PLUNKETT COONEY

Indoor Air Exclusion, Suit Coverage Update

March 1, 2017
Oklahoma, Washington Coverage Cases
The e-POST

Indoor Air Exclusion – Oklahoma

Siloam Springs Hotel, LLC v. Century Sur. Co.
--- P.3d ---, 2017 WL 696815 (Okla. Feb. 22, 2017)

The Oklahoma Supreme Court, answering a certified question, ruled that an indoor air exclusion was not against Oklahoma public policy. The exclusion at issue precluded insurance coverage for "Bodily injury, property damage, or personal and advertising injury arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating pathogenic or allergen qualities or characteristics of indoor air regardless of cause." The Supreme Court recognized the interplay between a party's freedom to contract and how that freedom can be limited by public policy concerns. The court also recognized that "[i]n the absence of specific guidance in the Oklahoma Constitution, it is the Legislature, and not this Court, which is vested with responsibility for declaring the public policy of this state." The Supreme Court also stated that a "contract violates public policy only if it clearly tends to injure public health, morals or confidence in the administration of law, or if it undermines the security of individual rights with respect to either personal liability or private property." Ultimately, the Supreme Court concluded that "there is no clearly articulated public policy in Oklahoma, statutory or otherwise, that prohibits enforcement of the Indoor Air Exclusion at issue in this cause."

Suit – W.D. Wash. (Washington Law)

King Cty. v. Travelers Indem. Co.
---F. Supp. ---, (W.D. Wash. Feb. 10, 2017)

A Washington federal district court ruled that insurers breached their duty to defend King County against state and federal enforcement actions regarding environmental contamination at two Seattle-based Superfund sites, as these were "suits" under the respective policies. The U.S. Environmental Protection Agency and the Washington State Department of Ecology designated King County as a Potentially Responsible Party (PRP) for cleanup at the two sites, but the insurers asserted these proceedings were not "suits" pursuant to the respective policies. The district judge, however, found that these administrative proceedings were "functionally equivalent" to suits as "[b]oth agencies assumed an adversarial posture by exercising their statutory authority to designate King County as a

strictly-liable PRP." The court opined that "[o]nce a party bears the scarlet letters 'PRP,' it may be called upon at anytime to assume responsibility for the cleanup effort" as "in every instance, designation as a PRP raises the specter of 'significant civil liability' regardless of whether the PRP cooperates or not." Nevertheless, the court held that whether the costs were considered defense or indemnity was a factual question to be resolved after further discovery. The court also held that the insurers had not acted in bad faith given the "'vigorously contested'" debate regarding whether environmental enforcement actions are suits, and the lack of Washington authority on this issue at the time of tender.

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