PLUNKETT COONEY

Consent to Settle Clauses, Bad Faith, Anti-Assignment Clause Insurance Coverage Update

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'Consent to Settle' Clauses/Bad Faith – Massachusetts

Rawan v. Continental Cas. Co.
--- N.E.3d ---, 2019 WL 6838013 (Mass. Dec. 16, 2019)

The Massachusetts Supreme Court ruled that a "consent to settle" clause in a liability policy is valid and enforceable under Massachusetts law. The particular clause at issue provided that the insurer would "not settle any claim without the informed consent of" the insured. The Supreme Court found that the insurer did not act in bad faith in failing to successfully settle the third-party's claims against its insured.

The underlying case arose out of negligence claims brought by Douglas and Kristen Rawans (Rawans) against the insured structural engineer, Kanayo Lala (Lala), for his work on their home. The Rawans claimed that Lala's work had structural design errors that compromised the home's stability. At the time the claims arose, Lala was insured under a professional liability policy issued by Continental Casualty Company (Continental), which had a $250,000 limit of liability. Lala consented to offering $100,000 to settle the case, which the Rawans rejected. Lala then withdrew his authorization to convey any settlement offers. The case eventually went to trial, where the Rawans were awarded $440,000. Continental paid the Rawans the policy limit amount, with Lala paying the difference.

The Rawans subsequently sued Continental for bad faith, alleging that Continental breached its duty to bring about a reasonable settlement of their suit. The bad faith suit made its way to the Massachusetts Supreme Court, which agreed with the lower court's ruling that the "consent to settle" clause in Lala's policy limited Continental's ability to settle the claims. The Supreme Court found that Continental met its obligations because Lala had the right under the policy to refuse to give Continental consent to settle the claims. The Supreme Court explained its reasoning for upholding "consent to settle" policy provisions, stating that they serve the public good by encouraging professionals to buy liability insurance. Furthermore, such clauses have never been limited in Massachusetts despite the failure of some insureds, like Lala, to settle.

Anti-Assignment Clause – South Carolina

PCS Nitrogen, Inc. v. Continental Cas. Co.
--- S.E.2d ---, 2019 WL 6884913 (S.C. App. Dec. 18, 2019)

The South Carolina Court of Appeals affirmed the decision of the trial court, which held there was no coverage under more than a dozen policies issued to a company's predecessor for costs to clean up a Superfund site. From 1966 to 1972, Columbia Nitrogen Corporation (Columbia) operated phosphate fertilizer plants, including one in Charleston, South Carolina. The Charleston site eventually became classified as a Superfund site. In 1985, Columbia sold the property. By 2005, the property had come to be owned by Ashley II of Charleston, LLC (Ashley). In 1986, Columbia sold some of its assets to a company that would eventually become PCS Nitrogen, Inc. (PCS). As part of the acquisition agreement, PCS agreed to assume some of Columbia's liabilities, and Columbia assigned to PCS all of its primary and excess liability policies from 1966 to 1985. The parties did not obtain the insurers' consent for the assignment.

In 2005, Ashley filed a declaratory judgment action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to force PCS to pay toward the remediation of the Charleston site. PCS was eventually found liable for those costs. PCS then turned to the insurers that had issued the 1966 to 1985 policies for coverage for the remediation costs. On the insurers' motion for summary judgment, the trial court found that the purported assignment of the policies was invalid because Columbia and PCS did not obtain the insurers' consent. The trial court also found that while consent may not be required where a potentially covered loss has already occurred, this exception did not apply to Columbia/PCS because coverage would not be implicated until Columbia was "legally obligated to pay [sums] as damages."

The appellate court affirmed, holding that the consent requirements of the 1966-1985 policies are only waived when a loss that implicates coverage has already occurred. At that point, "the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property." The appellate court found that the contamination itself was not the loss because the language of the policies only provided coverage once there was a final determination of Columbia's obligation to pay. Because there was not even a claim for damages until after the acquisition agreement, there was no vested claim at the time of the assignment, and Columbia/PCS were required to obtain the consent of the insurers to assign the policies. Because neither party had obtained such consent, there was no coverage for the costs of remediation.

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