PLUNKETT COONEY

Mechanical Device Exclusion, Excess Coverage, Premises Pollution Liability Coverage Update

December 15, 2020
The e-POST

Mechanical Device Exclusion – Illinois

State Farm Mut. Auto. Ins. Co. v. Elmore
--- N.E.3d ---, 2020 WL 7062484 (Ill. Dec. 3, 2020)

The Illinois Supreme Court ruled that a mechanical device exclusion in an automobile policy applied to preclude coverage for an action arising from injuries the underlying plaintiff allegedly incurred while unloading grain from the insured vehicle. The underlying plaintiff was attempting to unload grain from the vehicle into an auger when he accidentally stepped onto the auger blades, which caused significant injuries. Thereafter, the underlying plaintiff brought suit against the owner of the insured vehicle and auger. The suit eventually settled and, in exchange for releasing all claims against the owner, the underlying plaintiff received $1.9 million from Bishop Mutual Insurance Company, Grinnell Mutual, and State Farm Fire and Casualty. The underlying plaintiff reserved his right to pursue coverage under the automobile policy issued by State Farm Mutual Auto Insurance Company (State Farm).

In response to the underlying plaintiff's claim, State Farm filed a declaratory judgment action, seeking a determination that coverage was not available based on the applicability of the mechanical device exclusion. That exclusion stated, in relevant part: "there is no coverage for an insured for damages resulting from … the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the vehicle."

The Illinois Supreme Court agreed with State Farm that the auger constituted a mechanical device under the exclusion's plain meaning. The Supreme Court reasoned that, in accordance with the exclusion's plain meaning, "the auger was not a small hand-propelled truck or wheelbarrow, and it was not attached to the insured vehicle."

In so ruling, the Supreme Court rejected the argument that the mechanical device exclusion needed to be read in the context of the preceding exclusions and thus only applied when property was moved onto the vehicle. The Supreme Court explained that because the exclusions were separated by the word "or," the exclusions should be read independently. Additionally, the Supreme Court disagreed that the exclusion was ambiguous when considered in the context of the risks the policy was intended

to cover. Specifically, because the "policy on the truck is an automobile policy, not a comprehensive general liability policy or a farm liability policy," the exclusion made "perfect sense when viewed in this context."

Premises Pollution Liability – District of Arizona (Arizona Law)

London Bridge Resort LLC v. Illinois Union Ins. Co. Inc.
CV-20-08109, 2020 WL 7123024 (D. Ariz. Dec. 4, 2020)

The U.S. District Court for the District of Arizona held that a Lake Havasu City resort, London Bridge Resort LLC (London Bridge), was not entitled to insurance coverage from its insurer, Illinois Union Insurance Company, Inc. (Illinois Union), for its revenue losses stemming from the COVID-19 pandemic. London Bridge brought a cause of action against Illinois Union for breach of contract and declaratory judgment, seeking coverage under its Premises Pollution Liability Insurance Policy (the Policy).

The Illinois Union policy provides coverage for a "pollution condition," which is defined in the Policy as "[t]he discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant …" The district court noted that this definition is typically associated with traditional environmental pollution and, therefore, the question before the district court was whether the COVID-19 virus constitutes traditional environmental pollution.

London Bridge argued that COVID-19 constitutes traditional environmental pollution because "different government agencies include 'virus' in the definition of certain contaminants and pollutants." The district court disagreed, holding that the COVID-19 virus is not a "traditional environmental pollution." The district court reasoned that "a virus outbreak does not closely resemble the enumerated examples provided in the Policy's definition." As a result, the district court granted Illinois Union's motion to dismiss, stating that it had "little trouble concluding that no plausible interpretation of 'traditional environmental pollution' includes a virus outbreak."

Excess Coverage – New York

Jin Ming Chen v. Ins. Co. of the State of Penn.
--- N.E.3d ---, 2020 WL 6875983 (N.Y. Nov. 24, 2020)

The New York Court of Appeals affirmed the decisions of the trial and appellate courts that an excess insurer had no obligation to drop down and cover a portion of interest on an underlying personal injury judgment where the primary policy was rendered void.

Insurance Company of Pennsylvania (ICP) issued an excess liability insurance policy to Kam Cheung Construction Inc. (Kam Cheung) that was excess over a $1 million primary policy issued by Arch Specialty Insurance company (Arch). Arch's policy provided supplementary payments coverage, covering, among other things, pre-judgment interest. Jin Ming Chen (Chen) sustained bodily injury at a worksite and sued Kam Cheung, eventually obtaining a $2.3 million judgment, plus $396,934 in prejudgment interest. While the personal injury action was ongoing, Arch sought a declaration that its primary policy was void *ab initio* and rescinded based on material misrepresentations by Kam Cheung in its application for coverage. The rescission was granted.

Chen, thereafter, sought payment under the ICP policy for the judgment. The trial court found that ICP's policy did not "drop down" to take the place of the voided Arch policy. Accordingly, the trial court denied Chen's proposed judgment, which included the disputed amount of interest, and accepted ICPs proposed judgment that included some interest, but not the pre-judgment interest covered by the Arch policy's supplementary payments provision. Chen appealed to the intermediary appellate court and then the Court of Appeals. Both courts affirmed the trial court's ruling.

As the high court noted, "based on the [ICP] Policy's Coverage and Ultimate Net Loss provisions, the excess policy covers only losses in excess of those that would have been paid by Arch under the Arch Policy." Because Arch's policy was rendered void, Arch was not responsible for paying the interest contemplated in the supplementary payments provision. The high court concluded that "[b]y its terms, the [ICP] Policy did not drop down in the event Arch failed to satisfy its obligations; it existed to cover losses in excess of those covered by the Arch Policy, up to [ICP]'s $4 million limits of liability."

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