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Insurance Update
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In California: Pharmaceutical Companies Lose Bid for Coverage of Opioid Suits

An appellate court in California has ruled that insurance companies had no duty to defend pharmaceutical companies sued by several local governments for allegedly engaging in a "deceptive marketing campaign" to expand the market for opioid products.

The Case

Two counties in California and the city of Chicago sued various pharmaceutical manufacturers and distributors, alleging that they had engaged in a "common, sophisticated, and highly deceptive marketing campaign" designed to expand the market and increase sales of opioid products by promoting them for treating long-term chronic, non-acute, and non-cancer pain – a purpose for which they allegedly knew their opioid products were not suited.

The complaints alleged that the defendants "had access to scientific studies, detailed prescription data, and reports of adverse events, including reports of addiction, hospitalization, and deaths – all of which made clear the significant adverse outcomes from opioids and that patients were suffering from addiction, overdoses, and death in alarming numbers."

The defendants sought a defense from their commercial general liability insurers.

The insurers denied the demand and asked a California court to declare that they had no duty to defend.

The trial court ruled that the insurers had no duty to defend because the injuries alleged were not the result of an accident within the meaning of the insurance policies. Also, the claims alleged fell within a policy exclusion for the insured's products and for warranties and representations made about those products.

The defendants appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the policies covered damages for bodily injury

caused by an “accident.”

It then ruled that the California and Chicago lawsuits did “not create a potential for liability for an accident” because they were based, and only could be read as being based, on the allegedly “deliberate and intentional conduct” of the defendants “that produced injuries – including a resurgence in heroin use – that were neither unexpected nor unforeseen.” The role of doctors in prescribing or mis-prescribing opioids was “not an independent or unforeseen happening” that might have led to coverage, the appellate court ruled.

According to the appellate court, there was no possibility that the defendants would be held liable, if at all, for conduct or omissions that were negligent. It ruled that the allegations that the defendants had engaged in “a common, sophisticated, and highly deceptive marketing campaign” aimed at increasing sales of opioids and enhancing corporate profits only could describe “deliberate, intentional acts.”

The appellate court concluded that, in any event, to the extent that the lawsuits created a potential for liability based on unintentional conduct, coverage was excluded by the policies’ products exclusions, because all of the injuries allegedly arose out of the defendant’s products or the alleged statements and misrepresentations they had made about those products.

The case is *Travelers Property Casualty Co. of America v. Actavis, Inc.*, No. G053749 (Cal. Ct. App. Nov. 6, 2017).

In New Hampshire: Supreme Court Rules That Faulty Workmanship Exclusion Precluded Coverage of Homeowners’ Claim for Mold Contamination

The New Hampshire Supreme Court has ruled that a faulty workmanship exclusion in a homeowners’ insurance policy precluded coverage of the insureds’ claim that an accumulation of moisture led to mold contamination in their home.

The Case

After the owners of a custom home in Windham, New Hampshire, discovered mold and moisture in their home’s attic, they submitted a claim to their insurer. The insurer denied the claim, explaining that the mold had been caused by faulty workmanship, which was an excluded peril.

The homeowners sued, and the parties moved for summary judgment.

The trial court granted the insurer’s motion, and the homeowners appealed to the New Hampshire Supreme Court. They argued that their claim was covered by their policy because their damages constituted “ensuing losses” of faulty workmanship. In particular, they contended that hidden and unknown accumulation of moisture was an ensuing loss of faulty

workmanship, that it led to the mold, and that the mold led to mold contamination, illness, and, ultimately, their damages claim.

The New Hampshire Supreme Court's Decision

The court affirmed.

In its decision, the court explained that the homeowners' chain of reasoning – that hidden and unknown accumulated moisture was the causative agent of the damage, as opposed to the faulty workmanship; that hidden and unknown accumulated moisture was not specifically excluded from the policy; and that coverage accordingly applied – essentially undid the faulty workmanship exclusion.

The court said that in the case of faulty workmanship, "it should come as no surprise that the botched construction will permit . . . water . . . to enter the structure and inside of the building and eventually cause damage to both." Moreover, the court said, mold was a "natural and expected, as opposed to a separate and independent, result of water damage." In finding that the homeowners' claim was not covered, the court concluded that the alleged hidden and unknown accumulated moisture and mold losses were "directly attributable to the initial negligent" workmanship – an excluded peril.

The case is *Russell v. NGM Ins. Co.*, No. 2016-0540 (N.H. Nov. 15, 2017).

Rivkin Radler Comment

A California appellate court recently reached the same conclusion in a case with similar facts. *Cohen v. Pacific Specialty Ins. Co.*, No. B276060 (Cal. Ct. App. Nov. 14, 2017).

In *Cohen*, homeowners alleged that their insurer had wrongfully denied a portion of their first-party claim for rainwater damage to their home, and they sued. The trial court granted the insurer's motion for summary judgment, ruling that the portion of the homeowners' damages claim in dispute had been proximately caused by construction defects, a peril that was excluded from the coverage afforded under their policy.

The homeowners appealed, but the appellate court affirmed. It stated that homeowners who were aware, long before a rainstorm had occurred and caused damage, of possible leakage caused by construction defects could not reasonably expect their insurer to pay for repairs on the theory that rainwater, and not the construction defects, had caused the damage.

The appellate court concluded that the construction defect exclusion "would be essentially meaningless" if the homeowners could recover for water damages in the form of rotted framing or cracking concrete that "resulted directly from the defective construction."

In Tennessee: No Coverage for Claims of Negligence and Negligent Misrepresentation Against Home Sellers

An appellate court in Tennessee, reversing a trial court's decision, has ruled that an insurance company did not have to defend its insureds against negligence and negligent misrepresentation claims stemming from the sale of their home.

The Case

A couple who purchased a home in Cookeville, Tennessee, sued the sellers, alleging that the home had flooded and that the sellers had failed to advise them of the defects and problems with the property relating to flooding. The buyers asserted six claims against the sellers, including negligence and negligent misrepresentation concerning the property's propensity to flood.

The sellers sought defense and indemnification for the lawsuit from their insurer. Thereafter, the insurer asked a Tennessee court to declare that it had no duty to defend the sellers in the buyers' action because none of the claims the buyers asserted against the sellers contained an allegation constituting an "occurrence."

The trial court granted summary judgment for the insurer on four of the six claims against the sellers, but ruled that the insurer had a duty to defend with respect to the buyers' claims based on negligence and negligent misrepresentation.

The insurer appealed the denial of its motion for summary judgment concerning the negligence and negligent misrepresentation claims.

The Appellate Court's Decision

The appellate court reversed, holding that the insurer did not have a duty to defend the sellers' against the buyers' negligence or negligent misrepresentation claims because the alleged misrepresentations had not caused the "damage to the property." Rather, the appellate court continued, the property damage allegedly sustained by the buyers had been "caused by flooding." Thus, the occurrence that caused the property damage was flooding, not the insured's misrepresentation concerning the propensity of the property to flood.

Furthermore, the appellate court agreed with the majority of courts that have concluded that a claim for negligent misrepresentation arising from the sale of property is not an "occurrence."

Accordingly, the appellate court instructed the trial court to enter summary judgment in favor of the insurer.

The case is *Erie Ins. Exchange v. Maxwell*, No. M2017-00193-COA-R9-CV (Tenn. Ct. App. Nov.

15, 2017).

In Kentucky: Unfair Claims Settlement Practices Act Did Not Apply to Captive Insurer

An appellate court in Kentucky has ruled that the state's Unfair Claims Settlement Practices Act does not apply to a foreign captive insurer because it was not in the "business of insurance."

The Case

The plaintiffs sued various medical providers for negligence. They also asserted a bad faith claim against the foreign captive insurer that provided insurance for the defendants, contending that the insurer had violated Kentucky's Unfair Claims Settlement Practices Act ("UCSPA").

The insurer moved for summary judgment, arguing that it was not subject to the UCSPA because, as a captive insurer, it was not involved in the "business of insurance."

The trial court granted the insurer's motion, and the plaintiffs appealed. Plaintiffs conceded that the UCSPA only was applicable to entities engaging in the "business of insurance" and that it did not apply to captive insurance companies because they are not generally considered to be engaged in the business of insurance. They argued, however, that the insurer in this case was involved in the "business of insurance," and therefore, was subject to the UCSPA. They reasoned that the insurer had an independent corporate identity from the other defendants, which negated its ability to self-insure them. They also maintained that the transactions between the insurer and the insureds involved the shifting of risk, and therefore, satisfied Kentucky's definition of insurance.

The Appellate Court's Decision

The appellate court affirmed.

It found that the insurer, which was wholly owned by one of the defendants, was a captive insurer under Kentucky law that with its only purpose being to insure the defendants. Furthermore, the insurer was a foreign captive insurer because it was located in Grand Cayman, subject to the laws of the Cayman Islands.

The insurer, the appellate court ruled, was not in the "business of insurance" – which involved "the transferring of risk and reducing the uncertainty of risk by risk distribution" – but, rather, was in the business of captive self-insurance for its parent company.

The appellate court found the plaintiffs' argument that the insurer was subject to the UCSPA because its corporate identity was separate from the insureds' identity "not convincing." It reasoned that a captive insurer, by definition, was an entity created to provide insurance of its

parent and affiliated companies. It had "no separate corporate identity," the appellate court concluded, and it was exempt from the UCSPA.

The case is *Merritt v. Catholic Health Initiatives Inc.*, No. 2016-CA-001470-MR (Ky. Ct. App. Nov. 17, 2017).

In Missouri: Supreme Court Decides That Pollution Exclusion Bars Coverage for Lead Emission Claims

The Supreme Court of Missouri has ruled that an insurer had no duty to defend its insured against lawsuits alleging that the plaintiffs had been injured by lead emissions from the insured's smelting facility in La Oroya, Peru.

The Case

More than two dozen lawsuits were filed against a Missouri company that operated a metallurgical industrial complex in La Oroya, Peru. The lawsuits alleged that the company had released harmful substances such as lead into the environment. The complaints contended that these emissions had created a dust that permeated the surrounding air and water, and settled inside plaintiffs' houses and on their furniture, clothing, water, and crops.

The company sued its insurers, seeking reimbursement of the costs it incurred in defending the lawsuits. An insurer argued that its policy's pollution exclusion barred coverage of the lawsuits, but the trial court found that the pollution exclusion was ambiguous and that the insurer had a duty to defend its insured.

The insurer appealed to the Missouri Supreme Court, arguing that its pollution exclusion was unambiguous and barred coverage.

The Missouri Supreme Court's Decision

The court reversed the trial court, holding that the pollution exclusion was not ambiguous, coverage was barred, and the insurer had no duty to defend its insured.

In its decision, the court first considered the insured's argument that because lead was not unambiguously a contaminant or irritant, the pollution exclusion was ambiguous as to whether lead was a pollutant under the policy. The court found that argument "incorrect." It reasoned that although lead had commercial value – particularly to a lead mining and smelting corporation such as the insured – it was "undoubtedly an irritant or contaminant when released as particulate matter into the environment."

The court pointed out that the effect of the pollution exclusion was "clearly to proscribe the types of claims" raised in the lawsuits against the insured. The court observed that the lawsuits'

allegations were clear: toxic substances were in the air surrounding the La Oroya facility; these substances harmed people who breathed them; and the plaintiffs breathed this impure air.

There was "no question," the court concluded, that this type of pollution was "the exact type of damage excluded from coverage" under the insurer's policy.

The fact that the toxic or hazardous materials were valuable products if the insured properly contained them did not make them any less "pollutants" when they were abandoned and released into the environment, the court concluded.

The case is *Doe Run Resources Corp. v. American Guarantee & Liability Ins.*, No. SC96107 (Mo. Oct. 31, 2017).

Rivkin Radler Comment

Only weeks after the Missouri Supreme Court's decision in *Doe Run Resources*, a federal district court in Missouri ruled that an insurer had no duty to defend a painting contractor against claims relating to the cleanup of lead dust that allegedly remained after the contractor had removed lead paint from a St. Louis high school.

In *Rice Painting Co., Inc. v. Depositors Ins. Co.*, No. 4:15 CV 1064 JMB (E.D. Mo. Nov. 20, 2017), the district court ruled that the pollution endorsement in the policy issued to the contractor did not afford coverage to the contractor. The endorsement, the district court explained, had two prerequisites to coverage:

First, the alleged environmental damage had to begin and end within 72 hours of the "pollution incident" – in this case, the alleged release of lead dust into the high school. The district court pointed out, however, that, based on the underlying allegations, the damage had not begun and ended within 72 hours of the alleged release of the lead dust.

Second, the pollution incident had to be "accidental." Here, it found, the lead incident did not "arguably fall" within the plain meaning of an accident. As alleged, the painting contractor failed to follow required safety procedures, which allowed lead contaminants to be released and spread throughout the high school project site.

Therefore, the district court concluded, the insurer had no duty to defend the painting contractor and it was entitled to summary judgment in its favor.

In Utah: Supreme Court Rejects Insured's Claim for Attorneys' Fees Where Coverage Had Been "Fairly Debatable"

The Utah Supreme Court has affirmed an appellate court decision denying attorneys' fees and expenses to an insured where the insurer demonstrated that coverage of the insured's claim

had been “fairly debatable.”

The Case

The insured was piloting a Honda F-12 Aquatrax personal watercraft that was towing his brother-in-law. The brother-in-law was injured, and he sued the insured.

The insured tendered the defense to his homeowner’s insurance company.

The insurer conducted an in-house review of its insured’s claim. The issue was whether an exclusion for jet skis applied to the Aquatrax. The insurer submitted the claim to outside counsel for a coverage opinion. The insurer’s outside counsel believed there was a high probability that the incident would not be covered, but advised the insurer to file a declaratory judgment action seeking a determination of its responsibility under the policy.

The insurer filed the action and then moved for summary judgment.

The trial court ruled in favor of the insurer, finding that a policy exclusion precluded coverage.

The appellate court reversed, holding that a term in the exclusion was ambiguous.

The insurer then settled with the insured’s brother-in-law for the policy limit of $300,000 and paid its insured’s attorneys’ fees and expenses for his defense of that claim.

The insurer, however, did not pay for its insured’s costs of defending the declaratory judgment action.

The insured filed a counterclaim against the insurer in the declaratory judgment action, seeking “damages for breach of the implied covenant [of good faith and fair dealing],” including his attorneys’ fees for prosecuting the action and the appeal as well as “damages for the severe emotional distress that was caused by the coverage denial and his self-defense of a significant personal injury claim.”

The trial court granted summary judgment in favor of the insurer, finding that its actions had been reasonable because the coverage issue had been “fairly debatable.”

The court of appeals affirmed, holding that “when an insurance company proceeds in a reasonable way to resolve a difficult coverage question, its eventual loss at the appellate level does not foreclose a determination that an issue of interpretation was fairly debatable, as was the case here.”

The insured appealed to the Utah Supreme Court, arguing that the insurer was liable because, in connection with what the insured characterized as his first-party claim, the insurer could not argue that coverage had been “fairly debatable.”

The Utah Supreme Court's Decision

The court found that the coverage question litigated by the insurer had been "fairly debatable." Therefore, the court decided, the insured's claim that the insurer had not fairly evaluated his claim and had unreasonably rejected it failed.

Accordingly, the court affirmed the decision by the court of appeals.

It should be noted that the litigants framed the issue as a first-party dispute, although the claim itself arose in the third-party context. Hence, there was a concern among the judges as to whether the "fairly debatable" standard even applied. The court specifically left open the questions of whether claims like those brought by the insured in this case should be analyzed under third-party insurance principles, and if so, what those principles are.

The case is *Fire Ins. Exchange v. Oltmanns*, No. 20160304 (Utah Nov. 21, 2017).

From Michigan: "Insured Contract" Exception to Exclusion Did Not Afford Coverage to Target

The U.S. Court of Appeals for the Sixth Circuit, affirming a decision by the U.S. District Court for the Eastern District of Michigan, has ruled that neither an indemnification agreement between Target Stores and a distributor, nor an assignment agreement between the distributor and another company, was an "insured contract" that would allow Target to recover for damages it paid to settle a customer's lawsuit.

The Case

A household products distributor supplied products to Target Stores pursuant to an agreement that provided that the distributor would indemnify and defend Target for liabilities arising from products it manufactured or supplied.

After the distributor began to wind down its dealings with Target, the distributor assigned its indemnification obligation to Target to another company.

Thereafter, a child allegedly was injured while using a product that was supplied by the distributor and purchased at Target. The child's mother filed a product liability action against Target, the distributor, and the company that had been assigned the distributor's indemnification obligation to Target. Target ultimately settled with the child's mother, and a federal court found that the distributor and the assignee had breached their indemnification obligation to Target. Target then sought coverage for those amounts under the assignee's insurance policy.

The assignee's insurer contended that there was no coverage available to Target because its policy excluded coverage for bodily injury for which its insured was obligated to pay damages by reason of the assumption of liability in a contract.

Target, however, sought to rely on the "insured contract" exception to that exclusion, for a contract under which the insured assumed the "tort liability" of another party to pay for bodily injury to a third person or organization. Target asserted that the agreement between the distributor and the assignee was an insured contract because the child's damages were tort damages and Target was "another party," as referenced in the insurance policy's definition of insured contract. Target also argued that, even if the agreement between the distributor and assignee was not an insured contract, the distributor's agreement with Target and the distributor's agreement with the assignee, read together, comprised an insured contract because they had assumed "the tort liability of another party."

The assignee's insurer asked the Michigan district court to determine the availability and scope of insurance coverage under the policy it had issued to the assignee.

The district court granted summary judgment in favor of the insurer. It held that neither of the two agreements was an insured contract and that the two agreements could not be combined to create an insured contract that satisfied the exception to exclusion from coverage.

Target appealed to the Sixth Circuit.

The Circuit Court's Decision

The circuit court affirmed, ruling that the insured contract exception to the exclusion did not apply.

In its decision, the circuit court explained that, to be an insured contract, an agreement had to "assume the tort liability of another party." Tort liability, the circuit court continued, was liability "that would be imposed by law in the absence of any contract or agreement." The circuit court added that even though Target was subject to tort liability, the distributor and the assignee were not.

Rather, the circuit court reasoned, the distributor was liable to Target "solely because of the indemnification provision" in its agreement with Target. Moreover, because the distributor's obligation to Target was based on the agreement between the distributor and Target, the assignee had assumed the distributor's contractual liability – not tort liability.

The Sixth Circuit also found that Target was not "another party" as referenced by the definition of insured contract because it was not a party to the operative agreement: the agreement between the distributor and the assignee.

Finally, the circuit court determined that both agreements could not be read together to create

an insured contract because the definition indicated that an insured contract was "a *singular* agreement" that "*directly*" assumed the tort liability of another party.

Accordingly, the circuit court concluded, the district court had correctly determined that the insured contract exception to the policy exclusion did not apply.

The case is *Northern Ins. Co. v. Target Corp.*, No. 16-2222 (6th Cir. Nov. 29, 2017)

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