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Professional Services Exclusion Precluded Coverage of Suit against Landscape Architect

The U.S. Court of Appeals for the Eleventh Circuit has ruled that architecture and construction services required "specialized skill or training," and therefore, qualified as professional services for purposes of an exclusion in insurance policies issued to a landscape architect.

The Case

After a traffic accident at an intersection in a residential community in Broward County, Florida, resulted in the death of an 11-year-old boy, his estate sued the "landscape architect" that allegedly had designed and constructed the intersection where the accident had occurred, asserting negligence.

The landscape architect's insurer refused to defend or indemnify the wrongful death action, basing its decision on the professional services exclusion in its insurance policies.

The landscape architect went to court, but the U.S. District Court for the Southern District of Florida dismissed the case. The dispute reached the Eleventh Circuit.

The Eleventh Circuit's Decision

The circuit court affirmed.

In its decision, the Eleventh Circuit ruled that the professional services exclusions were "clear," and that they applied to "any service requiring specialized skill or training."

It then decided that the landscape architect's alleged conduct in designing and constructing the intersection fell "squarely within the professional services exclusions." The circuit court reasoned that architecture and construction services required "specialized skill or training," and therefore, qualified as professional services.

Accordingly, the Eleventh Circuit concluded, the insurer did not have to defend or indemnify the wrongful death action.

The case is *Witkin Design Group, Inc. v. Travelers Property Casualty Co. of America*, No. 17-10488 (11th Cir. Oct. 19, 2017).

Workmanship and Earth Movement Exclusions Precluded Coverage of Suit against Developer

The U.S. Court of Appeals for the Fourth Circuit has ruled that workmanship and earth movement exclusions barred coverage of a developer's claim stemming from the collapse of a row house it was renovating.

The Case

A real estate development company was renovating a row house in Washington, D.C., when the east wall collapsed. The developer sought to recover the cost of repairs under its builder's risk insurance policy.

The insurer concluded that the collapse had been caused by the developer's failure to support the building's foundation properly while excavating the basement, and it denied the claim under a policy exclusion for losses resulting from defects in workmanship and construction (the "Workmanship" exclusion) and, alternatively, under a policy exclusion for losses caused by "movement or vibration of the earth's surface" (the "Earth Movement" exclusion).

The developer sued, and the U.S. District Court for the Eastern District of Virginia granted summary judgment to the insurer.

The district court first found that the Workmanship exclusion applied, reasoning that the damages associated with the collapse had been the "direct result" of the developer's "failure of workmanship."

It also concluded that the Earth Movement exclusion barred coverage, rejecting the developer's argument that the exclusion did not apply because the "movement" in this case had occurred *below* the earth's surface, at the basement level of the row house being renovated. According to the district court, although the movement that caused the east wall's collapse had occurred below grade, it "still involved movement of the earth surface (the uppermost layer of the soil and clay)."

The dispute reached the Fourth Circuit.

The Fourth Circuit's Decision

The circuit court affirmed.

In its brief opinion, the Fourth Circuit said that it had carefully considered the controlling law and the parties' briefs and oral arguments, and it affirmed on the reasoning of the opinion of the district court.

War Exclusions Precluded Coverage of Claim Stemming from Israel-Hamas Conflict

The U.S. District Court for the Central District of California has ruled that an insurance policy's war exclusions precluded coverage for losses claimed by a television production company during the summer 2014 conflict between Israel and Hamas.

The Case

Universal Cable Productions LLC was filming a television show in Israel during the summer of 2014 when security conditions deteriorated. Hamas fired rockets into Israel, and Israel took action to protect its civilian citizens and to stop those attacks.

Universal Cable decided to move production out of Israel and to relocate production to Croatia and New Mexico.

The conflict between Israel and Hamas was referred to worldwide as a war. During the conflict, among other things, Hamas and other militant groups fired over 4,000 rockets and mortar shells into Israel, while the Israeli government conducted over 5,000 airstrikes within Gaza and a 20-day military ground operation in Gaza.

Universal Cable sought reimbursement from its insurance company for the expenses it had occurred as a result of the production delay and its relocation of production.

The insurer denied Universal Cable's claim, relying on its policy's war exclusions, and Universal Cable sued.

The insurer moved for summary judgment.

The District Court's Decision

The district court granted the insurer's motion.

In its decision, the district court said that it had "little trouble" concluding that the events occurring in Israel and Gaza in the summer of 2014 "constituted war" and that the policy's first war exclusion – barring coverage for loss caused by "[w]ar, including undeclared or civil war" – applied to preclude coverage of the expenses Universal Cable had incurred as a result of the summer 2014 conflict.

The district court was not persuaded by Universal Cable's argument, and its citation to a number of New York court decisions, that war required the existence of a conflict between two sovereign or quasi-sovereign entities and that Hamas was a terrorist group rather than a military force of any origin. Applicable California law, the district court said, required that it apply the policy's terms "pursuant to their ordinary and popular sense."

The district court added that, in the common meaning, "war" could include conflicts both between sovereign entities and between other groups; the word did "not require a detailed

assessment of the structure of one or more of the parties to the conflict or their precise international standing."

The district court also found that coverage of Universal Cable's loss was precluded by the policy's second war exclusion, which applied to loss caused by "[w]arlike action by a military force." It rejected Universal Cable's argument that there had been no "warlike action" because Hamas was not a sovereign or a quasi-sovereign nation, declaring that this war exclusion was even "broader than the first."

The district court concluded that the Israeli-Hamas conflict in the summer of 2014 was accurately labeled a war, but said that even if it was not a war, the hostilities "certainly" qualified as "warlike."

The case is *Universal Cable Productions LLC v. Atlantic Specialty Ins. Co.*, No. CV 16-4435 PA (MRWx) (C.D. Cal. Oct. 6, 2017).

IP Exclusion Precluded Coverage of Trademark Infringement Claims against Condo Operator

A federal district court in Florida has ruled that an insurance policy's intellectual property exclusion barred coverage of claims alleging that the insured operator of a condominium complex had infringed on another corporation's trademark.

The Case

Land's End at Sunset Beach Community Association, Inc., the operator of a condominium complex in Treasure Island, Florida, successfully defended itself against an Alaskan corporation's claims that its use of "Land's End" in advertisements had infringed on the Alaskan corporation's trademark.

Land's End then filed a lawsuit against its commercial general liability insurer, contending that the insurer had a duty to defend Land's End against the Alaskan corporation's claims as a "personal advertising injury."

The insurer moved for judgment on the pleadings. It relied on the policy's "Infringement of Patent, Copyright, Trademark or Trade Secret" exclusion (the "IP" exclusion), which barred coverage for "'personal and advertising injury' arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." The IP exclusion further provided that "[u]nder this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your 'advertisement.'" The exclusion, however, did not apply to "infringement, in your 'advertisement,' of a copyright, trade dress or slogan."

Land's End argued that the claim against it fell within the "personal and advertising injury" offense for the "use of another's advertising idea in your 'advertisement,'" and for "infringing

on another's copyright, trade dress or slogan in your 'advertisement.'" In essence, Land's End argued that the suit alleged unfair competition, which was broader than trademark infringement, and also involved the infringement of a slogan. It argued that the IP exclusion did not apply to the advertising idea offense, and that the slogan infringement fell within the exception to the IP exclusion.

The District Court's Decision

The district court agreed with Land's End that the unfair competition count fell within the advertising idea offense. It disagreed, however, that the suit alleged slogan infringement, as "Land's End" could not serve as both a trademark and a slogan.

The court next turned to the IP exclusion. It granted the insurer's motion, finding that the claims against Land's End were excluded from coverage. The court acknowledged that an unfair competition claim could theoretically be broader than a trademark claim. The court was not concerned, however, with what could be alleged, but rather, what was actually alleged.

In its decision, the district court explained that all that the Alaskan corporation had alleged was that Land's End had infringed on its trademark. The district court observed that the policy's IP exclusion barred coverage for claims arising out of trademark infringement, and it ruled that the Alaskan corporation's claims against Land's End were "clearly excluded from coverage."

The court also found that the second sentence of the IP exclusion did not apply. The exception did not apply to trademark infringement, only the infringement of other intellectual property rights. The court explained that this decision makes sense. It reasoned that given the "broad definition of advertising idea under Florida law," all cases of trademark infringement involving advertisements would fall within the exception to the IP exclusion if the court were to adopt Land's End's position. In such case, the exception would swallow the rule, which could not be the policy's intent.

The case is *Land's End at Sunset Beach Community Ass'n, Inc. v. Aspen Specialty Ins. Co.*, No: 8:17-cv-1740-T-30TGW (M.D. Fla. Oct. 3, 2017).

Damage to Property and Professional Services Exclusions Precluded Coverage for Claim of Damaged Oil Well

A federal district court in Texas has ruled that two exclusions barred coverage for claims that the insured had negligently caused damage to an oil well.

The Case

CBX Resources, LLC, the lessee of a mineral tract in Zavala County, Texas, arranged for the drilling and operation of a well to be performed by Espada Operating, LLC. Espada drilled the well bore, placed surface and production casing into the well, and installed a fracking system into the production casing.

When Espada attempted to pull the production casing out of the well bore, it discovered a fracture in the well. Espada determined that the production casing below the fracture could not be recovered from the well bore, resulting in the plugging and abandonment of the well.

CBX sued Espada for damages arising from its total loss of the use of the well. Espada's insurer declined to defend Espada, citing its policy's "damage to property" exclusion and "professional services" exclusion.

The trial court found that Espada had been negligent and awarded damages and interest to CBX.

Espada assigned any rights it had against its insurer to CBX, which then filed suit.

The insurer moved for summary judgment on the duty to defend.

The District Court's Decision

The district court granted the insurer's motion.

In its decision, the district court rejected CBX's contention that the "damage to property" exclusion precluded coverage only for damage to the production casing and/or the completion liner of the well but not physical injury to, and loss of use of, the well in its entirety.

The district court agreed with the insurers that because all the parts were necessary to the whole, the exclusion barred coverage for the whole well rather than just components of it.

The district court ruled, therefore, that the property damage alleged by CBX, including the physical injury to, and loss of use of, the well, fell within the "property damage" exclusion and was excluded from coverage.

The district court next decided that the professional services exclusion also precluded coverage for the damage to the well. It reasoned that CBX had alleged that Espada had failed "to perform[] oil and gas well drilling and completion services to deliver a producing well for [CBX]." Those activities, the district court concluded, were "all indisputably professional tasks requiring specialized knowledge."

The case is *CBX Resources, LLC v. Ace American Ins. Co.*, No. 5:17-CV-17-DAE (W.D. Tex. Oct. 16, 2017).

Late Notice Doomed Coverage of Suit against Security Company

The U.S. Court of Appeals for the Fifth Circuit, affirming a Texas district court's decision, has ruled that an insurance company was not obligated to defend or indemnify a security company where it had not received timely notice of the action against the company.

The Case

A waitress working at a nightclub was shot after armed gunmen entered and began shooting at patrons and employees. She sued the security company for negligence, alleging that it had not provided adequate security for her.

The security company was served with process, but did not make an appearance.

The state court granted the waitress' motion for default judgment against the security company. Six weeks later, her counsel sent a letter to the security company's insurer, seeking "a resolution, and payment of the judgment amount."

The insurer asked the U.S. District Court for the Southern District of Texas to declare that it had no duty to defend or indemnify the security company for the judgment.

The district court found that the insurer had not received notice of the initial lawsuit until over 40 days after the state court had entered a default judgment against the security company. The district court concluded that, under Texas law, the delay in providing notice of the suit resulted in the insurer having no duty either to defend the security company in the lawsuit or to indemnify it for the default judgment.

The waitress appealed to the Fifth Circuit.

The Fifth Circuit's Decision

The circuit court affirmed.

In its decision, the Fifth Circuit found "no factual dispute" that the insurer had first received notice of the lawsuit when the waitress' counsel sent a letter to the insurer more than 40 days after the state court had entered default judgment against the security company. The circuit court pointed out that the insurance policy required notice to the insurer "as soon as practicable . . . [i]f a claim is made or 'suit' is brought" against the insured, and it concluded that the delayed notice had prejudiced the insurer as a matter of law and had relieved it of liability under the policy.

The case is *Nautilus Ins. Co. v. Miranda-Mondragon*, No. 17-20261 (5th Cir. Oct. 20, 2017).

Insurer That Accepted Defense without Reservation of Rights Did Not Have to Pay Defense Costs Where Insured Refused to Relinquish Control

A Massachusetts appellate court has ruled that an insurer that accepted the defense of its insured without a reservation of rights had no obligation to pay its insured's defense costs where the insured refused to permit the insurer to control the defense.

The Case

After numerous lawsuits were filed against Celanese Corporation involving claims of bodily injury from asbestos and chemicals allegedly contained in Celanese's products or facilities, it demanded that its insurer defend the claims under its general liability insurance policies.

The insurer agreed to defend Celanese without a reservation of rights, offering to waive any

issues of coverage and to indemnify Celanese from any settlements or judgments up to its full liability limits.

The insurer, however, also sought to assume full control of Celanese's defense of these claims.

In response, Celanese refused to cede its control of the defense to the insurer, alleging that a "demonstrated conflict of interest" existed.

The insurer advised Celanese that it did not consent to Celanese's retention of independent counsel and was not contractually obligated to compensate Celanese for such defense costs.

The insurer then filed an action for declaratory relief.

A trial court declared that the insurer had the right to control the defense of the claims against Celanese as a result of its offer to defend without a reservation of rights. The dispute reached a Massachusetts appellate court.

The Massachusetts Appellate Court's Decision

The appellate court ruled that the insurer had the right to control Celanese's defense where it had offered to defend without a reservation of rights, and had no obligation for the legal fees Celanese had incurred after it refused the insurer's offer.

In its decision, the appellate court explained that, in Massachusetts, where an insurer offered to defend its insured under a reservation of rights, and the insured was unwilling to allow the insurer to do so, the insured could require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs. In other words, the appellate court said, an insurer could not reserve its rights to disclaim liability in a case and at the same time insist on retaining control of its defense.

The appellate court then reasoned that, when an insurer offered to defend its insured without a reservation of rights, it could "retain control of that defense."

Here, the appellate court observed, Celanese's insurer offered to defend Celanese against asbestos and chemical product injury claims without a reservation of rights and, as a result, it had the right to control Celanese's defense of those claims. The right to control Celanese's defense included the authority to choose the counsel to defend the claims and to make other decisions related to control of the defense that traditionally would be vested in the insured, as a named party in the case, the appellate court ruled.

Finding no sufficient conflict of interest to justify Celanese's refusal of its insurer's control of the defense, the appellate court concluded that Celanese had unjustifiably refused its insurer's offer to defend without a reservation of rights and, therefore, the insurer was not liable for legal fees that Celanese had incurred in conducting its own defense.

The case is *OneBeacon America Ins. Co. v. Celanese Corp.*, No. 16-P-203 (Mass. Ct. App. Oct. 16, 2017).

Missouri Appeals Court Applies "All Sums" and "Vertical Exhaustion" in Asbestos Coverage Case

An appellate court in Missouri, affirming a trial court's decision, has ruled that an "all sums" allocation, with "vertical exhaustion," applied to coverage of asbestos claims under excess insurance policies.

The Case

In the 1990s, plaintiffs began filing lawsuits against Nooter Corporation for asbestos-related bodily injuries. The suits involved similar allegations (i.e., personal injury caused by exposure to asbestos at Nooter sites), although each claim involved different exposures based on each claimant's work history or unique circumstances that allegedly exposed the claimants to asbestos. Moreover, most of the suits were "long-tail" claims involving allegations of continuous or escalating damages over a range of time, sometimes spanning several years, or even decades.

Nooter sought defense or reimbursement for those expenses under various insurance policies. Nooter and its "first level" and "second level" excess insurers disagreed on coverage, and litigation ensued.

A trial court in Missouri held that an "all sums" allocation method, and "vertical exhaustion," applied to the claims against Nooter under the excess policies.

The excess insurers appealed.

The Missouri Appellate Court's Decision

In its decision, the appellate court first upheld the trial court's "all sums" ruling.

It observed that all of the policies had some type of "all sums" language ("all sums," "the sum," "the sums," or "the total sum") as well as language limiting losses or occurrences to a particular policy period ("during the [policy] period," "while this policy is in force," "occurring during the policy period," or "coming within the terms and limits of this [policy]").

The appellate court ruled that, in the context of the excess policies issued to Nooter, the two categories of language – permutations of "all sums" language and "during the policy period" language – operated in a substantially similar manner, and it affirmed the trial court's grant of summary judgment in favor of Nooter regarding allocation.

Next, the appellate court upheld the trial court's decision to apply "vertical exhaustion."

The excess insurers argued that the "other insurance" clauses in their policies required Nooter to exhaust all "other valid and collectible insurance" before the excess policies attached. Nooter argued that the "other insurance" language addressed the rights among insurers and not insurers' obligations to policyholders.

The appellate court decided that both parties offered reasonable interpretations and that the "other insurance" provisions were ambiguous on the issue of exhaustion. Consequently, the appellate court resolved the ambiguity in favor of the insured, Nooter, concluding that vertical exhaustion applied to the excess policies.

The case is *Nooter Corp. v. Allianz Underwriters Ins. Co.*, No. ED103835 (Mo. Ct. App. Oct. 3, 2017).

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