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Ninth Circuit: War Exclusions Did Not Preclude Coverage of TV Producers' Relocation Claim

The U.S. Court of Appeals for the Ninth Circuit, reversing a trial court's decision, has ruled that a claim for costs incurred by television producers to move their series out of Jerusalem after Hamas fired rockets from Gaza into Israel was not excluded by war exclusions in their insurance policy.

The Case

In late June and through July 2014, Hamas fired rockets from Gaza into Israel. Because of these hostilities, Universal Cable Productions, LLC, and Northern Entertainment Productions, LLC (together "Universal") moved the production of their television series *Dig* out of Jerusalem.

Universal incurred significant expenses during this move and filed an insurance claim for coverage of those costs under a television production insurance policy (the "Policy") issued by Atlantic Specialty Insurance Company.

Atlantic denied coverage, relying on the policy's war exclusions, which excluded coverage for expenses resulting from "war," "warlike action by a military force," or "insurrection, rebellion, [or] revolution." Atlantic concluded that Hamas' actions were excluded acts of war.

Universal responded that these war exclusions did not apply because the terms had a specialized meaning in the insurance context. Specifically, it asserted, "war" and "warlike action by a military force" required hostilities between sovereigns. Universal argued that Hamas was not acting as a sovereign and, therefore, its actions were not excluded from coverage.

The U.S. District Court for the Central District of California held that Hamas' actions clearly constituted "war" and "warlike action by a military force" and granted summary judgment to Atlantic.

Universal appealed to the Ninth Circuit.

The Decision

The Ninth Circuit reversed.

In its decision, the circuit court explained that California law required that courts apply the specialized meaning of a term – instead of the plain, ordinary meaning – when that specialized meaning had been developed from customary usage in a given industry and when both parties had constructive notice of that usage. The circuit court added that both "war" and "warlike action by a military force" had a specialized meaning in the insurance context, requiring hostilities between sovereigns, and that Atlantic and Universal had, at the least, constructive notice of that meaning. The Ninth Circuit found that Hamas, which had never been recognized by the United States as a sovereign or even a quasi-sovereign, was not a sovereign. Therefore, it decided, Hamas' conduct in the summer of 2014 could not be defined as "war" for the purposes of interpreting the insurance policy.

Accordingly, the Ninth Circuit reversed the district court's entry of summary judgment in favor of Atlantic on the first two war exclusions and held that the "war" and "warlike action by a military force" exclusions did not preclude coverage for Atlantic's claims.

Because the district court had not addressed the third war exclusion — whether Hamas' actions constituted "insurrection, rebellion, [or] revolution" – the circuit court remanded for the district court to consider that issue.

The case is *Universal Cable Productions, LLC v. Atlantic Specialty Ins. Co.*, No. 17-56672 (9th Cir. July 12, 2019).

Third Circuit: Insurer Had No Duty to Defend Insured Where Competitor's Suit Did Not Allege "Disparagement"

The U.S. Court of Appeals for the Third Circuit, affirming a district court's decision, has ruled that an insurance company had no duty to defend its insured against a lawsuit alleging that the insured had made false statements about its own products.

The Case

Newborn, a competitor of Albion Engineering Company, sued Albion in a federal district court in New Jersey, contending that Albion had claimed that its products were made in the United States when they actually were made in Taiwan. Newborn asserted claims for (1) false advertising and product marking in violation of the federal Lanham Act and (2) New Jersey tortious unfair competition through false statements and material omissions.

Albion notified its business liability insurer, Hartford Fire Insurance Company, of the lawsuit. It contended that it was entitled to coverage of Newborn's lawsuit under the policy's "personal and advertising [i]njury" provisions. Hartford disclaimed coverage and Albion sued.

The U.S. District Court for the District of New Jersey entered judgment for Hartford, and Albion appealed to the Third Circuit.

The Decision

The Third Circuit affirmed.

The court explained that for the Newborn suit to fall within the personal and advertising injury coverage provisions of the policy, Albion had to demonstrate, among other things, that Newborn claimed that Albion slandered or libeled Newborn or disparaged Newborn's goods, products, or services.

The court added that a trade libel or product disparagement claim under New Jersey law required publication of a false statement concerning another.
The court found, however, that the essence of Newborn's suit was that Albion had lied about Albion's products, not Newborn's. The court noted that Newborn never claimed that Albion had published false statements about Newborn's products.

Accordingly, the court ruled, Newborn's suit was not covered by the Hartford policy.

The court was not persuaded by Albion's argument that its statements about its own products "implicitly" defamed Newborn, observing that New Jersey did not recognize a claim for implicit disparagement or defamation.

The case is *Albion Engineering Co. v. Hartford Fire Ins. Co.*, No. 18-1756 (3d Cir. July 10, 2019).

New Jersey Appellate Court: Insured's Breach of Cooperation Clause Doomed Coverage of Lawsuit

An appellate court in New Jersey has affirmed a trial court's decision that an insured's breach of the cooperation clause in its insurance policy precluded coverage of a lawsuit against the insured.

The Case

In December 2008, Jacquelyn Ferentz, a police officer, filed a complaint under the New Jersey Conscientious Protection Act ("CEPA") against the Borough of West Wildwood, New Jersey, and its mayor, Herbert Frederick.

Thereafter, a notice of disciplinary action was filed against Ferentz and, after a hearing, she was fired.

Ferentz initially challenged her removal in court, but later agreed to dismiss the action.

The borough agreed to reimburse her for back pay and other benefits from the time she was out of work. But the agreement did not resolve Ferentz's CEPA claim and expressly stated that the resolution of the employment case "in no way affects [Ferentz's] ability to pursue her remedies" in the CEPA action. It also provided that the borough would not use "in any negative manner" the disciplinary action against Ferentz in her CEPA case.

The borough did not consult with its insurer, Municipal Excess Liability Joint Insurance Fund, before reaching the agreement with Ferentz. When the Fund learned about it, it disclaimed coverage of the CEPA action, asserting that the borough had violated the policy's cooperation clause by destroying the borough's only viable defense to Ferentz's CEPA claim.

The borough filed a declaratory judgment action against the Fund, seeking coverage under the policy for Ferentz's CEPA claim.

Before that action was resolved, Ferentz's CEPA claim went to trial. The trial court permitted Ferentz to testify about her termination and the hardships she allegedly had suffered – and barred the borough from asserting that the disciplinary action had been justified. The jury returned a verdict in favor of Ferentz, and the trial court later entered a judgment against the borough in the amount of $1,766,687.40 for damages, counsel fees, and costs.

The court hearing the borough's declaratory judgment action ruled in favor of the Fund, concluding that the borough had breached the policy's cooperation clause. The borough appealed.

The Decision

The appellate court affirmed.

In its decision, the appellate court rejected the borough's contention that its settlement with Ferentz "was an immaterial and inconsequential matter incapable of being a material and deliberate breach of the cooperation clause."

Rather, the appellate court pointed out, the borough had unilaterally settled with Ferentz without consulting with the Fund and, because of the agreement, the fund "was not able to present a defense that the suspension and termination [of Ferentz] was justified, made for good cause, or even in good faith."

Accordingly, the appellate court concluded that the trial court had properly granted summary judgment to the Fund.

The case is *Ferentz v. Frederick*, No. A-5628-17T2 (N.J. App. Div. July 15, 2019).

Maryland Appellate Court Rejects Unfair Settlement Practices Complaint Against Insurer

An appellate court in Maryland has affirmed a trial court's decision in favor of an insurer against a complaint alleging that, among other things, it had engaged in unfair claim settlement practices.

The Case

After Samuel and Cathy Brooks-McCollum allegedly failed to pay assessed fees on their home to their homeowners' association (the "HOA"), the HOA notified the McCollums of its intent to place a lien against their property.

In response, the McCollums allegedly sent lien notices of their own (which they later admitted had no validity) to individual members of the HOA's board of directors and its property management company.

To challenge the validity of those liens, the HOA sued the McCollums.

The McCollums submitted a claim to their insurer, State Farm Fire & Casualty Insurance Company, for defense and indemnification. State Farm denied the McCollums' claims. State Farm asserted that the McCollums were not insureds under the policy and that the civil suit against them did not meet the definition of an "occurrence" under the policy.

The McCollums filed an administrative complaint with the Property and Casualty Unit of the Maryland Insurance Administration ("MIA"). The McCollums challenged State Farm's denial-of-coverage decision and its denial of their claim for compensation for their asserted damages.

The MIA determined that "State Farm's actions have not been shown to be arbitrary and capricious or to otherwise be in violation of the Insurance Article."

Then, an administrative law judge concluded, as a matter of law, that the McCollums had not proven, by a preponderance of the evidence, that State Farm had acted arbitrarily or capriciously in handling their claim for coverage, engaged in unfair claim settlement practices, or refused or delayed payment of an amount due them without just cause. The administrative law judge proposed that State Farm not be found in violation of the Maryland Insurance Article and that the McCollums' complaint be denied and dismissed.

The MIA decided that the result reached by the administrative law judge was correct.

A trial court affirmed the MIA's final order, finding that "there was substantial evidence" to support the conclusion that the McCollums were not covered by the State Farm policy as an "insured" and/or that the civil action for which they sought coverage was not covered by the policy.

The McCollums appealed.

The Decision

The appellate court affirmed.

In its decision, the appellate court explained that despite the McCollums' "numerous claims of denial of due process, fraud on the part of the HOA, error on the part of the MIA and [trial] court in declining to grant them summary judgment, and denial of full trial and discovery," they failed to

set forth "any coherent argument or legal authority as to why the final decision of the MIA, upholding State Farm's denial of coverage and finding no violation by the insurer of the Insurance Article, was not legally correct based on substantial evidence."

In the appellate court's view, the competent evidence "credibly showed" that the McCollums were not insureds under the HOA's insurance policy with State Farm because they were not directors, officers, board members, or managers of the HOA, and Ms. McCollum's "tentative" membership on a finance committee did not prove that she served in any covered capacity for the HOA.

The appellate court added that, even had the MIA been persuaded that the McCollums were insureds under the policy, their act of sending invalid lien notices to members of the HOA, and consequently having to defend a lawsuit, did not meet the definition of "occurrence" in the policy such that defense and indemnification were warranted.

Accordingly, the appellate court affirmed the trial court's decision in favor of State Farm.

The case is *McCollum v. Maryland Ins. Administration*, No. 290 (Md. Ct. Spec. App. July 9, 2019).

Virginia Federal District Court: Advertising Injury Exclusion Bars Coverage for Trademark Infringement Claim

A federal district court in Virginia has ruled that an advertising injury exclusion in businessowners insurance policies precluded coverage for a trademark infringement lawsuit against the insured.

The Case

Video Gaming Technologies, Inc. sued Castle Hill Studios LLC in a federal district court in Oklahoma for, among other things, trademark and trade dress infringement, alleging that "class II bingo-based games" developed by Castle Hill had features closely resembling games produced by Video Gaming Technologies.

Castle Hill tendered the action to Hanover Insurance Company under its businessowners policies.

Hanover, citing the policies' "advertising injury" exclusion, asked the U.S. District Court for the Western District of Virginia to declare that it had no obligations to defend or indemnify Castle Hill. The exclusion stated: "The following is added to **Section II — Liability** and supersedes any provision to the contrary: The insurance provided under Paragraph **A. Coverages** does not apply to 'personal and advertising injury.'"

For its part, Castle Hill contended that the businessowners policies were ambiguous because, although one provision purported to exclude advertising injury coverage, other conflicting exclusions and endorsements appeared to provide for such coverage.

The parties moved for summary judgment.

The Decision

The district court granted Hanover's motion.

In its decision, the district court ruled that the businessowners policies "plainly and unambiguously" excluded coverage for personal and advertising injury.

The district court was not persuaded by Castle Hill's reliance on other endorsements and exclusions mentioning coverage for personal and advertising injury, reasoning that the advertising injury exclusion stated that it "supersedes any provision to the contrary," including the supposedly conflicting endorsements and exclusions relied on by Castle Hill.

There was no similar language purporting to supersede all other provisions in those other endorsements and exclusions, the district court added.

Accordingly, the district court concluded, based on a "plain reading of the advertising injury exclusion," the businessowners policies did not cover personal and advertising injury.

The case is *Hanover Ins. Co. v. Castle Hill Studios, LLC*, No. 3:18-cv-00072 (W.D. Va. July 8, 2019).

Michigan Appellate Court: Statutes Exclusion Barred TCPA Claim

A Michigan appellate court has affirmed a trial court's decision that an insurance policy did not provide coverage for a third party's claims against the insured.

The Case

In 2013, Sparkle Hill, Inc. sued Invecor LLC, doing business as AMB Business Supply. In an amended complaint, Sparkle Hill alleged that AMB had transmitted unsolicited facsimiles to Sparkle Hill and others similarly situated in or about January 2007 in violation of the federal Telephone Consumer Protection Act, an analogous New Jersey statute, and the New Jersey Consumer Fraud Act.

Before 2006, AMCO Insurance Company, had issued insurance policies to AMB that provided for defense and indemnity coverage for claims brought against AMB for causing "personal and advertising injury." AMCO asserted that prior to the May 2006 to May 2007 policy period, it added a new exclusion to AMB's policy that excluded coverage for "Violation of Statutes that Govern Emails, Fax, Phone Calls or Other Methods of Sending Materials or Information."

AMCO went to court, seeking a determination that it owed no duty to provide insurance coverage or a defense to AMB for the claims Sparkle Hill raised in its lawsuit.

The trial court granted AMCO's motion for summary disposition, finding that the exclusion in the insurance policy regarding violation of statutes precluded coverage for Sparkle Hill's claims.

Sparkle Hill appealed. It argued that the trial court should not have granted AMCO's motion for summary disposition because AMCO had not provided evidence that AMB had received notice

regarding the addition of the statutory-violation exclusion in the insurance policy when it was renewed in 2006.

The Decision

The appellate court affirmed.

In its decision, the appellate court explained that AMCO had provided evidence that AMB had received notice regarding the policy changes because it mailed the policy renewal packet to AMB's independent insurance agent. Moreover, the appellate court continued, Sparkle Hill had not provided any evidence to rebut the presumption that the packet had been delivered.

Accordingly, the appellate court upheld the trial court's decision that the insurance policy that AMCO issued to AMB did not provide coverage for Sparkle Hill's claims against AMB.

The case is *AMCO Ins. Co. LLC v. Invecor LLC*, No. 342498 (Mich. Ct. App. July 25, 2019).

Wisconsin Federal Court Holds That Amazon Could Be Required To Reimburse An Insurer For Property Damage Caused By A Defective Product Sold On Its Website

A Wisconsin federal court, ruling for an insurer, held that Amazon can be held liable under Wisconsin product liability law for a product sold by a third party through Amazon.com.

The Case

An insured bought a bathtub faucet adapter from a third-party seller, XMJ, on Amazon.com. The third-party seller, XMJ, was a Chinese company with no presence in the United States. Amazon did not own the faucet or any of XMJ's products.

The adapter malfunctioned and flooded the insured's home, which was insured by State Farm and Casualty Company. State Farm paid to repair the insured's home.

State Farm then sued Amazon for strict product liability under Wisconsin law.

Amazon moved for summary judgment. Amazon argued that it was not a seller within the meaning of Wisconsin product liability law. Amazon also argued that it could not be held liable for third-party content on its website because the federal Communications Decency Act prohibited treating it as a "publisher."

The Decision

The court denied Amazon's motion for summary judgment.

The court acknowledged that, under Wisconsin law, the manufacturer is the preferred target of product liability. However, the court noted, if a manufacturer cannot be sued in Wisconsin court,

a seller or distributor can be held strictly liable under Wisconsin law if they played an integral part of the chain of distribution. The court concluded that Amazon played such a role.

The court observed that Amazon provides payment processing for XMJ, and that Amazon provides a guarantee of both the timely delivery of products sold by XMJ and that the product will arrive in the condition described on Amazon.com. The court also noted that XMJ paid Amazon a fee to store its inventory at Amazon fulfillment centers in the United States and to ship products to buyers.

The court determined that Amazon took all the roles of a traditional reseller/distributor. The court also noted that, by listing the adapter for sale among its own products, Amazon implicitly represented that the adapter was safe. Amazon was also in a position to halt the flow of any defective goods of which it became aware.

Further, the court noted that Amazon provided the "only conduit" between XMJ, a Chinese seller, and the American marketplace. Without Amazon, the court noted, XMJ products would not be available at all in Wisconsin. For these reasons, the court held that Amazon can be held strictly liable under Wisconsin product liability law.

Finally, the court held that the Communications Decency Act did not immunize Amazon because State Farm did not seek to impose liability merely because it posted third-party content. Rather, the court noted, State Farm was seeking to hold Amazon liable for putting a defective product into the stream of commerce.

The case is *State Farm Fire & Cas. Co. v. Amazon*, 18-cv-261 (W.D. Wis. July 23, 2019).