Pre-Tender Costs, Occurrence, Insured-Versus-Insured Exclusion Coverage Update

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Florida, California Coverage Cases

Pre-Tender Costs – Eleventh Circuit (Florida Law)

EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am.
--- F.3d ---, 2017 WL 74694 (11th Cir. Jan. 9, 2017)

The U.S. Court of Appeals for the Eleventh Circuit held that Travelers Property Casualty Company of America (Travelers) was not obligated to pay for an insured's pre-tender defense costs from an underlying copyright infringement suit because Travelers did not violate Florida's Claims Administration Statute (CAS) and these costs were excluded under the liability policy. The insured waited over 18 months to notify Travelers of the underlying litigation, and Travelers refused to pay for pre-tender defense costs, citing a provision in the policy that no insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense without Travelers' consent. The insured claimed that Travelers violated the CAS by waiting 39 days to notify the insured about the refusal to cover these costs, as the statute requires 30-days' notice. The appellate court ruled in favor of Travelers, finding that "[t]he policy provision here precluding reimbursement for litigation expenses incurred by an insured without the prior consent of the insurer falls within the exclusion category, not the coverage defense classification." The appellate court held that because "Travelers relied on an exclusion, not a coverage defense, in its refusal to pay [the insured]'s pre-tender legal expenses ... the CAS does not control." The appellate court concluded that "[b]ecause the CAS cannot resurrect coverage that has been explicitly excluded and because the provision at issue here constitutes such an exclusion, ... [the insured] is not entitled to reimbursement of legal expenses that it incurred without the permission of Travelers."

Occurrence – California

Navigators Specialty Ins. Co. v. Moorefield Constr., Inc.
--- Cal. Rptr. 3d ---, 2016 WL 7439032 (Cal. Ct. App. Dec. 27, 2016)

The California Court of Appeals ruled that a general contractor's installation of flooring tiles over a vapor-emitting concrete slab was not an occurrence under a CGL policy. The general contractor was

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required to ensure that the concrete slabs were dry and could only have a specified maximum moisture content before installing the tile. Despite the fact that the concrete slabs exceeded the specified moisture content, the general contractor installed the tile flooring over the concrete slabs. Ultimately, the flooring failed, causing various damages. In deciding that the general contractor was not afforded coverage under the policy, the appellate court recognized that, under California law, "[a]n accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." The appellate court concluded that the general contractor's "conduct was not an accident because it was a deliberate decision made with knowledge that the moisture vapor emission rate from the concrete slab exceeded specifications" and "[t]he damage was not produced by an additional, unexpected, independent, and unforeseen happening."

Insured-Versus-Insured Exclusion – Ninth Circuit (California Law)

Federal Deposit Ins. Corp. v. BancInsure, Inc.
--- Fed. Appx. ---, 2017 WL 83489 (9th Cir. Jan. 10, 2017)

The U.S. Court of Appeals for the Ninth Circuit held that the insured-versus-insured exclusion in a directors-and-officers-liability-insurance policy clearly applied to preclude coverage. The Federal Deposit Insurance Corporation (FDIC), as the receiver of the failed Security Pacific Bank (Security Pacific), sued Security Pacific alleging negligence, gross negligence and breach of fiduciary duty committed by a number of former Security Pacific directors and officers. FDIC then sought insurance coverage for the losses related to these claims from a directors-and-officers liability insurance policy issued to Security Pacific by BancInsure, Inc. (BancInsure). The insured-versus-insured exclusion in the policy excluded "from coverage losses arising from legal actions brought 'by, or on behalf of, or at the behest of' Security Pacific, a person insured under the D&O Policy, or 'any successor, trustee, assignee or receiver' of Security Pacific[.]" The appellate court disagreed with the FDIC's arguments concerning the term "receiver" and held that "the term 'receiver' is clear and unambiguous and includes the FDIC in its role as receiver of Security Pacific." More specifically, the FDIC, as the receiver of Security Pacific, was the successor of Security Pacific's board of directors' rights, which included the right to bring a claim against Security Pacific's former directors and officers. Because the insured-versus-insured exclusion would have barred coverage of a claim brought by Security Pacific's board of directors against its former directors and officers, the insured-versus-insured exclusion also barred coverage of a claim brought by the FDIC as receiver against Security Pacific's former directors and officers. Accordingly, "the FDIC's claims fall within the scope of the D&O Policy's insured-versus-insured exclusion."

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