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CaseWatch: Insurance

The latest court decisions and developments | Vol.19, No. 3

CGL EXCLUSIONS

"Your Work" Exclusion Applies to All of Policyholder's Work

Auto-Owners Ins. Co. v. Elite Homes, Inc.
(11th Cir., Jan. 23, 2017)

The insurer sought judgment that it owed no coverage for property damage claims based on the "damage to your work" exclusion." The court stated that the underlying complaint did not allege damages beyond damage to the named insured's work as there were no allegations beyond damage to the underlying plaintiff's home, which was constructed by the named insured. Therefore, the court found there was no coverage under the policy based on the damage to your work exclusion.

Safety Supervision Falls Within Professional Services Exclusion

Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co.
(6th Cir., Jan. 20, 2017)

The court found that the insured's general liability insurers did not have a duty to defend the insured in underlying action — which alleged that the insured was negligent in its duty to supervise construction operations, provide adequate safety supervision, and include in its project plans ways to ensure the safe removal of digester lids — because the allegations fell inside the professional services exclusion in the policies.

"Labor Law" Exclusion Enforced

United Specialty Ins. Co. v. CDC Hous., Inc.
(S.D.N.Y., Feb. 9, 2017)

The insurer issued a policy to the insured which contained an exclusion for bodily injury to employees of subcontractors — a so-called "labor law exclusion." An employee of a subcontractor was injured on the job and the named insured sought coverage. The court found there was no coverage under the policy.

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CaseWatch: Insurance, a collaborative effort of Goldberg Segalla's Global Insurance Services Practice Group, provides summaries of and access to important insurance law decisions and legislation.

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DUTY TO DEFEND

Duty to Defend Gunshot Suit Because Complaint Lacked Language of Intent

Certain Underwriters at Lloyd's London v. Butler
(D.S.C., Feb. 13, 2017)

A patron was shot in both legs while a guest at an insured night club. The patron brought a suit against the policyholder for, among other causes of action, negligently failing to secure the premises and failing to maintain control of the area. Importantly, this underlying complaint did not contain language alleging that the gun was fired with intent to cause bodily injury or associated with a dispute. The insurer filed a declaratory judgment action based on the "assault and battery" exclusion, which excluded coverage for any claim arising from an "assault and/or battery regardless of culpability or intent." The court denied the insurer's motion for summary judgment and ruled the exclusion did not bar coverage because the language of the underlying complaint created a possibility that the injury did not arise out of an assault or battery.

Pollution Exclusion Bars Coverage for Explosion at Natural Gas Facility

Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co.
(8th Cir., Jan. 31, 2017)

The owner of a natural gas processing facility was sued by a worker injured at the facility when a hydrocarbon condensate tank overflowed, causing an explosion. The owner had contracted with an insured contractor to perform work at the facility, and the injured worker was an employee of a subcontractor. The Eighth Circuit ruled there was no duty to defend based on the policy's pollution exclusion because hydrocarbon condensate was a pollutant.

ENVIRONMENTAL

Assignment of Occurrence-Based Policy After Expiration Deemed Post-Loss Assignment

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.
(N.J., Feb. 1, 2017)

After contamination of a site, a policyholder assigned its rights to several insurance policies. The assignee thereafter sought coverage under those policies for environmental claims later brought by governmental entities. The insurers argued that since they did not consent to the assignment, and the claims had not been reduced to judgment, the assignment violated the anti-assignment clause. The court determined that anti-assignment clauses only applied to assignments prior to a loss, and did not prohibit post-loss assignments. The court further explained that since the policies were occurrence-based, and the policy periods expired prior to the assignment, the assignment of the environmental claims was effectively a post-loss assignment that did not increase or alter the risk of exposure contractually undertaken by the insurers.

FRAUD

California Officials Bust San Diego Insurance Fraud Ring

February 2, 2017

The California Department of Insurance and San Diego County District Attorney's office recently announced the arrest of nine individuals for insurance fraud. The San Diego Automobile Insurance Fraud Task Force discovered and busted an auto insurance fraud ring in which nine defendants made claims for over $200,000 and bilked 12 insurance companies out of approximately $125,000 on those fraudulent claims. "Victim insurance companies include: Allstate, Access, GEICO, Infinity, State Farm, Rental Insurance Services, Fred Loya, Nationwide, Alliance, Farmers, Nations, and Travelers." The taskforce "is made up of law enforcement officers from the Department of Insurance, the San Diego District Attorney's Office, and California Highway Patrol. The National Insurance Crime Bureau also provides support to the task force."

LOST POLICIES

Secondary Evidence Creates Issue of Fact Regarding Lost Policies

E.M. Sergeant Pulp & Chem. Co. v. Travelers Indem. Co.
(D.N.J., Jan. 19, 2017)

The policyholder initiated a declaratory judgment action to obtain defense costs and indemnity for environmental remediation claims that arose from activities on the policyholder's property between 1942 and 1984. As a significant period of time elapsed since the alleged contamination, the policyholder was unable to locate its insurance policies. Instead, the policyholder proffered indirect evidence to show the type of policies issued, such as ledgers and bookkeeping reports. The insurer moved for summary judgment, and argued that there was insufficient evidence to show that the insurer issued any insurance to the policyholder, or the relevant terms of such insurance policies. The court held that the secondary evidence proffered by the policyholder, coupled with the expert testimony that explained the evidence, was sufficient to create a triable issue of fact regarding whether the policies were actually issued.

PERSONAL AND ADVERTISING INJURY

"Wrongful Entry" Must Be on Owner's Behalf to Constitute "Personal Injury"

Admiral Indemnity Co. v. 899 Plymouth Court Condominium Association
(N.D. Ill., Jan. 24, 2017)

Two lawsuits were brought against the policyholder, a condominium association, for water damage suffered by a commercial unit in its building. While defending under a reservation of rights, the insurer filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify the policyholder. With respect to coverage for "personal and advertising injury," the policyholder argued the insurer had a duty to defend since the invasion of the right of private occupancy offense was satisfied. The court rejected this argument, stating the invasion had to be committed on behalf of the owner. Accordingly, since the policyholder was not the owner, there was no "personal and advertising injury." Notwithstanding the lack of "personal and advertising injury," there was coverage for other claims asserting "property damage."

Intellectual Property Exclusion Applied Broadly to Claims Linked to Trademark

Catlin Specialty Insurance Co. v. Tegol, Inc.
(W.D.N.C., Jan. 19, 2017)

The coverage issue arose when the policyholder — who designs, manufactures, and sells motorcycle helmets — began using the trademark "Rebel Helmets" on its products. However, a competitor, which used the same mark, filed suit contending a series of trademark violations among other claims. The coverage dispute was whether two insurers had the duty to defend the policyholder. After filing dispositive motions, a North Carolina federal district court determined the insurers' intellectual property exclusions barred coverage. Although the underlying complaint contained other causes of actions besides trademark infringement, the exclusions applied to the other claims (i.e. trade name infringement, slogan infringement, and unfair competition) because they could not be extricated from the trademark infringement allegations.

The Intellectual Property Exclusion Strikes Again

Sentinel Insurance Co. v. Yorktown Industries, Inc.
(N.D. Ill., Feb. 2, 2017)

An underlying plaintiff sued the policyholder, which sells and distributes office supplies, alleging that the policyholder hired the underlying plaintiff's employees as independent contractors and stole confidential information, including sales statistics. It also alleged that through the confidential information it obtained, the policyholder diverted sales from the underlying plaintiff to the policyholder. The underlying complaint contained claims for violations of the Uniform Trade Secrets Act, civil conspiracy, and intentional interference with prospective business advantage, among others.

The insurer denied the policyholder's tender and the insurer initiated the instant declaratory judgment action seeking a ruling that it owed no coverage. Notably, the insurer contended the underlying plaintiff did not allege "personal and advertising injury" and that the Intellectual Property Exclusion barred coverage. The Illinois federal district court first concluded the usage of stolen date did not amount to a "advertising injury" since there were no allegations that the policyholder used any of the underlying plaintiff's advertising plans, schemes, or designs to contact customers. In addition, the Intellectual Property Exclusion also barred coverage because every claim in the underlying complaint was predicated on the misappropriation of trade secrets.

Complaint Merely Referencing Trademark Issues Does Not Trigger Coverage

IVFMD Florida, Inc. v. Allied Property & Casualty Insurance Co.
(11th Cir., Feb. 8, 2017)

The issue on appeal was whether the policyholder, a reproductive medical institute, was entitled to coverage in relation to trademark claims contained in counterclaims filed by an entity with a similar name. Analyzing Florida law, the Eleventh Circuit concluded the subject counterclaims did not trigger defense obligations under the policy. Notably, the counterclaimant did not contend the name at issue was its idea or concept for promotion of in vitro fertilization services or allege copyright, trade dress, or slogan infringement related to the name. The court found the counterclaims merely suggested the name at issue was not distinctive and, therefore, could be used by both parties, and thus did not fall within the scope of "personal and advertising injury."

Prior Noticed Claims Exclusion No Bar for Disparagement During Policy Period

Millennium Laboratories, Inc. v. Darwin Select Insurance Co.
(9th Cir., Jan. 27, 2017)

The policyholder's sales team was alleged to have made disparaging statements to customers that the competitors' businesses were illegal during their policy period. The insurer contended the policy's prior noticed claims exclusion barred coverage. While the policyholder had reported other claims in the third-party complaints to previous insurers, the Ninth Circuit held the policyholder could not have reported the potential disparagement claim to the previous insurers since those events first occurred during the policy period in question.

PRIORITY OF COVERAGE/ ALLOCATION

Primary and Non-Contributory Coverage Endorsement Only Applies to Other Insurance Covering Additional Insured for Named Insured's Work

Colony National Insurance Company v. United Fire & Casualty Company (5th Cir., Jan. 31, 2017)

The employee of a subcontractor at a construction site allegedly sustained catastrophic injuries when a wall being hoisted swung uncontrollably and struck him. The injured employee filed suit against the general contractor and another subcontractor. The court determined both the employer's insurer and the other sub's insurer owed the general contractor a duty to defend. It also held that the employer's insurer's primary and non-contributory endorsement did not apply to coverage provided to the general contractor by the other subcontractor. Since the endorsement only provided primary and non-contributory coverage to the general contractor for the named insured subcontractor's work, it did not apply to coverage for losses attributable another subcontractor. Both policies were primary.

Priority of Coverage Did Not Turn on Competing "Other Insurance" Clauses, But on the Insured's Status as a Property Manager

Scottsdale Insurance Company v. Steadfast Insurance Company (S.D. Tex., Feb. 17, 2017)

A federal district court in Texas resolved a priority of coverage dispute among two insurers that included, in part, two policies, each of which would respond to an underlying bodily injury claim against a real property manager in which a five-year-old was injured seriously after he fell into a swimming pool. One policy contained standard "other insurance" language. The other contained the same language, plus an endorsement that made it excess for real property managers. Because the defendant was a property manager, the endorsement in the second policy made the policy excess, regardless of whether other insurance existed. Notably, however, the "excess language" did not make it excess to a true umbrella policy. The second policy therefore was excess to the other primary policy, but had to be exhausted before the true excess policy was triggered.

PROFESSIONAL LINES INSURANCE

"Disciplinary Proceeding" as Defined in Lawyers' Professional Liability Policy Is Broadly Interpreted to Include Initial Inquiry From State Licensing Board

Trelles v. Cont'l Cas. Co., (La. App. 1 Cir., February 17, 2017)

The policyholder attorney received a letter from the Louisiana Attorney Disciplinary Board, Office of the Disciplinary Counsel on October 28, 2010 advising him that a professional misconduct complaint was made out against him. Formal charges of misconduct were filed with the Louisiana Attorney Disciplinary Board a year and a half later. Under the Lawyers Professional Liability policy issued by the defendant insurer, notice of a Disciplinary Proceeding needed to be "both received by the insured and reported in writing during the policy period or within 60 days after termination of the policy period."

The insurer denied a claim made by the insured regarding the misconduct complaint, asserting that the insured received notice of a disciplinary proceeding on October 28, 2010, prior to the effective date of the policy period. The policyholder argued that the October 28 letter did not constitute a Disciplinary Proceeding because there were no formal charges. The court, disagreeing with the insured, held that the definition of Disciplinary Proceedings "is more broadly defined in the policy to include an 'initial inquiry.'"

Professional Liability Policy Did Not Obligate the Insurer to Defend Its Insured in Proceedings That Sought Sanctions Against the Insured

Jones, Foster, Johnston & Stubbs, P.A. v. Prosight-Syndicate 1110 at Lloyd's (11th Cir., Feb. 14, 2017)

A professional liability insurer declined to provide a defense to its policyholder related to an order to show cause against employee attorneys regarding why they should not be held in contempt and sanctioned related to use of privileged information in violation of a protective order because the remedy sought was sanctions, which were excluded. The court held that the attorneys' fees sought in the Contempt Motion were not "compensatory" because they were part of the sanctions.

REGULATORY

IRS Releases Guidance With Respect to ACA Executive Order

January/February 2017

On January 20, 2017, President Donald J. Trump issued an Executive Order directing federal agencies to, among other things, "exercise all authority and discretion available to them" to minimize burdens associated with the Affordable Care Act. In line with this directive, the Internal Revenue Service (IRS) announced that it is reversing a 2016 policy in which it "would reject tax returns during processing in instances where the taxpayer didn't provide information related to health coverage." Under the new policy (which is reflective of pre-2016 policy), the IRS will "continue to allow electronic and paper returns to be accepted for processing in instances where a taxpayer doesn't indicate their [health care] coverage status." The IRS will follow-up with individual taxpayers if additional information is required.

NAIC Opposes Covered Agreement at Congressional Hearing

February 16, 2017

The President of the NAIC and Wisconsin Insurance Commissioner, Ted Nickel, recently testified against the U.S.-E.U. Covered Agreement at a hearing entitled: Assessing the U.S.-EU Covered Agreement before the U.S. House of Representatives Subcommittee on Housing and Insurance, Committee on Financial Services. The NAIC objected to the Covered Agreement on several grounds including that the agreement "provides limited benefit to the U.S. insurance sector.

Specifically, the NAIC noted that the "agreement … fails to grant full 'recognition' by the E.U. of the U.S. insurance regulatory system, including with respect to group supervision." In addition, the NAIC raised concerns that it and other U.S. insurance regulators were not active participants in the negotiations of the agreement. However, Commissioner Nickel pledged that the NAIC would work with the Trump Administration, "E.U., Congress, and stakeholders to negotiate one which does." Other witnesses at the hearing included Charles Chamness, President and CEO, National Association of Mutual Insurance Companies; Leigh Ann Pusey, President and CEO, American Insurance Association; and Michael T. McRaith, Former Director of the Federal Insurance Office.

NAIC Opposes Key Amendment to McCarran-Ferguson

February 16, 2017

The NAIC has submitted testimony in opposition to the Competitive Health Insurance Reform Act of 2017 (the "Act"). The Act would amend the McCarran-Ferguson Act which exempts insurance regulation from federal antitrust provisions. The NAIC testimony stated, "Eliminating the anti-trust exemption in McCarran-Ferguson for health carriers will do nothing to address the real drivers of higher health insurance premiums: the cost of health care and utilization. In fact, as proposed, state regulators believe the Competitive Health Insurance Reform Act would lead to higher administrative costs, more confusion and uncertainty, and more instability in the health insurance markets and, therefore, higher premiums." Shortly after this testimony was submitted on January 24, 2017, the NAIC submitted a letter to key House Committee chairs reaffirming the benefits of state-based model of insurance regulation. The letter expressed concern about the number of federal proposals that would allow "sales across state lines by federal edict, without proper discretion for the states to form compacts between themselves."

Full U.S. Court of Appeals Agrees to Hear Significant CFPB Decision

PHH v. CFPB
(D.C. Cir. Feb. 2017)

In October 2016, a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held that a provision in Dodd Frank that only permits the President of the United States to fire the Director of the Consumer Financial Protection Bureau ("CFPB") for cause was unconstitutional. On February 16, 2017, the full court of appeals voided that decision and granted the CFPB's petition for the court to hear the case *en banc*. The court asked the parties to brief three questions:

1. Is the CFPB's structure as a single-director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute?
2. May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?
3. If the *en banc* court, which has today separately ordered en banc consideration of *Lucia v. SEC, 832 F.3d 277 (D.C. Cir. 2016)*, concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?

Oral arguments will take place in May 2017.

REINSURANCE

Applicability of a Valid Reinsurance Agreement Must Be Decided by an Arbitrator

HDI Global SE v. Lexington Ins. Co. (S.D.N.Y., Feb. 7, 2017)

A ceding insurer demanded arbitration under a reinsurance agreement containing a broad arbitration clause. The reinsurer brought this suit in the Southern District of New York to stay arbitration and determine whether the reinsurance agreement existed in the first place. The reinsurance agreement referred to a specific policy form; the cedent however accidently used another one when it issued policies. The reinsurer contended that it did not agree to reinsure the policies at issue in the suit, and therefore that the reinsurance agreement was void for lack of mutual assent. The Southern District determined that the reinsurance agreement was not void. Instead, the question was whether the reinsurance agreement covers losses under an entirely different policy than the one referred to in the agreement, and it was a question subject to arbitration. While whether a reinsurance contract or valid arbitration clause exists may be litigated, where there is a valid reinsurance contract and no challenge to the arbitration clause itself, the applicability of the reinsurance contract had to be arbitrated.

"Evident Partiality" Involves More Than Just Being Appointed as an Arbitrator for Affiliated Companies

Nat'l Indem. Co. v. IRB Brasil Reseguros S.A. (2d Cir., Jan. 31, 2017)

Following arbitrations regarding a dispute over retrocessional coverage, a reinsurer petitioned in federal court to vacate several arbitration awards in favor of a retrocessionaire. The reinsurer argued that a neutral umpire demonstrated "evident partiality" on behalf of the retrocessionaire as defined in the Federal Arbitration Act because he had been appointed as a party arbitrator for companies affiliated to the retrocessionaire in other ongoing arbitrations. The Second Circuit held that evident partiality is found when "a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side." Because the umpire had only a professional relationship with the retrocessionaire and its affiliate, and actually voted against the affiliate in his party arbitrator role, the Court held that there was no evident partiality, and the arbitration awards would stand.

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