Simpson Thacher

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***– Chambers USA* 2022 (quoting a client)**

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Michigan Court of Appeals Rules That Insurer Has No Duty To Indemnify TCPA Settlement

HOLDING

A Michigan appellate court ruled that an insurer had no duty to indemnify a class action settlement for claims alleging violations of the Telephone Consumer Protection Act ("TCPA"). *Bridging Communities, Inc. v. Hartford Cas. Ins. Co.*, No. 355955 (Mich. Ct. App. Mar. 2, 2023).

BACKGROUND

As a result of an advertising campaign initiated by Top Flite, thousands of individuals received unsolicited fax messages. The recipients filed a class action suit, alleging violations of the TCPA. After the suit settled, Top Flite sought indemnification from Hartford under a commercial business policy that provided coverage for "property damage" caused by an "occurrence," as well as "personal and advertising injury," defined to include violations of a person's right to privacy. Hartford denied coverage on several bases, including the lack of a covered occurrence, an expected or intended exclusion and a statutory right to privacy exclusion. The trial court concluded that both exclusions barred coverage and the appellate court affirmed.

DECISION

The appellate court ruled that coverage was barred by a statutory right of privacy exclusion, which applied to personal or advertising injury claims "[a]rising out of the violation of a person's right to privacy created by any state or federal act." However, the exclusion did not apply to "liability for damages that the insured would have in the absence of such state or federal act." The court explained that the claims against Top Flite were brought pursuant to the TCPA and that no common law cause of action exists under Michigan law for invasion of privacy arising out of unsolicited fax advertising. In so ruling, the court rejected the assertion that a right to seclusion from unwanted fax advertisements preexisted in common law and that the TCPA merely provided a remedy for violations of that right. Further, the court ruled that the exclusion was unambiguous and applied squarely to the underlying settlement even though the exclusion did not specifically mention the TCPA. In this respect, the court noted that the inclusion of a specific TCPA exclusion in a subsequent policy did not create ambiguity as to the exclusion in the operative policy.

The court also held that there was no covered "occurrence" because Top Flite intended to transmit the fax advertisements. The court explained that the "natural consequence" of that intentional act was the resulting property damage, in the form of depleted paper and ink supplies and use of the plaintiffs' fax machines. Based on this same reasoning, the court concluded that coverage was barred by an exclusion for damage that was "expected or intended from the standpoint of the insured."

COMMENTS

Numerous courts have addressed coverage for TCPA violations. Courts of Appeals in the Ninth and Eleventh Circuits have upheld coverage denials for TCPA claims based on exclusions for invasion of privacy claims. While those decisions involved different policy language than that presented in *Bridging Communities*, a common issue among many TCPA coverage decisions is whether a "right of solitude" (*i.e.*, the right to be free from unwanted intrusions) is part of a more general "right to privacy." *Bridging Communities* illustrates that even when a state recognizes a common law right to privacy, policyholders may face challenges in arguing that such a common law right encompasses unwanted fax advertising claims because such activity does not involve private information.

Finding That Policyholder Adequately Alleged "Ownership" Of Funds, New Jersey Court Declines To Dismiss Suit Seeking Coverage For Fraudulent Wire Transfer Loss

HOLDING

A New Jersey district court denied an insurer's motion to dismiss, ruling that a policyholder sufficiently alleged "ownership" of funds it never held for purposes of seeking coverage for wire transfer losses incurred as a result of an email hacking scheme. *Montachem International Inc. v. Federal Ins. Co.*, 2023 U.S. Dist. LEXIS 38640 (D.N.J. Mar. 8, 2023).

BACKGROUND

A hacker gained access to the email account of a Montachem sales representative and thereafter sent emails providing new payment and banking information for customers. As a result of the fraudulent emails, a customer sent payment to the hacker's account. When Montachem discovered the fraud, it sought coverage from Federal under computer fraud and forgery provisions. Federal denied coverage, arguing that Montachem never owned the funds that were transferred, a prerequisite to coverage under the policy. In ensuing litigation, Federal moved to dismiss the coverage suit.

DECISION

The court denied Federal's motion, ruling that Montachem adequately alleged ownership of the lost funds. The "Ownership" clause in Federal's policy provided that computer fraud and forgery coverage apply only to money "owned by" Montachem, "held by" Montachem "in any capacity," or for which Montachem is "legally liable." Federal argued that the complaint failed to allege any of these requirements because Montachem alleged that its customer transferred funds from the customer's own bank account to the hacker. As such, Federal asserted that Montachem never owned or "held" the lost funds. Rejecting this contention, the court reasoned that Montachem alleged, indirectly, that it "held" the funds in its capacity as a holder of an account receivable. The court explained that this allegation satisfied the requirement of "held . . . in any capacity" for purpose of denying Federal's motion to dismiss.

COMMENTS

In a case involving a nearly identical factual scenario, a different New Jersey district court granted the insurer's motion to dismiss based on the absence of allegations of "ownership." *See Posco Daewoo Am. Corp. v. Allnex USA, Inc.*, 2017 U.S. Dist. LEXIS 180069 (D.N.J. Oct. 31, 2017) (discussed in our November 2017 Alert). The *Montachem* court distinguished *Posco,* noting that the ownership provision in *Posco* covered property that the insured "owns or leases," "holds for others," or for which the insured is "legally liable," but did not include the more expansive phrase "in any capacity." This decision highlights the importance of policy language in this context, particularly the arguably expansive phrase "in any capacity."

New Jersey Supreme Court Rules That CGL Coverage Is Primary And Entity's Participation in Joint Insurance Fund Does Not Implicate "Other Insurance" Clause

HOLDING

The New Jersey Supreme Court ruled that a joint insurance fund affords protection through "self-insurance," not insurance, and therefore that a general liability insurer's "other insurance" clause was not implicated. *Statewide Ins. Fund v. Star Ins. Co.*, 2023 N.J. LEXIS 205 (N.J. Feb. 16, 2023).

BACKGROUND

A city was sued in a negligence action following the death of a young boy. After the suit settled, a dispute arose as to which party was responsible for indemnification of the settlement. Statewide Insurance Fund, a public entity joint insurance fund, provided $10 million per-occurrence coverage to the city, excess over any other insurance or self-insurance. The city also had coverage from Star Insurance under a general liability policy that was excess to both a self-insured retention and to "other insurance." The Fund and Star each argued that the other had the primary responsibility to indemnify the settlement. A trial court granted the Fund's motion, ruling that the Fund did not provide insurance so as to trigger the "other insurance" clause in Star's policy, and therefore that Star was primarily responsible for the settlement. An appellate court affirmed, as did the New Jersey Supreme Court.

DECISION

The New Jersey Supreme Court ruled that the city's participation in the Fund constituted self-insurance, rather than insurance, for purposes of Star's "other insurance" clause. The court emphasized that the statute governing the establishment of joint insurance funds, N.J.S.A. 40A:10-48, provides that a fund is "not an insurance company or an insurer under the laws of this State" and is therefore not subject to the extensive regulation of insurance under state law. Further, the court noted that the "risk pooling" nature of joint insurance funds differs fundamentally from traditional insurance, which contemplates a transfer of risk in consideration for premium payments.

Having determined that the Fund was not "insurance" within the meaning of Star's "other insurance" clause, the court ruled that Star's general liability policy was primary in covering the city's underlying settlement.

COMMENTS

The New Jersey Supreme Court's decision comports with the majority of decisions holding that participation in a joint insurance fund is akin to self-insurance, rather than traditional insurance, for purposes of an "other insurance" clause in a general liability policy. Importantly, the court deemed it irrelevant that the word "insurance" was used in both the Fund's contracting document and New Jersey's Joint Fund Act. The court emphasized that use of that term does not "override the Legislature's clear mandate that [joint insurance funds] are not insurance companies, that they cannot insure members, and that their authorized activities do not constitute 'the transaction of insurance nor doing an insurance business.'"

Georgia Court Rules That Reinsurance Dispute Is Subject To Arbitration Under Third-Party Beneficiary Doctrine

HOLDING

A Georgia district court ruled that a reinsurance dispute between General Electric and various reinsurers and retrocessionaires that indemnified insurance issued to a power plant was subject to arbitration, notwithstanding that the contract between the power plant and General Electric did not contain an arbitration provision. *Various Insurers, Reinsurers and Retrocessionaires Subscribing to Policy Numbers v. General Electric International, Inc.*, No. 1:21-cv-04751 (N.D. Ga. Mar. 17, 2023).

BACKGROUND

General Electric ("GE") designed, manufactured and installed a gas turbine at an Algerian power plant owned by SKH. When the turbine malfunctioned, SKH allegedly incurred tens of millions of dollars in damage and business interruption losses. SKH was partially reimbursed by its insurer. In turn, several reinsurers and retrocessionaires (collectively, the "Plaintiffs") partially indemnified SKH's insurer. Plaintiffs, as SKH's subrogees, then sought reimbursement from GE for those payments. GE moved to compel arbitration even though the contract between SKH and GE did not contain an arbitration clause. The court granted the motion to compel, concluding that SKH was a third-party beneficiary to a separate service contract between GE and the power plant's operator, which did contain an arbitration clause.

DECISION

The court ruled that Plaintiffs (as subrogees to SKH) were third-party beneficiaries of the service contract between GE and the plant operator because SKH received "direct tangible benefits" from that contract in terms of warranty, maintenance, inspection, testing and repair of parts and machinery. In addition, the court held that the claims at issue arose from the service contract and were therefore subject to arbitration. Plaintiffs argued that their claims were grounded in tort or statutory law, not contract, and therefore outside the scope of the service contract. The court rejected this contention, explaining that it need not reach "the issue of whether Plaintiffs' claims are within the scope of the Services Contract's arbitration provision, because . . . the provision in question delegates questions of arbitrability, including scope, to the arbitrator."

COMMENTS

The question of whether a non-signatory may be bound by an arbitration clause under a third-party beneficiary doctrine (or other equitable doctrines) turns not only on applicable policy language, but also on the particular factual record. One fact deemed important by the *General Electric* court was the sophisticated nature of the parties. The court stated: "Where contract terms are drafted by sophisticated parties that presumably understand the legal impact of conferring a substantial benefit on a non-executing third party, the equities further favor application of non-signatory doctrines."

Insurance Coverage for Claims Arising Out Of PFA "Forever Chemicals"

Previous Alerts have discussed the limits of general liability coverage for property damage and bodily injury claims arising out of exposure to various harmful substances, such as asbestos, lead paint particles, carbon monoxide, and toxic fumes. In many cases, policyholders have argued that such claims are not excluded from coverage by a pollution exclusion because they do not arise from traditional environmental contamination. An emerging area of litigation is whether claims arising out of exposure to PFA "forever chemicals" are excluded from coverage by virtue of pollution exclusions.

Thus far, a handful of courts have addressed insurers' coverage obligations for PFA claims against policyholders in the face of a pollution exclusion. In two cases, the courts granted insurers' motions to dismiss, concluding that pollution exclusions barred coverage for alleged bodily injuries and property damage arising out of PFA claims as a matter of law. *See Tonoga, Inc. v. New Hampshire Ins. Co.*, 159 N.Y.S.3d 252 (N.Y. App. Div. 3d Dep't 2022); *Grange Ins. Co. v. Cycle-Tex Ins. Co.*, 2022 WL 18781187 (N.D. Ga. Dec. 5, 2022). Notably, the *Tonoga* court held that coverage was not only barred by a total pollution exclusion but also a qualified pollution exclusion that contained an exception for "sudden and accidental" discharges. The court held that vague references in the complaint regarding "other ways" or "likely" types of discharge were insufficient to withstand the insurer's motion to dismiss as to its duty to defend. Additionally, the *Tonoga* court deemed it irrelevant that PFA substances were not specifically named in the exclusion or known to have a detrimental effect on the environment at the time the policy was formed.

However, other courts have ruled that insurers are required to defend suits alleging bodily injury and property damage arising out of exposure to PFA chemicals. In *Wolverine World Wide, Inc. v. Am. Ins. Co.*, 2021 U.S. Dist. LEXIS 200978 (W.D. Mich. June 15, 2021), the court held that the underlying complaint, which alleged bodily injury and property damage claims stemming from the policyholder's historical operations and waste disposal practices, was "arguably" within the scope of coverage, noting that the underlying actions were "silent, uncertain, and or unclear as to whether any of the alleged polluting events were 'sudden or accidental' or 'unexpected or unintended.'" A North Carolina district court also concluded that an insurer was obligated to defend an underlying PFA suit in *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 20, 2020). There, the court explained that under North Carolina law, the terms "discharge, dispersal, release, or escape" are "environmental terms of art" which apply to "prototypical environmental harms." Because the underlying complaints alleged harm caused by both contamination of water well systems and firefighters' direct contact with PFA-containing equipment, the court held that the exclusion did not relieve the insurer of its defense obligations.

An Ohio district court recently declined to exercise jurisdiction over a declaratory judgment action relating to an insurer's duty to defend and indemnify underlying PFA claims. In *Admiral Ins. Co. v. Fire-Dex, LLC*, 2022 U.S. Dist. LEXIS 198034 (N.D. Ohio Oct. 31, 2022), the court explained that resolution of the coverage issues, including application of total pollution exclusions, involved "novel and unsettled matters of state law" which were best left for a state court forum.

Aside from pollution exclusion clauses, future coverage litigation in this context is likely to implicate other complex questions of fact and law, including issues relating to the date of allegedly covered bodily injury or property damage (*see Crum & Forster Specialty Ins. Co. v. Chemicals, Inc.,* 2021 U.S. Dist. LEXIS 146702 (S.D. Tex. Aug. 5, 2021)), questions of causation between PFA exposure and any potential bodily injury, applicability of a "discharge" requirement in many pollution exclusions for claims that arise out of PFA-containing products as opposed to environmental contamination, and the applicability of intended act exclusions, among other things.

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