RIVKIN RADLER LLP
ATTORNEYS AT LAW

January 2018 | Insurance Update | WWW.RIVKINRADLER.COM

Mandatory Presuit Process for Resolving Construction Defect Claims Was a "Suit," Florida Supreme Court Rules

The Florida Supreme Court has ruled that the statutory presuit "notice and repair" process set forth in Florida law to resolve construction defect claims amounted to an "alternative dispute resolution proceeding" that was included in the definition of "suit" in a commercial general liability insurance policy.

The Case

Altman Contractors, Inc. was the general contractor for the construction of Sapphire Condominium in Broward County, Florida. Between April 2012 and November 2012, Sapphire served Altman with notices claiming over 800 construction defects pursuant to a Florida law that required that notices about construction defects be served, with the contractor having the opportunity to repair any such defects, before the claimant could sue the contractor for damages.

Altman notified its commercial general liability insurer of Sapphire's claims, demanding defense and indemnification. The insurer determined that it had no duty to defend because the statutory notices served by Sapphire under Florida's statutory notice and repair process did not constitute a "suit."

After Altman settled all of Sapphire's claimed construction defects without any lawsuit being filed and without its insurer's involvement, Altman filed an action in the U.S. District Court for the Southern District of Florida seeking a declaration that the insurer owed it a defense and indemnification.

The district court granted summary judgment for the insurer, and Altman appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The circuit court asked the Florida Supreme Court to decide whether the presuit notice and repair process set forth in Florida law amounted to a "suit" within the meaning of the insurance policy issued to Altman.

The Florida Supreme Court's Decision

The Florida Supreme Court held that the statutory notice and repair process constituted a "suit" within the meaning of Altman's insurance policy.

In its decision, the court explained that the policy defined "suit" to include an "alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." The court then reasoned that "alternative dispute resolution"

meant "[a] procedure for settling a dispute by means other than litigation," and it concluded that the statutory notice and repair process fell within this definition as a statutorily mandated process that sought to encourage parties to settle claims for construction defects without resorting to litigation.

The court added that the statutory presuit process included "monetary payment" as a potential resolution of a claim, which met the damages requirement in the policy's definition of "suit."

The court concluded by noting that the policy's definition of "suit" required the insurer's consent to Altman's submission to the "alternative dispute resolution proceeding" in order to invoke the insurer's duty to defend Altman under the policy. The court specifically did not address whether the insurer had consented to Altman's participation in the presuit process as required by the policy, explaining that it was outside the scope of the certified question and an issue of fact disputed by the parties.

The case is *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. SC16-1420 (Fla. Dec. 14, 2017).

Connecticut Supreme Court Tackles "Business Pursuits" Exclusion

The Supreme Court of Connecticut has issued a noteworthy decision on an insurance policy's business pursuits exclusion under an unusual set of facts.

The Case

The insured owned a construction company and maintained an office in his home. An office employee was tied and gagged after a masked intruder demanded that she give him the combination to the safe. The intruder threatened to harm the employee and her family if she did not comply. The insured returned home during the incident and was attacked by the intruder. During the melee, the insured ripped off the intruder's mask, only to discover that he was a lifelong friend. The employee was untied and the intruder was permitted to leave without the police being notified. The insured refused to let the employee leave or call the police. The employee remained in the insured's home for hours in fear that harm would be done to her or her family.

The employee later sued the insured for false imprisonment. The insured sought coverage under his homeowners and personal umbrella policies.

The insurers defended under a reservation of rights. The insurers then went to court, seeking a declaration that they had no duty to defend or indemnify the insured in the employee's action.

The trial court ruled in favor of the insured and the appellate court reversed. The case reached the Connecticut Supreme Court, which considered whether the employee's alleged false imprisonment was excluded from coverage as an "[a]n occurrence arising out of the business pursuits . . . of an insured." The Connecticut Supreme Court stated that the analysis of both lower courts was flawed; neither one applied the proper standard for "arising out of" a business pursuit.

The Connecticut Supreme Court's Decision

In its decision, the court pointed out that the construction company's activities were a "business pursuit" and that false imprisonment was not. Therefore, the court reasoned, the question was whether the insured's alleged false imprisonment of the employee "arose out of" his business pursuits in operating the construction company.

The court said that the required causal nexus between the company's business pursuits and the alleged false imprisonment was not met "merely by a sequential relationship between the injury and the business pursuit." Accordingly, it said, the mere fact that the alleged false imprisonment had occurred after the employee had arrived at her workplace did not, in and of itself, establish the requisite connection.

The court also declared that an act did not have to be "exclusively" in furtherance of a business pursuit to satisfy the exclusion, so that the existence of a personal motive for the act would not have to negate application of the exclusion. Otherwise, the court pointed out, most tortious conduct (even if accidental) would be outside the scope of the business pursuits exclusion because tortious conduct rarely actually furthers a business purpose.

The court concluded that it could not determine on the basis of the "limited facts" found by the trial court or the record whether the business pursuits exclusion applied as a matter of law in this case to preclude coverage. Therefore, it remanded the case to the trial court to determine whether the facts required the application of the business pursuits exclusion.

The case is *Nationwide Mutual Ins. Co. v. Pasiak*, No. SC 19618 (Conn. Dec. 19, 2017).

"Claims in Process" Exclusion Precluded Coverage of Contamination Claim, Seventh Circuit Decides

The U.S. Court of Appeals for the Seventh Circuit, affirming a decision by the U.S. District Court for the Northern District of Indiana, has ruled that the owners of property contaminated before they took title were not entitled to insurance coverage to remediate the property even if they had not known that the property was contaminated when they purchased it.

The Case

From approximately 1946 to 2000, certain commercial property in Lake Station, Indiana, was used as a dry cleaning facility. It had six underground storage tanks, four of which were for petroleum-based Stoddard solvent, one for gasoline, and one for heating oil.

In 1999, the dry cleaning company reported a leak from the Stoddard solvent tanks to the Indiana Department of Environmental Management ("IDEM"). In 2000, a site investigation was conducted, an initial site characterization report was prepared, and five groundwater monitoring wells were installed.

On February 9, 2001, IDEM requested additional investigation to fully delineate the nature and extent of the petroleum pollution, as well as testing for volatile organic compounds. Due to a lack of information provided from the February 2001 request, IDEM requested additional testing on April 8, 2004.

On August 9, 2004, Juan and Maria Garcia, allegedly unaware of the contamination, purchased the property to operate an automobile repair shop and day spa. The Garcias said that they discovered that the property was contaminated in September 2014 and that an investigation revealed that chemicals from the Stoddard solvent tanks, Perchloroethylene solvent, and heating oil still affected the property.

The Garcias tendered a claim to their commercial general liability insurer. The insurer asserted the "Claims in Process" exclusion, which precludes coverage for losses or claims for damages arising out of property damage – known or unknown – that occurred or was in the process of occurring before the policy's inception.

The insurer sought declaratory relief, and filed a summary judgment motion. The U.S. District Court for the Northern District of Indiana granted the insurer's motion.

The Garcias appealed to the Seventh Circuit, arguing that the exclusion was ambiguous.

The Seventh Circuit's Decision

The circuit court affirmed.

In its decision, the circuit court rejected the Garcias' contention that the exclusion was ambiguous. It said that the exclusion precluded coverage for losses or claims for damages arising out of property damage – known or unknown – that occurred or was in the process of occurring before the policy's inception.

Thus, the Seventh Circuit continued, even if the property damage had occurred before the policy period but the damage had not been discovered, the exclusion barred coverage.

Finding no dispute that the damage to the Garcias' property had begun before the inception of the policies, the circuit court concluded that the exclusion barred recovery on behalf of the Garcias.

The case is *Atlantic Casualty Ins. Co. v. Garcia*, No. 17-1224 (7th Cir. Dec. 22, 2017).

Insurer Had No Duty to Defend Insured Who Breached Policy's Notice Requirement, Seventh Circuit Says

The U.S. Court of Appeals for the Seventh Circuit, reversing a district court's decision, has ruled that an automobile insurer had no duty to defend its insured given his 21-month delay in notifying the insurer about an accident.

The Case

Carl Brumit, the owner of Brumit Services, Inc., was backing out of a parking space when he struck a 68-year-old woman with the truck he used in his business. He was unaware that he had hit the woman until a bystander alerted him as he was driving away.

Brumit returned to the scene and observed that the woman was sitting down. In his statement to the responding police officer, he said that she "may have had a scratch on her knee." The woman was treated by an EMT, declined a trip to the hospital, and drove herself home. Brumit treated the incident as minor and did not report it to his insurer.

Almost two years later, the woman sued Brumit, and he notified his automobile insurance company that he had been sued.

The insurer sought a declaratory judgment that it had no duty to defend Brumit because Brumit had breached the policy's notice requirement.

The U.S. District Court for the Southern District of Illinois granted summary judgment in favor of Brumit, finding that his 21-month delay in notifying the insurer about the accident was reasonable as a matter of law. The court reasoned that it would not make sense for the insurer to want to know about "each and every accident" its insureds were involved in because its "phones would never stop ringing."

The insurer appealed to the Seventh Circuit.

The Seventh Circuit's Decision

The Seventh Circuit reversed, holding that Brumit's failure to provide prompt notice of the accident "was inexcusable under Illinois law."

In its decision, the circuit court first found that the policy language, which stated that the insurer had "no duty" to defend Brumit unless he provided "prompt notice" of the accident, was "unmistakably clear."

Any reasonable driver, the circuit court added, would have recognized that Brumit's accident "might lead to a claim." The circuit court added that although everyone at the scene on the day of the accident apparently viewed it as minor, it was "fairly common" for individuals involved in automobile accidents to experience injuries that did not manifest themselves until days, weeks, or even months after the accident.

The Seventh Circuit noted that Brumit had testified that he was aware that such latent injuries might arise, which indicated that he knew that the woman he struck with his truck might later claim to be injured as a result of the accident. The circuit court said that "every reasonable driver" should know that making contact with a person could plausibly lead to an insurance claim or a lawsuit.

Because a reasonable person would have known that a claim might be filed after the accident, Brumit could not avoid the mandatory policy language, the Seventh Circuit declared.

The circuit court reasoned that Illinois law expected someone of Brumit's intelligence and competence to understand his rights and obligations under a basic automobile insurance policy,

that Brumit at least should have called his insurance agent to determine whether the accident should have been reported (but he had not done so), and that Brumit's delay exposed the insurer to significant uncertainty and deprived it of the benefit it expected to receive from the notice provision.

Accordingly, the circuit court concluded that Brumit's 21-month delay in notifying his insurer was unreasonable as a matter of law and that Brumit had breached the policy's mandatory notice provision without a reasonable excuse. The insurer had no obligation to defend Brumit, the Seventh Circuit concluded.

The case is *State Auto Property and Casualty Ins. Co. v. Brumit Services, Inc.*, No. 17-1700 (7th Cir. Dec. 11, 2017).

Manufacturer's Asbestos Losses Were a Single Occurrence, Illinois Appeals Court Concludes

An Illinois appellate court, affirming a trial court's decision, has ruled that a manufacturer's asbestos-related losses resulting from its continuous manufacturing and selling of custom-designed ash-handling conveyor systems containing asbestos parts amounted to a single occurrence under its insurance policies and not multiple occurrences.

The Case

Beginning in 1983, United Conveyor Corporation, which designed, manufactured, and sold ash-handling conveyor systems for coal plants according to each customer's individual specifications, was named as a defendant in thousands of lawsuits by individuals claiming to have been injured from inhaling asbestos fibers from asbestos containing products in United's conveyor systems. United's insurer defended United under a full reservation of rights.

In January 2009, the insurer told United that all of the primary policies it had issued to United had been exhausted.

United thereafter filed a complaint seeking a declaration that the asbestos claims constituted multiple occurrences because the asbestos exposure had resulted from the separate installation and maintenance of the custom-designed conveyor systems, triggering the policies' higher aggregate limits and meaning that the policies had not been exhausted. United asserted that the insurer had breached the policies by treating the asbestos losses as a single occurrence.

The trial court granted summary judgment in favor of the insurer, finding that the underlying asbestos claims against United arose from its continuous manufacture and sale of conveyor systems that used asbestos containing materials and, therefore, constituted a single occurrence.

United appealed, arguing that the trial court had erred in entering summary judgment in the insurer's favor based on its finding that the asbestos claims had resulted from a single occurrence rather than multiple occurrences.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court ruled that the cause of United's loss was its continuous manufacture and sale of conveyor systems incorporating asbestos containing products. The appellate court said that the fact that each system had been designed to the customer's individual specifications – and, therefore, that the systems had not been mass produced – was "true, but beside the point."

In the appellate court's opinion, the "single, unitary cause of claims against United" was the fact that "it incorporated asbestos-containing components or products into each of its systems designed for high-heat operations." The appellate court added that "the installation and maintenance by United's customers did not give rise to United's liability; its manufacturing activities did."

Accordingly, the appellate court ruled, the claims against United related to a single occurrence and, as a consequence, the per-occurrence limit applied.

The case is *United Conveyor Corp. v. Allstate Ins. Co.*, No. 1-16-2314 (Ill. Ct. App. Dec. 5, 2017).

Sellers' Alleged Misrepresentations About Home's Concrete Were Not an Occurrence, Connecticut District Court Holds

A federal district court in Connecticut has ruled that a homeowner's insurance company had no obligation to defend or indemnify insureds who were sued for allegedly misrepresenting the condition of their home's concrete.

The Case

Several years after buying a home in South Windsor, Connecticut, Kristen Cole alleged that she discovered that concrete in the home had been deteriorating for years and would need to be replaced.

Ms. Cole sued the sellers for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, and negligent misrepresentation. She alleged that the sellers had known or should have known about the condition of the concrete and that the concrete in houses in the area had been deteriorating; that the sellers had used a sealer to conceal the problem; and that the sellers had failed to disclose that.

In addition, Ms. Cole contended that the "Residential Property Condition Disclosure Report" contained either intentional or negligent misrepresentations about the concrete's condition.

The sellers sought coverage and a defense of the lawsuit from their homeowner's insurance company. The insurer declined, and asked a court to declare that it had no obligation to defend or indemnify the sellers in the lawsuit brought by Ms. Cole.

The insurer moved for summary judgment.

The District Court's Decision

The district court granted the insurer's motion, ruling that none of Ms. Cole's allegations asserted property damage or bodily injury covered by the sellers' homeowner's insurance policy.

The district court explained that Ms. Cole sought damages related to the sellers' allegedly fraudulent or negligent misrepresentation of the condition of the concrete supporting the house. Her injury, the district court said, stemmed "from their alleged deception, not from the property damage" that preceded the alleged misrepresentations.

The district court concluded that the sellers' alleged concealment of the deteriorating concrete was "not a covered event under their homeowner's insurance policy" and, therefore, that the sellers' insurer had no duty to defend them or to indemnify them under the policy.

The case is *Allstate Ins. Co. v. Swaminathan*, No. 3:16-cv-1708 (VAB) (D. Conn. Dec. 27, 2017).

Illinois District Court Finds That an Intellectual Property Exclusion Precluded Coverage for Entire Suit Against Insured

A federal district court in Illinois has ruled that an insured sued for copyright and trademark infringement was not entitled to any defense from its insurer because the existence of the trademark allegations precluded coverage for the entire suit.

The Case

Woofbeach, Inc., sued Beach for Dogs Corporation, Beach for Dogs Aurora, and Steve Holland, individually and d/b/a Beach for Dogs (collectively, "Beach for Dogs"), for copyright and trademark infringement in connection with the logo, business name, and marketing materials used by Beach for Dogs.

The insurer for Beach for Dogs declined to defend the suit, relying on its policy's intellectual property exclusion. The exclusion barred coverage for personal and advertising injury "arising out of any actual or alleged infringement or violation of any intellectual property right, such as copyright, patent, trademark, trade name, trade secret, service mark, or other designation or origin or authenticity," or "[a]ny injury or damages alleged in any claim or 'suit' that also alleges an infringement or violation of any intellectual property right, whether such allegation of infringement or violation is made by you or any other party involved in the claim or 'suit,' regardless of whether this insurance would otherwise apply."

An exception applied in narrow circumstances. It stated that the exclusion does not apply "if the only allegation in the claim or suit involving any intellectual property right is limited to:

(1) Infringement, in your 'advertisement' of:

(a) Copyright;

(b) Slogan; or

(c) Title of any literary or artistic work; or

(2) Copying, in your 'advertisement,' a person's or organization's 'advertising idea' or style of 'advertisement.'

The insurer then asked a federal district court in Illinois to declare that it had no duty to defend or cover Beach for Dogs in the Woofbeach suit.

Beach for Dogs contended that it was entitled to a defense of at least the copyright claims because they were not excluded by the intellectual property exclusion.

The parties each moved for summary judgment.

The District Court's Decision

The district court granted the insurer's motion.

In its decision, the district court explained that the policy's intellectual property exclusion stated that the policy did not apply to any claim or "suit" that alleged an infringement or violation "of any intellectual property right." The exclusion, the district court said, was "clear" and "explicit."

Even if there might be coverage for the copyright claims asserted by Woofbeach, the existence of the trademark allegations in its complaint precluded coverage for Woofbeach's "*entire*" lawsuit, the district court concluded.

The court also found that the exception was not triggered for the same reasons. It explained that the exclusion applies to any "suit" that includes an alleged intellectual property right unless "the only allegation in the claim or suit" flows from a copyright violation. "By conceding that the Woofbeach suit includes allegations of trademark infringement alongside copyright infringement, Beach for Dogs admit that the Exception, by its own terms, does not trigger to override the IP Exclusion."

The case is *Sentinel Ins. Co. v. Beach for Dogs Corp.*, No. 17 C 1501 (N.D. Ill. Dec. 21, 2017).

Rivkin Comment

Other federal district courts in Illinois and elsewhere have reached the same conclusion when interpreting the intellectual property exclusion. In *Sentinel Ins. Co., Ltd. v. Yorktown Industries, Inc.*, No. 14-cv-4212 (N.D. Ill. Feb. 2, 2017), the district court said that "even if not every claim in the [underlying action] arose out of an intellectual property violation, coverage would be excluded because at least one claim . . . clearly alleges an excluded intellectual property claim." Similarly, the district court in *Hartford Casualty Ins. Co. v. Dental USA, Inc.*, No. 13 C 7637 (N.D. Ill. Jun. 24, 2014), stated that where "allegations of infringement of patent and trademark rights" were alleged in the underlying counterclaims, coverage for the underlying suit was precluded.

In Michigan, in *Vitamin Health, Inc. v. Hartford Casualty Ins. Co.*, 186 F. Supp. 3d 712 (E.D. Mich. 2016), the district court found that the intellectual property exclusion "clearly and unambiguously bars coverage in situations where, as here, a claim of false advertising is alleged in the same complaint alleging patent infringement."

In California, in *Tria Beauty, Inc. v. National Fire Ins. Co. of Hartford,* No. C 12-05465 WHA (N.D. Cal. May 20, 2013), the district court ruled that the insurer had no duty to defend because the intellectual property exclusion "exempted not only trademark infringement claims, but also suits on other claims that also allege trademark infringement." Two years later, in *Pinnacle Brokers Ins. Solutions LLC v. Sentinel Ins. Co., Ltd.*, No. 15-cv-02976-JST (N.D. Cal Sep. 2, 2015), the district court said that the "conspicuous, plain and clear" language of the intellectual property exclusion barred coverage where the underlying suit alleged trade secret violations.

And, in Arizona, in *Ventana Medical Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, 709 F. Supp. 2d 744 (D. Ariz. 2010), the district court decided that where the insurer "intended to exclude from its general liability policy . . . any damages that arise from any other claims when a claim of intellectual property is asserted," there was no duty to defend in the underlying case where it alleged both intellectual property and patent infringements.

RIVKIN RADLER LLP
ATTORNEYS AT LAW

Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com