PLUNKETT COONEY

Duty to Defend, Absolute Pollution Exclusion, Coverage B, Assignment Coverage Update

May 1, 2018
Wisconsin, Alabama, California, Oregon, New Jersey Insurance Coverage Update
The e-POST

Duty to Defend – Wisconsin

Johnson Controls, Inc. v. Central Nat'l Ins. Co. of Omaha
--- N.W.2d ---, 2018 WL 1957131 (Wis. Ct. App. Apr. 25, 2018)

The Wisconsin Court of Appeals reversed the trial court and held that excess carriers Central National Insurance Company of Omaha and Westchester Fire Insurance Company (collectively Central Insurance) did not owe a duty to defend Johnson Controls, Inc. (Johnson Controls) against potential liabilities for environmental contamination under multiple excess insurance policies. The appellate court rejected the trial court's reliance on general practices regarding the duty to defend, and concluded that Central National's duty to defend should be "driven by policy language – not generalizable concepts about the role of excess insurance and the duties of excess insurers."

Central National's excess policies stated that "[a]s respects occurrences covered under this policy, but not covered under the underlying insurances … the Company shall … defend. ..." Based on this policy language, the appellate court found that "if an occurrence was covered under the underlying insurances, then Central National had no duty to defend because the excess insurance policies promised a defense only when an occurrence was 'not covered under the underlying insurances.'" And, "[i]f the occurrences were not covered under the underlying insurances, then those occurrences were not covered by the excess insurance either because the scope of coverage for environmental liability in the primary and excess policies was the same." Accordingly, the appellate court concluded that "Central National owed no duty to defend Johnson Controls[,]" and it reversed and remanded with directions for the trial court to enter judgment for Central National.

Absolute Pollution Exclusion – Eleventh Circuit (Alabama Law)

Evanston Ins. Co. v. J&J Cable Constr., LLC
--- Fed. Appx ---, 2018 WL 1887459 (11th Cir. Apr. 20, 2018)

The U.S. Court of Appeals for the Eleventh Circuit held that the absolute pollution exclusion did not apply to preclude coverage for claims of property damage and personal injuries resulting from a sewage leak. The insured was hired to install underground electrical conduit in a subdivision, but it struck and broke the sewer laterals of two houses and triggered a sewage leak. The commercial general liability policy at issue defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed." The appellate court found that Alabama law had already addressed the issue of whether sewage was a "pollutant," albeit in the qualified pollution exclusion context. Finding "no legally significant distinctions between the pollution exclusion" in the two cases, the appellate court affirmed that sewage was not a "pollutant."

Coverage B – Eleventh Circuit (California and Oregon Law)

Scott, Blane, and Darren Recovery, LLC v. Auto-Owners Ins. Co.
--- Fed. Appx. ---, 2018 WL 1611256 (11th Cir. Apr. 3, 2018)

The U.S. Court of Appeals for the Eleventh Circuit held that Auto-Owners Ins. Co. (Auto-Owners) had no duty to defend Anova Food Inc. (Anova) against claims by its competitor, King Tuna, agreeing that an exclusion to the "advertising injury" coverage section specifically barred claims that Anova's products failed to conform to statements of quality. King Tuna sued Anova in Oregon and California federal courts, accusing Anova of misrepresenting the smoking process for its canned tuna. Anova sought coverage for the Oregon suit, which Auto-Owners denied, but never requested coverage for the California suit. King Tuna dismissed the Oregon suit, and Anova ultimately prevailed in the California suit after years of litigation. Anova then sued Auto-Owners in Florida seeking coverage for defense costs incurred in both King Tuna suits. The 11th Circuit Court upheld the trial court's finding that coverage for King Tuna's suits was barred by the "failure to conform" exclusion. The panel further agreed that coverage for the California suit was precluded by Anova's failure to comply with the policy's notice requirement. The panel rejected Anova's position that it had no obligation to notify Auto-Owners of the California complaint because it advanced the same claims as the Oregon action: "Because the California Suit advanced a new state law claim, Anova had a duty to notify Auto-Owners," and its failure to do so "constituted a material breach of the Policy that substantially prejudiced Auto-Owners and released it from its duty to defend Anova."

Assignment – New Jersey

Cooper Indus., LLC v. Columbia Cas. Co.
No. A-0593-15T1, 2018 WL 1770260 (N.J. Super. App. Div. Apr. 13, 2018)

The Superior Court of New Jersey affirmed a trial court's summary judgment in favor of Cooper Industries, LLC (Cooper) against its insurers, Columbia Casualty Co. (Columbia) and OneBeacon Ins. Group (OneBeacon), holding that a bill of sale between Cooper and its predecessor, McGraw-Edison Co. (McGraw), effectively transferred insurance rights under several primary and umbrella policies issued to McGraw for periods spanning from 1971 through 1980 and did not violate the anti-assignment clauses contained within the insurance policies at issue. In 1986, McGraw merged with CI Acquisition, which transferred its "assets, rights and properties of every kind and nature" to a newly-created company, "new McGraw," that subsequently merged with Cooper in 2004. In 2009, the Environmental Protection Agency (EPA) identified Cooper as a potentially responsible party for remediation of hazardous materials based on "old McGraw's" past operations. Cooper sought coverage under the OneBeacon and Columbia policies, but the insurers declined. Cooper executed a settlement agreement and consent order with the EPA in 2013 then sued OneBeacon and Columbia for breach of contract.

The trial court, finding ambiguity in the 1986 bill of sale transferring CI Acquisition's assets to new McGraw, took testimony from Cooper's legal and risk management personnel, which supported Cooper's position that the parties intended that all of the assets and liabilities of old McGraw, including the rights to the OneBeacon and Columbia policies, be transferred to Cooper. The testimony further provided that Cooper had made retroactive premium payments on the insurance policies in furtherance of that objective. The appellate court noted that neither OneBeacon nor Columbia rebutted the testimony offered by Cooper's witnesses. "Thus, the evidence here was 'so one-sided that one party must prevail as a matter of law,' and the court's conclusion in this regard was amply supported by the record." Moreover, because the 1986 transaction occurred years after the alleged pollution occurred, the appellate court agreed "that the assignment of insurance rights in the 1986 Bill of Sale was a post-loss assignment [of claims], as opposed to an impermissible assignment of insurance policies."

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