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Insurance Law Alert

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West Virginia Supreme Court Adopts Continuous Trigger For Long Tail Injury Claims Arising From Exposure To Harmful Substances

HOLDING

The West Virginia Supreme Court ruled that a continuous trigger applied to potentially trigger occurrence-based policies in effect from initial exposure through manifestation of bodily injury in a case involving a latent cancer. *Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, 2023 W.Va. LEXIS 455 (W. Va. Nov. 8, 2023).

BACKGROUND

From 1985 through 2010, Sistersville Tank Works was insured under a series of general liability policies issued by Westfield. The policies covered bodily injury "which occurs during the policy period" and defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In 2014, 2015 and 2016, three former employees of Sistersville were diagnosed with cancer and sued the company, alleging negligent failure to maintain tanks at a chemical plant in West Virginia. The claimants had worked at the plant for various times between 1960 and 2006 and were allegedly exposed to harmful materials and fumes during the course of their employment.

Westfield denied coverage for the suits and sought a declaration of no duty to defend or indemnify the claims. Westfield argued that there was no "occurrence" within any policy period because the claimants were not diagnosed with cancer until after the expiration of the last liability policy. Ruling on the parties' cross-motions for summary judgment, the district court granted Sistersville's motion, finding policy language ambiguous as to when coverage was triggered. The district court also predicted that the West Virginia Supreme Court would apply a continuous trigger to determine each insurer's coverage obligations over successive policy periods. On appeal, the Fourth Circuit noted the absence of West Virginia authority on this issue and certified the following question to the West Virginia Supreme Court: "At what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to development of a latent illness?"

DECISION

The West Virginia Supreme Court deemed the insuring clause of the policy ambiguous as to what event(s) triggers coverage in the context of latent or progressive diseases. Noting that ambiguities must be resolved in favor of the insured, the court endorsed the continuous trigger theory. The court also found support for a continuous trigger theory in the drafting history of general liability policies. In particular, the court found "occurrence" language to encompass gradual or repeated exposure to harmful conditions which inherently may occur over the course of several policy periods.

Additionally, the court found that a continuous trigger promotes cost efficiency because it "spread[s] the risk of loss widely to all of the occurrence-based insurance policies in effect during the entire process of injury or damage."

Finally, the court observed that while exposure to a harmful substance may not necessarily cause an "immediate or discrete injury," it is part of an ongoing injurious process, and therefore constitutes "injury" under the continuous trigger theory.

COMMENTS

The West Virginia Supreme Court expressly rejected a manifestation trigger theory in the context of latent disease, deeming it inconsistent with both drafting history and the law adopted by the majority of courts in other jurisdictions. The court noted that it had "found no court that currently follows the manifestation trigger in the context of a bodily injury, sickness, or disease." In addition to the absence of historical or legal authority for a manifestation trigger, the court also deemed it inconsistent with policy language. In particular, the court explained that the policy provides coverage for injuries taking place during the policy period and thus "does not make coverage dependent on the time of the discovery."

Ruling On Motion To Compel Production Of Allegedly Privileged Documents, Illinois Court Addresses Scope Of Common Interest Doctrine And "At Issue" Waiver

HOLDING

An Illinois district court granted in part and denied in part a motion to compel the production of certain documents, and addressed the scope of the common interest doctrine and the "at issue" waiver of privilege. *Ansur Am. Ins. Co. v. Borland*, 2023 U.S. Dist. LEXIS 190193 (S.D. Ill. Oct. 23, 2023).

BACKGROUND

Ansur hired the defendant attorneys to represent its insured in an underlying product liability action. Thereafter, Ansur filed a legal malpractice suit alleging that the defendants failed to adequately defend the insured, resulting in a higher than anticipated policy limits settlement. In response, the defendants argued that Ansur was partly responsible for its alleged loss.

In the malpractice suit, Ansur refused to produce certain materials on the basis of attorney-client and work product privilege. The defendants moved to compel the production of various materials, and the court addressed the following privilege-related issues: (1) whether certain individuals at Ansur were part of its "control group" such that their communications would give rise to a privilege; (2) whether Ansur and its reinsurers share a common legal interest such that the sharing of privileged documents would not waive privilege; and (3) whether Ansur waived privilege as to certain documents by placing their contents "at issue" in the litigation.

DECISION

Under Illinois law, when a corporate client invokes attorney-client privilege, the corporation must demonstrate that the employee involved in the communication falls within the "control group" of the company. The court explained that the control group consists of two tiers: top management decision makers, and employees who directly advise top management. In determining whether certain individuals were members of Ansur's control group, the court emphasized that the focus must be on the level of decision-making responsibility and the nature of advice given to decision makers, rather than the executive's job title.

The court also addressed the defendants' assertions that Ansur waived privilege as to certain materials by sharing those materials with its reinsurers. Ansur argued that privilege remained intact under the common interest doctrine, which holds that the privileged status of otherwise protected documents is not waived by distribution to non-control group parties where the parties to the communication share an "identical" interest and work "toward a common legal goal." The court noted that it was unable to determine whether an underlying privilege existed in the first place without an inspection of the documents at issue, but stated that "assuming an underlying privilege does exist, Ansur has submitted affidavits demonstrating the common legal interest between Ansur and its reinsurers." Specifically, the court noted the common interest in holding the defendants liable for their alleged malpractice and in recovering losses resulting from that malpractice. However, the court emphasized that communications between Ansur and its reinsurers are not protected by the common interest doctrine if the content of those materials is not privileged in the first place, such as documents "related to finance or other insurance matters," as opposed to legal advice or legal strategy.

Finally, the court rejected the defendants' contention that Ansur waived privilege as to certain documents by placing the contents of such documents "at issue." As the court noted, this doctrine prevents a party from strategically disclosing privileged communications to use "as a sword," but simultaneously invoking privilege "as a shield" to other communications. The court concluded that Ansur did not place the contents of any privileged materials "at issue" because it was defendants' affirmative defense of contributory negligence (rather than the claims in the action filed by Ansur) that implicated the disputed communications.

COMMENTS

The decision sheds light on an important distinction in the context of whether certain individuals are members of a company's "control group" for purposes of attorney-client privilege. The court emphasized that in order to be a member of a control group under Illinois law, the employee must provide substantive advice that is relied upon by company decision makers, rather than mere facts or information that is relied upon by decision makers. Further, the decision suggests that an employee's senior executive status, without more, does not automatically qualify an individual as a control group member.

Fifth Circuit Rules That Pre-Petition Payment Of Insurance Policy Limits Triggers Preference Provisions Of Bankruptcy Code

HOLDING

The Fifth Circuit ruled that a pre-petition policy limits settlement payment to a tort victim may be classified as a "transfer of an interest of the debtor in property" pursuant to federal bankruptcy law. *Law Office of Rogelio Solis PLLC v. Curtis*, 2023 U.S. App. LEXIS 26621 (5th Cir. Oct. 6, 2023).

BACKGROUND

The dispute arose out of a motor vehicle accident that involved two fatalities. The family of one victim (the Tellez family) filed suit against the tractor-trailer company whereas the family of the other victim (the Gomez family) issued a settlement demand for policy limits. The insurer paid the policy limits to the Gomez family and then notified the Tellez family that the policy had been exhausted. Thereafter, the Tellez family initiated an involuntary bankruptcy proceeding against the tractor-trailer company. The interim trustee commenced an adversary proceeding against the Gomez family, seeking to recover the insurance proceeds paid to the Gomez family pursuant to Bankruptcy Code Section 547, which provides the means by which a trustee may avoid any transfer of an interest of the debtor in property, including those made on or within 90 days before the date of the filing of the petition. The Gomez family moved to dismiss, arguing that the proceeds were not property of the debtor's estate since the debtor held "neither legal title in nor a contractual right" to the policy proceeds, and otherwise lacked control over the disbursement of those proceeds.

The bankruptcy court denied the motion to dismiss, ruling that the pre-petition payment of the policy proceeds to the first family could be considered a "transfer of interest of the debtor in property" under Section 547 of the Bankruptcy Code. More specifically, the court ruled that the Tellez family's complaint, alleging over $8 million in claims against a $1 million policy limit, satisfied the "limited circumstances" set forth in *Martinez v. OGA Charters, L.L.C.*, 901 F.3d 599 (5th Cir. 2018), under which a debtor may have an equitable interest in insurance proceeds such that they could be classified as property of the estate. In *OGA Charters*, the Fifth Circuit specified that such limited circumstances may exist where, as here, tort victims threaten the debtor's estate over and above policy limits. The Fifth Circuit affirmed.

DECISION

The Fifth Circuit ruled the debtor held an equitable property interest in the policy proceeds under the precedent set forth in *OGA Charters*. In *OGA Charters*, the court held that "where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate." (Citations omitted). As the Fifth Circuit noted, this property interest allows for a wider distribution of available assets during liquidation of the estate.

Further, the Fifth Circuit deemed *OGA Charters* controlling, notwithstanding that *OGA Charters* presented the question of whether insurance proceeds were property of the debtor's estate pursuant to Section 541 of the Bankruptcy Code (applicable where policy proceeds have not been disbursed prior to petition), rather than Section 547, at issue here, and which deals with pre-petition payments. In so ruling, the court noted that the meaning of the phrase "interest of the debtor in property," included in Section 541 is coextensive with the meaning of that same phrase in Section 547. The Fifth Circuit stated that:

> [T]he purpose of the avoidance provision is to [ ] preserve the property includable within the bankruptcy estate . . . ."[P]roperty of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.

(Citations omitted). The Fifth Circuit therefore concluded that the bankruptcy court correctly ruled that the trustee had properly alleged a transfer of the debtor's property as required by Section 547.

COMMENTS

This decision has important implications in the context of mass tort cases involving multiple claimants seeking damages or settlement payments that exceed available insurance proceeds. Under certain limited circumstances, pre-petition payments under an insurance policy made within 90 days of the filing of a bankruptcy may be clawed back under the Fifth Circuit's rulings in *OGA Charters* and *Curtis*.

Citing Insured's Failure To Comply With Consent Provision, Ninth Circuit Rules That Excess Insurer Has No Duty To Indemnify Underlying Settlement

HOLDING

The Ninth Circuit ruled that an excess insurer had no duty to indemnify an underlying settlement based on the insured's failure to seek or obtain the excess insurer's consent prior to settlement. *Vizio, Inc. v. Arch Ins. Co.*, 2023 U.S. App. LEXIS 28735 (9th Cir. Oct. 30, 2023).

BACKGROUND

When Vizio was named as a defendant in a class action lawsuit arising out of its television products, it notified Navigators, its primary insurer, and Arch, its excess insurer. Navigators denied coverage and Arch requested more information. Vizio never provided Arch with any substantive updates about the litigation and Arch never conveyed a formal coverage decision, although Arch's internal records reveal that Arch had decided to deny coverage. Two years later, Vizio settled the underlying suit without notifying Arch.

In ensuing coverage litigation, a California district court dismissed Vizio's complaint, ruling that it failed to properly notify Arch of a claim following exhaustion of primary policy limits. The Ninth Circuit affirmed on different grounds.

DECISION

The Ninth Circuit ruled that the district court erred in holding that Vizio failed to provide proper notice, explaining that the Arch policy did not require notice of a claim following exhaustion of the primary policy limit. Rather, the policy required notice "as soon as practicable after the . . . Company . . . becomes aware of such Claim." The Ninth Circuit held that Vizio's original notice of the class action suit to Arch was sufficient under the policy.

However, the Ninth Circuit ruled that Vizio failed to comply with its consent obligation, rejecting Vizio's assertion that the Arch policy did not incorporate the primary policy's consent provision. In particular, the court rejected Vizio's assertion that the follow form provision should be interpreted to mean that "only coverage" follows form, and does not indicate an intent for the consent clause to be incorporated in the excess policy. Similarly, the court held that nothing in Arch's excess policy conflicted with Navigator's primary policy such that the Arch policy would "supersede" the consent provision in Navigator's policy. A clause entitled "Duties In The Event Of A Claim" in Arch's policy, which did not explicitly mention consent, merely required notification of claims and did not conflict with the underlying consent provision.

Finally, the court rejected Vizio's argument that it was excused from complying with the consent provision because Arch breached its policy by not issuing a formal coverage denial. The court noted that under California law, an "insurer's breach of its policy renders a prior written consent provision unenforceable," but explained that this principle applies only when the policyholder has requested and been denied coverage. Here, however, Vizio never requested or had been denied coverage. Therefore, it was obligated to obtain Arch's consent prior to settlement.

COMMENTS

The Ninth Circuit's decision highlights an important limitation on an insurer's statutory obligation to issue a coverage decision in a timely manner. California statutory law indicates that an insurer's failure to accept or deny coverage within 40 days of tender constitutes a breach of the policy. 10 C.C.R. § 2695.7(b). The court deemed this statutory provision inapplicable to the present case, noting that it applies only after an insurer receives "proof of claim," defined as evidence that "reasonably supports the magnitude or the amount of the claimed loss." 10 C.C.R. § 2695.2(s). Here, Vizio had only provided "notice of claim," defined by state statutory law as "notification to an insurer . . . that reasonably apprises the insurer that the claimant wished to make a claim against a policy . . . and that a condition giving rise to the insurer's obligations under that policy or bond may have arisen." 10 C.C.R. § 2695.2(n). As such, the Ninth Circuit concluded that the statutory 40 day coverage denial did not apply.

Insurance Implications Of New York Attorney General's Public Nuisance Lawsuit Against PepsiCo

In one of the first lawsuits of its kind, New York Attorney General Letitia James has sued PepsiCo, alleging harm to the public and environment stemming from the company's single-use plastic bottles. *New York v. PepsiCo, Inc.*, No. 814682/2023 (N.Y. Sup. Ct. Erie Cnty. filed Nov. 15, 2023). The complaint alleges that PepsiCo's packaging "contributes significantly to high levels of plastic pollution along the Buffalo River, pollution that is contaminating drinking water and harming wildlife." Additionally, it alleges that PepsiCo failed to warn consumers about these risks and misled the public about its efforts to combat pollution. According to the lawsuit, the vast majority of the trash collected at sites along the Buffalo River over the past decade was plastic, a significant amount of which came from PepsiCo products. The suit seeks injunctive relief, disgorgement, civil penalties and restitution for the alleged damage.

The *PepsiCo* lawsuit raises the question of whether insurance coverage is available for this and future similar lawsuits. Such determinations will ultimately depend on governing jurisdictional law and applicable policy language, including in particular, exclusions relating to pollution and known loss. With respect to the pollution exclusion, it may be noteworthy that the New York suit does not allege direct discharges of harmful plastic by PepsiCo into the environment, but rather that its products ended up in New York rivers through consumer misuse. Coverage disputes may implicate numerous other issues, including whether a policyholder's conduct constitutes an "occurrence" rather than intentional conduct and whether injunctive relief or monetary damages in the form of penalties or disgorgement is subject to insurance coverage.

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