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Georgia Supreme Court: Insurer Has Duty to Settle Only When Injured Party Presents Valid Offer Within Policy Limits

The Supreme Court of Georgia, clarifying its precedent, has ruled that an insurer's duty to settle cannot be invoked where a claimant's offer was not a time-limited settlement demand. As a result, the court held that as a matter of law, an insurer was not liable for a $5.3 million excess judgment against its insured arising from a multiple car accident.

The Case

Attorneys for two individuals injured in a multi-vehicle collision caused by another driver sent the driver's insurer letters stating their interest in attending a settlement conference and, in the alternative, offering to settle their claims for the available policy limits.

The following month, the attorney sent a letter to the insurer noting that "[i]t has now been 41 days since [he sent his] letter[s], and [he] had received nothing," and advising that the offers to settle his clients' claims had been revoked.

The two injured individuals sued the insurer and the insured driver's estate. A jury returned a verdict in their favor, and the trial court entered judgment for $5.3 million against the insured driver's estate.

The administrator of the insured driver's estate sued the insurer for bad faith failure to settle.

The trial court granted summary judgment in favor of the insurer, but an intermediate appellate court reversed.

The dispute reached the Georgia Supreme Court. The issue was whether an insurer's duty to settle arises when it knows or reasonably should know settlement with an injured party within the insured's policy limits is possible or, rather, only when the injured party presents a valid offer to settle within the insured's policy limits.

The Georgia Supreme Court's Decision

Reversing the decision of the intermediate appellate court, the Georgia Supreme Court held that an insurer's duty to settle with an injured party arises only when the injured party presents a valid offer to settle within the insured's policy limits.

The court found the meaning of the two letters from counsel for the injured claimants was "clear."

The court said the claimants expressed a willingness to participate in a settlement conference or to settle their claims for the insured's available policy limits.

The court noted that the offer to settle was "not, at least expressly, subject to a time limit for acceptance." The court observed that the offer to settle for available policy limits was presented as an alternative to the clients' participation in a settlement conference.

The court concluded that because the offer was not a time-limited settlement demand, the insurer had not been put on notice that its failure to accept the offer within any specific period would constitute a refusal of the offer. The court granted the insurer summary judgment on the failure-to-settle claim.

The case is *First Acceptance Ins. Co. of Georgia v. Hughes*, No. S18G0517 (Ga. March 11, 2019).

RIVKIN NOTE: Georgia now has a statute (OCGA § 9-11-67.1) that governs pre-litigation settlement demands involving auto accidents. The statute requires that such an offer must be open for at least 30 days. But the statute did not apply in this case as the statute went into effect on July 1, 2013 and the accident occurred in 2008.

Mississippi Supreme Court: Unambiguous Earth Movement Exclusion Precluded Coverage

The Supreme Court of Mississippi, reversing a trial court's decision, has ruled that an earth movement exclusion in a homeowner's insurance policy applied to any earth movement and precluded coverage of damage to the insured's home's foundation, notwithstanding a policy provision expressly covering water damage.

The Case

A Mississippi homeowner filed a claim with her homeowner's insurer asserting that her foundation was defective. The insurer denied the claim, citing the policy's earth movement exclusion. The homeowner then sued.

The insurer moved for summary judgment. It argued that the earth movement exclusion precluded coverage for any damage resulting from earth movement, regardless of its cause. The insurer argued that the homeowner's proof confirmed that earth movement had caused her foundation's problems.

In response, the homeowner argued that the earth movement exclusion in her policy was limited to earth movement resulting from natural forces such as earthquakes, volcanic eruptions, and landslides. The homeowner asserted that the policy expressly covered water damage, which she claimed caused the foundation's problems.

The trial court denied the insurer's summary judgment motion, and the dispute reached the Mississippi Supreme Court.

The Mississippi Supreme Court's Decision

The court reversed and rendered judgment in favor of the insurer.

The court ruled that the earth movement exclusion was unambiguous and that it was "not limited to movement resulting from natural forces" but applied to "any earth movement regardless of its cause."

The court then found that the water damage coverage clause did not supplant the earth movement exclusion. The court observed that the water damage coverage clause stated that it applied "[u]nless the loss is otherwise excluded." The court reasoned that the earth movement exclusion made clear that it excluded coverage for damage resulting from earth movement, regardless of the cause of the earth movement, including human forces such as water leaks from plumbing.

The court then concluded that the trial court had erred in denying the insurer's motion for summary judgment. The court held that the homeowners' proof showed that the property damage had been caused by earth movement. So, the court ruled, the earth movement exclusion barred coverage.

The case is *Mississippi Farm Bureau Casualty Ins. Co. v. Smith*, No. 2017-IA-01406-SCT (Miss. March 7, 2019).

Iowa Supreme Court: CGL Policy Must Respond to Accidental Shooting at LLC's Farmhouse

The Supreme Court of Iowa has affirmed a trial court's decision holding two insurers responsible for covering the settlement of a claim stemming from an accidental shooting.

The Case

A dentist formed a limited liability company ("LLC") that held title to investment properties, including a farmhouse where his son accidentally fatally shot a friend.

The LLC's commercial general liability ("CGL") insurer denied coverage, explaining that its policy only covered individuals with respect to the "conduct of a business" and that any claims resulting from the shooting were not business-related.

The dentist's homeowners' insurer settled the shooting claim for $900,000 and sued the CGL insurer for reimbursement.

The trial court entered judgment against the CGL insurer for $450,000, and the dispute reached the Supreme Court of Iowa.

The Iowa Supreme Court's Decision

The court affirmed.

The court explained that the LLC was the named insured under the CGL policy and the farmhouse was an insured location. The court rejected the CGL insurer's contention that the dentist's son was engaged in his own personal recreation and not engaged in the LLC's business when he accidentally shot his friend.

The court reasoned that the LLC had purchased the farmhouse property as an investment, which was a business purpose, and that the dentist's son had been acting for the LLC when the accidental shooting occurred because he had been told to secure the farmhouse. Securing the property, the court continued, was a business purpose – to protect the unoccupied farmhouse against vandals and burglars, including unloading and properly storing the loaded rifle that was used in the accidental shooting.

The court found it immaterial that the farmhouse also was used for recreation. The court then ruled that substantial evidence supported the trial court's finding that the dentist's son was engaged in conduct for the LLC's business at the time he accidentally shot his friend.

The court concluded that because the LLC was potentially liable for the shooting victim's death, the CGL policy provided liability coverage for the accidental shooting on the LLC's business property.

The case is *Metropolitan Property and Casualty Ins. Co. v. Auto-Owners Mut. Ins. Co.*, No. 18-0129 (Iowa March 8, 2019).

Neither Waiver Nor Estoppel Blocked Insurer from Objecting to Coverage, California District Court Rules

A federal district court in California has rejected a property owner's argument that his insurer had waived its right to rely on a policy exclusion or should be estopped from raising the exclusion because its adjuster had accepted coverage and issued partial payment to the property owner for his claim.

The Case

The owner of an apartment building in Oakland, California, sued his insurer for allegedly failing to adequately compensate him for the costs of repairing five units damaged by a sewage backup. The owner did not appear to assert that the property damage stemming from the sewage backup was within the policy's coverage. Rather, he argued that the insurer had waived its right to deny coverage for his claim when the insurer's claims adjuster sent him a letter accepting coverage and issued partial payment. The owner also argued that the insurer should be estopped from raising the policy's sewage backup exclusion.

The insurer moved for summary judgment.

The Court's Decision

The court granted the insurer's motion, finding that the owner had not met its burden of proving waiver or estoppel.

The court explained that, under California law, a waiver occurs when a party intentionally relinquishes a right or when the party's acts were so inconsistent with an intent to enforce the right as to induce a reasonable belief that it had relinquished the right.

The court then found that the adjuster's letter extending coverage and providing payment – without a reservation of rights – was not an express waiver of its defenses to coverage under the policy because the adjuster had made a mistake and did not understand that the policy contained a sewage backup exclusion.

The court said that a mistake was "not an intentional act," adding that the denial letters the insurer later sent to the owner all included statements reserving its right to assert coverage defenses.

Therefore, the court found, the owner failed to identify "clear and convincing evidence" that the insurer had "*intentionally* relinquished a *known* right."

The court reached the same result regarding the owner's argument that the insurer was equitably estopped from denying coverage.

The court explained that, under California law, estoppel (sometimes referred to as implied waiver) cannot operate to create coverage where none exists under the plain terms of the operative insurance policy. The court concluded that because the sewage backup exclusion precluded coverage for the owner's claims stemming from the sewage backup, holding the insurer liable for such claims based on the doctrines of implied waiver or estoppel would extend coverage that did not originally exist at the time of the cause of loss and was "impermissible under California law."

The case is *Udinsky v. State Farm Fire and Casualty Co.*, No. 18-cv-03994-JSC (N.D. Cal. March 4, 2019).

Pollution Exclusion Barred Coverage of Paint Fumes Claim, Florida District Court Decides

A federal district court in Florida has ruled that an insurer had no duty to defend its insureds against a lawsuit asserting bodily injury resulting from the inhalation of paint fumes.

The Case

A woman sued the owner of a Fort Lauderdale office building and the building's property manager for injuries she alleged she had sustained after oil-based paint was applied to the sixth floor of the building and she inhaled the "toxic fumes" that recirculated through the building's air conditioning unit.

The insurer filed an action in the U.S. District Court for the Southern District of Florida to declare that it had no duty to defend the insureds and moved for summary judgment. The insurer for the building owner and property manager asserted that the claim was excluded from coverage by the operative policy's pollution exclusion.

The District Court's Decision

The court granted the motion.

The court held that the pollution exclusion barred coverage for "bodily injury" resulting from "pollutants," which the policy defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The court reasoned that the personal injury plaintiff alleged that she had suffered bodily injury arising from oil-based paint vapors. Therefore, the court concluded, the claim was "clearly subject" to the pollution exclusion.

The case is *AIX Specialty Ins. Co. v. Williams-Panton*, No.: 0:18-cv-62553-UU (S.D. Fla. March 4, 2019).

Louisiana Federal Court Enforces Absolute Pollution Exclusion

A federal district court in Louisiana, granting summary judgment to an insurer, enforced a pollution exclusion and found that an insurer had no duty to defend or indemnify an insured in a claim alleging long-tail, environmental pollution damage.

The Case

The case involved a declaratory judgment action regarding coverage under liability policies.

The underlying lawsuit alleged that several oil and gas companies, including the insured, caused environmental contamination of the claimants' properties over several decades.

The claimants allegedly suffered damages resulting from the improper disposal of oilfield waste in unlined earthen pits, constructed by the insured and other defendants, on or near their properties during the course of oil and gas exploration and production activities. The oilfield wastes deposited in these pits included such substances as naturally occurring radioactive material, produced water, drilling fluids, chlorides, hydrocarbons, and heavy metals.

The claimants owned the properties at issue and had leased them to the defendants, including the insured. The claimants alleged that leaks, spills, and other surface and subsurface discharges of these and other substances polluted the surface and subsurface of their properties.

The Decision

The insurer filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify the insured in the underlying action. The insurer moved for summary

judgment based on two exclusions in the policies: an absolute pollution exclusion and an exclusion for damage to property leased by and/or in the care, custody, or control of the insured.

The pollution exclusion precluded coverage for property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" and "any loss, cost or expense arising out of any: (a) request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess the effects of 'pollutants.'"

The court noted that, under Louisiana law, there is a three part test to determine if a pollution exclusion bars coverage: (1) whether the insured is a "polluter" within the meaning of the exclusion; (2) whether the injury causing substance is a "pollutant" within the meaning of the exclusion; and (3) whether there was a "discharge, dispersal, seepage, migration release or escape" of a pollutant within the meaning of the policy.

Applying this test, the court found the pollution exclusion applicable.

First, the court found that the insured was a "polluter" under the test. The court noted that the insured was an oilfield operator and producer. The court also noted that oil drilling and related activities present a "clear and obvious risk of pollution."

Second, the court found that the toxins alleged by the claimants, including naturally occurring radioactive material, produced water, drilling fluids, chlorides, hydrocarbons, and heavy metals, were "pollutants" within the meaning of the pollution exclusion.

Finally, the court found that there was a "discharge, dispersal, seepage, migration release or escape" of a pollutant within the meaning of the policy. The court reasoned that the claimants alleged that the insured alleged a long-term discharge, release or escape of a pollutant caused by the insured.

The court found it immaterial that some causes of action asserted by the claimants were grounded on personal injury theories, namely trespass and continuing nuisance. The court noted that all of these claims arose out of the same allegations of contamination by pollution.

Alternatively, the court found that no coverage existed by virtue of the policies' exclusion for damage to property leased by and/or in the care, custody and control of the insured. The court noted the insured conducted activities on the properties through leases, assignments, subleases, servitudes. Thus, the court found that the damages alleged in the underlying litigation occurred to property that was leased to the insured and was in its care, custody, or control.

The case is *Evanston Ins. Co v. Riceland Petroleum Co.*, Case No. 2:17-cv-01031 -RRS (W.D. La. Mar. 28, 2019).

North Carolina Federal Court Relieves Insurer of Liability Based on Insured's Failure to Provide Notice of Claim

A federal district court in North Carolina, granting a default judgment to an insurer, found that the insurer was relieved of liability based on an insured's failure to provide notice of a claim.

The Case

The case involved a declaratory judgment regarding coverage under a commercial general liability policy.

The underlying lawsuit alleged that the insureds performed defective work on a townhome project in South Carolina. The insureds failed to notify their insurer of the claim. The insureds also failed to respond to the complaints in the underlying action, and defaults were entered against them.

The Decision

In the declaratory judgment action, the insureds failed to respond to the complaint in the coverage action.

The court laid out the three-part test in North Carolina to determine whether an insurer is relieved of liability based upon the insured's failure to comply with the notice requirements in an insurance policy. Under this test, the court first decides whether the notice was given as soon as practicable. If not, the court decides whether the insured has shown that it acted in good faith. If not, the insurer is relieved of its obligations to defend and indemnify the insured, even if it was not prejudiced by the delay. But, if the good faith test is met, the burden shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay. If it was, the insurer is relieved of liability.

Applying this test, the court found that the insurer was relieved of liability.

The court first found that notice was not given as soon as practicable. In fact, as the court noted, the insured never provided notice.

Next, the court found that, by defaulting in the coverage action, the insured had admitted the insurer's allegations that it did not act in good faith. But, the court found that, even if lack of good faith hadn't been admitted, the court would still have found lack of good faith on the basis that the insureds were personally served with the summonses and complaints in the underlying litigation.

The court also found, that even if the insureds had acted in good faith, the insurer was relieved of its obligations to the insureds under the policies on the basis that the insurer had been prejudiced by the insurer's failure to provide notice and cooperate in the underlying litigation. The court reasoned that because the insureds defaulted in the underlying action, the insurer "was completely deprived of the opportunity to investigate or defend the claims against the [insureds]."

The case is *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Castillo*, 3:18-cv-00271-GCM (W.D.N.C. Mar. 25, 2019).

Illinois Appellate Court Rules That Subcontractor's Insurer Must Defend Faulty Work Claim

In a dispute between insurers, an Illinois Appellate Court held that a subcontractor's insurer must split the cost of the subcontractor's defense with the subcontractors' other liability insurer. The court reasoned that the subcontractor had allegedly caused damage to a part of the construction project outside of the subcontractor's scope of work. Therefore, according to the court, an occurrence was alleged under the relevant commercial general liability policy.

The Case

A condominium association for a building sued its general contractor and construction manager to recover for alleged defects from their unworkmanlike construction of the building that allowed water to infiltrate and cause damage. The general contractor and construction manager, in turn, filed a third-party complaint against its subcontractors that worked on the building, including the carpentry subcontractor. The carpentry subcontractor held separate CGL policies with Acuity Insurance Company and Cincinnati Insurance Company (CIC).

Acuity filed an action seeking a declaration that it didn't have to defend the carpentry subcontractor in the construction suit. Acuity argued that the damage was due to the faulty workmanship of the subcontractor, and therefore, there was no occurrence. The subcontractor's other liability insurer, CIC, intervened to seek equitable contribution from Acuity. CIC had defended the subcontractor and ultimately settled all claims against it.

The trial court agreed with Acuity that there was no duty to defend and granted summary judgment to Acuity.

The Illinois Appellate Court's Decision

The appellate court reversed. The court recognized a line of cases distinguishing between the cost of correcting construction defects (which generally does not constitute an occurrence under a CGL policy) versus damage to something other than the project (which generally does constitute an occurrence).

The case turned on the question: what qualifies as damage beyond "the project itself," where the insured is a subcontractor performing discrete work on a project and that subcontractor has no control over other aspects of the project?

Following a line of Illinois state and federal court rulings, the court held that "when an underlying complaint alleges that a subcontractor's negligence caused something to occur to a part of the construction project outside of the subcontractor's scope of work, this alleges an occurrence

under this CGL policy language, notwithstanding that it would not be an occurrence from a general contractor or developer's perspective."

The court reasoned that, from the eyes of the subcontractor, the "project" is limited to the scope of its own work, and the specific damage that might occur to something outside of that scope is an unknown or unforeseeable as damage to something entirely outside of the construction project. For this reason, the court ruled that Acuity was required to participate with CIC in defending the carpentry subcontractor against the underlying claim.

The case is *Acuity Insurance Co. v. 950 West Huron Condominium Association*, No. 1-18-0743 (Ill. App. Ct. 1st Dist. Mar. 29, 2019).