PLUNKETT COONEY

Punitive Damages, Lost Policies, Preemption Coverage Update

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Colorado, Illinois, Sixth Circuit Insurance Coverage Update
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Punitive Damages – Tenth Circuit (Colorado Law)

Ace Am. Ins. Co. v. Dish Network, LLC
--- F.3d ---, 2018 WL 988404 (10th Cir. Feb. 21, 2018)

The U.S. Court of Appeals for the Tenth Circuit affirmed the district court's ruling that statutory damages stemming from violations of the Telephone Consumer Protection Act (TCPA) were penalties and, therefore, not insurable as a matter of Colorado public policy. The appellate court determined that "a claim for either non-willful or willful statutory damages under the TCPA is a claim for a penalty" and that "[t]he public policy of Colorado prohibits an insurance carrier from providing insurance coverage for punitive damages." Moreover, the appellate court noted that "Colorado courts focus on the precise TCPA remedy sought by the plaintiff, and where that claim is for statutory damages, the TCPA is treated as penal under Colorado law." Because the appellate court viewed the statutory damages as punitive damages, it ruled them to be uninsurable pursuant to established Colorado law

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Lost Policies – Illinois

Travelers Indem. Co. v. Rogers Cartage Co.
--- N.E.3d ---, 2017 WL 6997285 (Ill. Ct. App. Dec. 29, 2017)

The Illinois Court of Appeals held that the insured established by a preponderance of the evidence the existence and terms of missing Comprehensive General Liability (CGL) and auto policies the insurer issued from the 1960s and 1970s based on several secondary sources. The appellate court first found the insured established the existence of several CGL policies based on a claim adjuster's letter referencing secondary evidence of these policies, when considered in conjunction with a certificate of insurance issued during the time period, the existence of bookend policies, the absence of any evidence showing that the insurer did not issue these policies, and the absence of any evidence showing that the insured was covered under CGL policies from other insurers. The appellate court also found that the insured established the material terms and conditions of such policies as "the existence of the bookend policies and the specimen policies, all of which contain substantially the same material terms and conditions, coupled with the absence of any affirmative evidence suggesting the presence of different terms or conditions, supports a reasonable inference that the missing CGL policies contained

the same material terms and conditions as the bookend and specimen policies." Lastly, the appellate court found that the insured established the terms and conditions of auto policies from 1961 to 1970 as the insurer's documentation indicated it annually renewed the known auto policy from 1958 to 1970.

Preemption – Sixth Circuit

D & S Remodelers, Inc. v. Wright Nat'l Flood Ins. Servs., LLC
--- Fed. Appx. ---, 2018 WL 846574 (6th Cir. Feb. 14, 2018)

The U.S. Court of Appeals for the Sixth Circuit held that the Flood Insurance Act of 1968 (NFIA) preempts all disputes arising from the handling of any claim under a flood insurance policy. Following Hurricane Sandy, a condominium association needed substantial work completed to repair damage. D&S Remodelers, Inc. (D&S) was working at a nearby building when a representative of either Colonial Claims Corporation (Colonial), an insurance adjuster, or Wright National Flood Insurance Company (Wright), a flood insurance provider that provided flood insurance to the condominium association, requested emergency floodwater-pumping services at the condominiums. D&S and the condominium association entered into an agreement to perform various emergency flood remediation services. After those services were completed, representatives of Colonial and Wright instructed D&S to provide additional remediation and repair services that were broader in scope than the initial emergency services, to which Wright allegedly agreed to pay under the flood insurance policy. D&S was not paid for the flood remediation and repair services, and filed a lawsuit against Colonial and Wright for state law claims of breach of contract, unjust enrichment, intentional and negligent misrepresentation, and fraudulent inducement. The appellate court determined that the NFIA preempted D&S's claims because the "NFIA indisputably preempts state-law causes of action based on 'the handling and disposition of … claims' relating to a flood insurance policy," and affirmed the trial court's dismissal of Colonial and Wright.

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