PLUNKETT COONEY

Occurrence, Choice of Law/ Contestability of Life Insurance Policy Coverage Update

June 15, 2018
California, New York Insurance Coverage Update
The e-POST

Occurrence – California

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.
No. S236765, --- P.3d ---, 2018 WL 2470975 (Cal. June 4, 2018)

A student brought an action against a contractor for a school district, Ledesma & Meyer Construction Company (L&M), alleging negligent hiring, retention and supervision of L&M's employee, who allegedly sexually abused the student while working on a construction project at the student's middle school. L&M's insurer, Liberty Surplus Insurance Corp. (Liberty), brought a declaratory judgment action in federal court, contending it had no obligation to defend or indemnify L&M. The district court granted summary judgment in Liberty's favor, and L&M appealed. The U. S. Court of Appeals for the Ninth Circuit certified to the California Supreme Court the question of whether a suit against an employer for the negligent hiring, retention and supervision of an employee who intentionally injured a third party alleges an "occurrence" under a CGL policy. The California Supreme Court held in the affirmative, determining that the intentional conduct of a contractor's employee does not preclude potential coverage of an employer's independent tort liability for injury deliberately caused by its employee under a CGL policy that covered bodily injury caused by an "occurrence," which was defined as an "accident."

The Supreme Court reasoned that because Liberty promised to indemnify L&M for all sums which L&M shall become obligated to pay for damages because of bodily injury, coverage necessarily turned on whether the claimant's damages resulted, under tort law, from covered causes: "Causation is established ... if the defendant's conduct is a 'substantial factor' in bringing about the plaintiff's injury." While the alleged molestation was the act directly responsible for the claimant's injury, L&M's negligence in hiring, retaining and supervising him was an indirect cause, and "a finder of fact could conclude that the causal connection between L&M's alleged negligence and the injury inflicted by [its employee] was close enough to justify the imposition of liability on L&M." The Supreme Court further determined that even though L&M's hiring, retention and supervision of its employee may have been "deliberate," and, thus, not an "accident," the molestation could be considered an additional, unexpected, independent and unforeseen happening that resulted in the damage. The Supreme Court

reiterated that the public policy against insurance for one's own intentional misconduct does not extend to bar liability coverage for others whose mere negligence contributed in some way to the harm.

Choice of Law/Contestability of Life Insurance Policy – Second Circuit (New York Law)

AEI Life LLC v. Lincoln Benefit Life Co.
No 17-224, --- F.3d ---, 2018 WL 2746589 (2d Cir. June 8, 2018)

The U.S. Court of Appeals for the Second Circuit held that 1) a clause in a life insurance policy stating that the policy "is subject to the laws of the state where the application was signed" was not a choice-of-law provision, and 2) under New York law, the policy was incontestable for fraud because the challenge was brought later than the two-year contestability period. Lincoln Benefit Life Company (Lincoln) issued the policy in 2008, insuring the life of Gabriela Fischer, a New York resident. The policy was sold a few times, ultimately to AEI Life LLC (AEI). When Lincoln discovered what it believed to be fraudulent acts in the application for the policy, it tried to invalidate the policy. Lincoln argued that New Jersey law applied because it believed the application was signed in New Jersey, and a clause in the policy (called a "conformity" clause by the court) stated that the policy "is subject to the laws of the state where the application was signed." Importantly, New Jersey law allows for a life insurance policy to be contested even after the two-year contestability period expires. The appellate court found that this clause was not a choice-of-law provision "because it does not reflect the parties' intent to select the law of a specified state." The appellate court applied New York's conflicts law and found that the "center of gravity" of the transaction was in New York – the policyholder and her son were domiciled in New York, and the broker solicited the business in New York. Under New York law, Lincoln was barred from contesting the policy after the two-year contestability period. The appellate court also rejected Lincoln's substantive challenges to the validity of the policy because the incontestability law did not allow for such exceptions.

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