it alleged that Sunflower had a responsibility to respond and submit a plan for the testing at issue. Finally, the district court granted summary judgment finding that the claim regarding the additional contaminants was not excluded under the exclusions for the prior remediation plan. The district court relied on a previous ruling in the case that these additional contaminants were not within the original plan, and found that Illinois Union failed to allege any facts supporting its assertion that costs to remediate the additional contaminants might overlap with costs to comply with the previous plan.

Plunkett Cooney's insurance coverage update, The e-Post, is published bi-monthly via email. To receive your copy when it is issued, simply email - subscribe@plunkettcooney.com.