PLUNKETT COONEY

Knowledge of Claim, Contractor Exclusion Coverage Update

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New York, Pennsylvania, California Coverage Update
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Knowledge of a Claim – Second Circuit (New York Law)

Patriarch Partners, LLC v. Axis Ins. Co.
--- Fed. Appx. ---, 2018 WL 6431024 (2d Cir. Dec. 6, 2018)

The U.S. Court of Appeals for the Second Circuit held that Axis Insurance Co. (Axis) did not owe Patriarch Partners LLC (Patriarch) insurance coverage under its excess policy with respect to a U.S. Securities and Exchange Commission (SEC) investigation and enforcement action due to Patriarch's prior knowledge of the claim. The SEC's investigation alleged that Patriarch and its CEO, Lynn Tilton (Tilton), misled investors about the performance of the firm's Zohar funds. Patriarch incurred more than $25 million in legal bills defending against the SEC proceedings. Axis, however, declined coverage based, in part, on a warranty statement that Tilton had signed verifying that "neither the undersigned nor any other director or officer of Patriarch is aware of any facts or circumstances that would reasonably be expected to result in a Claim under the Captioned Policy."

The appellate court ruled that this warranty statement effectively erased coverage for "claims relating to facts or circumstances" that Patriarch was already "aware of and would reasonably have expected to result in a claim covered by" the excess policy. The appellate court rejected Patriarch's argument that the warranty barred coverage only for claims stemming from circumstances of which Tilton was personally aware prior to signing the warranty, as it was unsupported by the document's plain text. At a minimum, according to the appellate court, it found "that facts and circumstances that were known not only to Tilton, but to Patriarch's outside counsel and Patriarch's in-house counsel are facts and circumstances that 'Patriarch was aware of' for purposes of analyzing the Warranty." The appellate court found dispositive that, as of the warranty date, "Patriarch 'was aware' of the SEC Order of Investigation, the escalating severity and focus of the SEC investigation, the subpoena of a former employee, and notice of an impending subpoena to be issued to Patriarch itself."

Any Contractor Exclusion – Second Circuit (New York Law)

Am. Empire Surplus Lines Ins. Co v. Colony Ins. Co.
--- Fed. Appx. ---, 2018 WL 6324760 (2d Cir. Dec. 4, 2018)

The U.S. Court of Appeals for the Second Circuit ruled that an exclusion for injuries linked to “any contractor” applied to preclude coverage for three underlying lawsuits brought by workers employed by a contractor. In the underlying lawsuits, three employees of the contractor, Technico, were injured while performing construction work for the New York City Housing Authority (NYCHA). Colony Insurance Company (Colony) issued a policy to NYCHA, which precluded coverage for bodily injury “sustained by any contractor, subcontractor or independent contractor or any of their 'employees,' 'temporary workers,' or 'volunteer workers.'"

Colony argued that this exclusion applied to preclude coverage for the three underlying lawsuits. Technico's insurer, on the other hand, argued that as the policy provides coverage for injuries arising out of operations performed by the “contractor,” and the policy defines the “contractor” as Technico, the policy clearly intended to provide coverage for injuries sustained by Technico employees. The appellate court ruled in favor of Colony, finding that “[t]he plain meaning of 'any contractor' includes Technico, because Technico is defined in the policy as a 'contractor.' Technico does not lose its status as a contractor simply because it is also the defined 'contractor.'" On that basis, the appellate court held that the policy did not provide coverage for the three underlying lawsuits.

Cyberbullying as an Occurrence – Eastern District of Pennsylvania (Pennsylvania Law)

State Farm Fire and Cas. Co. v. Stephanie Motta, et al.
--- F. Supp. 3d ---, 2:18-cv-03956 (E.D.P.A. Dec. 1, 2018)

The U.S. District Court for the Eastern District of Pennsylvania held that State Farm Fire and Casualty Company (State Farm) must defend teenager Zach Trimbur (Trimbur) against a lawsuit accusing him of cyberbullying his classmate who committed suicide. The victim's family brought a lawsuit asserting claims of negligence, wrongful death and survival against Trimbur after the victim committed “suicide within a couple days of her classmate [Trimbur] attacking her health, appearance, cutting and sexual history in a text message.” In examining the homeowners policy that State Farm issued to Trimbur's mother, the district court found that "a prerequisite to coverage under the Policy is an 'occurrence,' defined in relevant part as an 'accident.'" The key inquiry, according to the district court, was whether “the underlying events were fortuitous from the perspective of the insured.” The district court ultimately found that when “[v]iewing these events from Zach Trimbur's perspective, we cannot conclusively find death by suicide is foreseeable from his cyberbullying[.]” In so holding, the district court recognized that “Pennsylvania law appears to prohibit such a sweeping conclusion” as “it is a general rule in Pennsylvania that suicide-or attempted suicide-is not a recognized basis for recovery in a tort claim.” Accordingly, the district court ruled that State Farm had a duty to defend Trimbur against the lawsuit.

Subrogation – California

Travelers Prop. Cas. Co. of Am. v. Engel Insulation, Inc.
--- Cal. Rptr. 3d ---, 2018 WL 6259032 (Cal. Ct. App. Nov. 30, 2018)

The California Court of Appeals ruled that Travelers Property Casualty Company of America (Travelers), as a purported subrogee of its insured, could not bring an action against the insured's subcontractor after the insured became a suspended corporation. Travelers defended as an additional insured Westlake Villas LLC and Meer Capital Partners, LLC (Westlake), the developer of the property, in a construction defect lawsuit. Travelers settled that case and then brought a separate subrogation action against a subcontractor allegedly liable for contribution to Westlake. At the time of that subrogation lawsuit, however, Westlake's corporate status had been suspended by the state of California. The trial court, therefore, granted the subcontractor's motion for judgment on the pleadings, ruling that because Westlake was barred from bringing claims on its own behalf as a suspended corporation, Travelers was also barred from bringing claims as Westlake's subrogee. The appellate court affirmed the trial court's ruling, noting that when a corporation is suspended for failure to pay taxes, it could not sue or defend a lawsuit. The appellate court rejected Travelers' argument that an exception to the Revenue and Taxation Code applied that allowed "any insurer, or … counsel retained by an insurer on behalf of the suspended corporation, who provides a defense for a suspended corporation in a civil action" to proceed with a subrogation action. The appellate court held that because Travelers had not protected its rights to recoup costs in defending Westlake by intervening on its own behalf in the underlying action, it could not assert a separate subrogation action on behalf of the suspended corporation after the underlying action concluded.

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