PLUNKETT COONEY

Settlement Agreement, Business Risk Exclusions, Unavailability of Insurance Rule Coverage Update

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West Virginia, California and Connecticut Coverage Cases
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Settlement Agreement – West Virginia

Penn-America Ins. Co. v. Osborne
--- S.E.2d ---, 2017 WL 878716 (W. Va. Mar. 1, 2017)

The West Virginia Supreme Court ruled that an insurer was not bound by a settlement agreement because it was not a party to the lawsuit in which the settlement agreement was entered. After suffering a leg injury, the injured party sued Heartwood Forestland Fund, IV, Limited Partnership (Heartwood) and Allegheny Wood Products, Inc. (Allegheny). Heartwood and Allegheny subsequently entered into a settlement agreement with the injured party, consented to a $1 million judgment and agreed to assign any claim they had against Penn-America Insurance Company (Penn-America) for failing to provide a defense in the lawsuit. In exchange, the injured party agreed not to execute the judgment against Allegheny or Heartwood. The injured party dismissed his lawsuit against Allegheny and Heartwood and filed suit against Penn-America. In that lawsuit, Penn-America argued that the settlement agreement was not binding on it because Penn-America was not a party to the underlying lawsuit and was not given notice of the parties' negotiations. The Supreme Court agreed and held that "[a] consent or confessed judgment against an insured party is not binding on that party's insurer in subsequent litigation against the insurer where the insurer was not a party to the proceeding in which the consent or confessed judgment was entered. …"

Business Risk Exclusions – Ninth Circuit (California Law)

Archer W. Contractors, LTD v. Nat'l Union Fire Ins. Co. of Pittsburgh
--- Fed. Appx. ---, 2017 WL 816891 (9th Cir. Mar. 2, 2017)

The U.S. Court of Appeals for the Ninth Circuit ruled that an insurer had no coverage obligations for the settlement of an underlying construction defect lawsuit based on two business risk policy exclusions. The insured was a general contractor for the construction of a pump house for an emergency water storage facility, and the San Diego County Water Authority filed suit against the insured, alleging property damage to the pump house and turbine generators. At issue were two exclusions that

respectively precluded coverage "for property damage to 'that particular part of real property on which [the contractor] ... [is] performing operations, if the Property Damage arises out of those operations,'" and "for property damage to 'that particular part of any property that must be restored, repaired, or replaced because [the contractor's] Work was incorrectly performed on it.'" In ruling that both exclusions applied, the appellate court recognized that "California courts have consistently adopted broad interpretations of the phrases 'that particular part' and 'arises out of' when applied to a general contractor." The appellate court specifically noted that California courts "have construed 'that particular part' to encompass the entire project on which a general contractor is performing operations." The appellate court ultimately determined "the alleged property damage was to the pump house and turbine generators, discrete portions of the property for which [the insured] was partially if not fully responsible, and the damage flowed from its allegedly defective work on the property."

Unavailability of Insurance Rule & Occupational Disease Exclusion – Connecticut

R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.
--- A.3d ---, 171 Conn. App. 61 (Conn. App. Mar. 7, 2017)

The Connecticut Court of Appeals determined several issues regarding commercial general liability policies in the context of complex asbestos litigation. In particular, the appellate court affirmed that when insurance is unavailable to a policyholder, that policyholder does not have to share in costs related to the asbestos personal injury claims for years it was unable to purchase insurance coverage. While the appellate court acknowledged that such a rule may result in certain insurers bearing a disproportionate share of the financial burden, it stated that "[u]ltimately, we believe that the allocation system that we have adopted … – pro rata time-on-the-risk, employing a continuous trigger and an unavailability rule – distributes the burdens equitably among all parties involved and maximizes the resources available to respond to claims while minimizing administrative hassles and transaction costs." The appellate court also found that the trial court erred in using a workers' compensation statute to limit the application of occupational disease exclusions in the subject policies to claims by the company's own workers. The appellate court engaged in a plain meaning interpretation of the occupational disease exclusions and concluded that they "unambiguously bar coverage for occupational disease claims brought not only by employees of [the policyholder] but also by individuals who contracted an occupational disease in the course of their work for other employers."

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