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WHAT'S INSIDE

DUTY TO DEFEND

Urban Outfitters owed no coverage for Navajo Nation suit, 3rd Circuit says

By Jason Schossler, Contributor, Westlaw Journals

An Urban Outfitters insurer has no duty to defend or indemnify the clothing retailer in a trademark infringement lawsuit filed by the Navajo Nation, a federal appeals court has ruled, upholding a lower court decision.

Hanover Insurance Co. v. Urban Outfitters Inc. et al., No. 14-3705, 2015 WL 6405763 (3d Cir. Oct. 23, 2015).

The 3rd U.S. Circuit Court of Appeals unanimously ruled that Hanover Insurance Co. is not obligated to provide coverage for the underlying case because the alleged infringement began 16 months before Hanover became the retailer's insurer.

A "prior publication" clause in Hanover's policy excluded coverage for any pre-policy injuries, the three-judge panel explained.

The Navajo Nation sued Pennsylvania-based Urban Outfitters in the U.S. District Court for the District of New Mexico for using as far back as March 2009 the terms "Navajo" and "Navaho" for the Navajo Collection clothing line.

The name and the patterns the line uses evoke the Navajo Nation's tribal designs and effectively misrepresent that the merchandise is produced by its members or some other American Indian tribe, even though it is not, the suit says.

REUTERS/Mario Anzuoni

Urban Outfitters was covered under a commercial general liability and umbrella liability policy for the period July 2010 to July 2011 issued by OneBeacon America Insurance Co., for which Hanover is the responsible insurer.

CONTINUED ON PAGE 13

COMMENTARY

Beware of patent trolls: Insurance coverage for infringement lawsuits brought by non-practicing entities

Christopher C. Loeber, Joseph Saka and Hilla Shimshoni of Lowenstein Sandler discuss how patent infringement risks can be mitigated or managed with the purchase of insurance coverage.

SEE PAGE 3

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TABLE OF CONTENTS

Beware of patent trolls: Insurance coverage for infringement lawsuits brought by non-practicing entities

By Christopher C. Loeber, Esq., Joseph Saka, Esq., and Hilla Shimshoni, Esq.
Lowenstein Sandler

On May 26 the U.S. Supreme Court issued a decision that is certain to give a significant boost to plaintiffs alleging patent infringement. The high court in *Commil USA LLC v. Cisco Systems Inc.*, 135 S. Ct. 1920 (2015), held that a good-faith belief that a patent is invalid is not a legal defense to a claim of induced infringement.[1] In so holding, the Supreme Court not only paved the way for the plaintiff to collect on a $64 million payout, but, as the dissent warned, also "increase[d] the *in terrorem* power of patent trolls."[2]

This decision underscores the legal and financial risks that patent trolls — also referred to as non-practicing entities or patent assertion entities — pose to companies big and small.

It is too soon to say whether the outcome will produce the dissent's anticipated effect, but there is no denying that patent infringement suits by NPEs are increasingly prevalent and that defending against them can be very expensive.

In 2013, for example, NPEs filed more than 3,600 suits, accounting for 67 percent of all patent infringement cases in the U.S.[3]

In total that year, NPEs sued 4,843 individual defendants. These defendants were from a wide variety of sectors, including e-commerce and software, semiconductors, and biotech.[4]

While a significant number of "repeat defendants" were companies with annual revenues greater than $10 billion, more than half the companies sued had earnings of less than $100 million.[5] These suits can be particularly devastating to startup companies that lack the time and resources to engage in expensive litigation.

Fortunately, some patent infringement risks can be mitigated or managed through insurance coverage. In recent years, several entities have introduced new products that expressly provide coverage for patent infringement claims. Not surprisingly, all insurance products are not created equal. Thus, companies contemplating the purchase of such policies should consider their needs carefully and educate themselves about the potential pitfalls and rewards.

> The high court held that a good-faith belief that a patent is invalid is not a legal defense to a claim of induced infringement.

While exploring specialized products for patent infringement claims, companies should not ignore the insurance policies they already have purchased. For instance, although many commercial general liability insurance policies, directors-and-officers liability insurance policies, and errors-and-omissions liability insurance policies exclude coverage for patent infringement claims, some such policies may be drafted broadly enough to cover certain patent infringement claims.

The bottom line: Whether shopping for a specialized policy or renewing a standard one, it is imperative for insureds to review and understand the scope of their potential patent infringement coverage.

SPECIALIZED PRODUCTS FOR PATENT INFRINGEMENT CLAIMS

Recognizing the growing risk and financial toll associated with defending patent infringement suits, several companies have created insurance products specifically designed to protect against NPE litigation. Among the companies offering these products are Intellectual Property Insurance Services Corp. and RPX Corp.[6]

The policies offered by these entities are generally touted as tools for covering the costs of defending a patent infringement action. RPX, for example, specifically markets its policy as "patent litigation insurance."[7]

Despite the labels, these policies cover more than just patent-related defense expenses. Many also cover the defense of other intellectual property infringement claims, such as copyright, trademark, business model, trade secret, process and application.[8] And still others provide coverage for IP-related verdicts and settlements.[9]

It should be noted that this product is in its infancy and the market is still being developed. Due to limited carrier participation, potentially high premiums and often-restrictive coverage terms, the current offerings are few.

Additionally, given the potential impact of patent troll claims, the underwriting process



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is quite involved. Prospective policyholders are subject to a lengthy and thorough application process.

On the plus side, if properly vetted, these policies can help companies avoid perilous and unforeseen cash drains that result from patent litigation. They can be particularly valuable to startups, because of these fledgling entities' limited resources.

But these policies are not cheap, and businesses of all sizes should carefully review the terms of the proposed coverage before purchasing patent infringement insurance. As with all insurance contracts, these specialized products are only as good as the policy forms on which they are written.

Upon entering the patent insurance market, prospective purchasers should first consider the scope of a proffered agreement. Does the policy obligate the insurer to provide a defense or simply to pay defense costs? Will the policyholder be able to use its preferred counsel in the defense of an infringement action? Will the policy cover only defense costs, or will it also provide indemnification against settlements or verdicts? Is "claim" defined to include demand letters, or does it apply solely to filed lawsuits? These questions are just a few of those that should be considered before any policy is purchased.

Next, buyers should take into account the coverage parameters. Patent insurance contracts are commonly "claims made and reported" policies, meaning coverage applies only to claims made and reported during the coverage period.[10]

To obtain broader coverage, policyholders should choose policies containing a "notice of circumstances" provision. Such provisions allow the policyholder to report circumstances that may result in a claim.

Specifically, if circumstances are reported during the initial coverage period but a claim relating to those circumstances is not filed until after the policy expires, the otherwise untimely claim will be considered to have been made during the initial coverage period. The notice of circumstances approach is particularly helpful in avoiding gaps when an existing claims-made policy is either non-renewed or replaced.

Exclusions are another key area of focus for the patent coverage shopper. For example, some policies exclude coverage for claims made during the first 90 days of the policy term. Others contain prior acts exclusions or preclude claims that can be traced to a retroactive date. Still others contain exclusions for fines or penalties, pre-existing infringement threats and losses/expenses that result from willful infringement.[11]

These may be important limitations, especially for first-time policy buyers. Thus, buyers should consider these exclusions in light of their individualized risk profile and seek to eliminate or narrow them wherever possible.

> This decision underscores the legal and financial risks that patent trolls — also referred to as non-practicing entities or patent assertion entities — pose to companies big and small.

Ultimately, patent infringement policies are new to the market, nonstandard, and relatively expensive. As a result, before incurring a substantial premium expense, prospective purchasers must become informed consumers. They must understand how the policy will respond and know what they are obligated to do in the event a claim is made.

COVERAGE UNDER TRADITIONAL POLICIES

Although patent infringement policies offer a focused approach to addressing claims by NPEs, businesses should not ignore their traditional policies as a source for potential coverage. Many standard policies (for example, CGL, D&O, E&O) contain exclusions for patent infringement claims, but not all do.

> Fortunately, some patent infringement risks can be mitigated or managed through insurance coverage.

Moreover, even where patent exclusions exist, coverage still may be found. For example, if an underlying action alleges multiple infringement claims — some of which are covered and some of which are excluded — the existence of the covered claims may entitle the policyholder to a defense of the entire infringement suit.[12]

For many years, patent infringement coverage was unavailable under traditional CGL policies. Following the U.S. Supreme Court's decision in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), which held that business methods are eligible for patents, courts have begun to recognize that CGL coverage may exist for certain types of patent infringement claims.

In addition to covering "bodily injury" and "property damage," CGL policies typically provide coverage for "advertising injury," which is defined to include, among other things, "infringing upon another's copyright, trade dress, or slogan" and "the use of another's advertising idea" in an advertisement.

Consequently, courts have found that, where a patent holder alleges infringement of a business method patent in the course of the alleged infringer's sales or marketing process, a CGL policy may respond.

By way of one example, in *Hyundai Motor America v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 600 F.3d 1092 (9th Cir. 2010), Hyundai sought coverage under a CGL policy for a patent infringement claim alleging the automaker infringed two patents related to the use of a "build your own vehicle" feature on its website.

Both patents concerned a method of generating customized product proposals for potential customers of an automobile dealer. The alleged infringing feature in question allowed customers to select options, and view photographs, of a virtual automobile based on the user's specifications.

Reversing the trial court, the 9th U.S. Circuit Court of Appeals held that the allegations in the underlying patent infringement suit did constitute "advertising injury."

"Depending on the context of the facts and circumstances of the case," the panel said, "patent infringement can qualify as an advertising injury if the patent involves any process or invention which could reasonably be considered an 'advertising idea' ... or, expressing the same idea in different words, if the third party alleged violation of a method patent involving advertising ideas."[13]

Patent coverage also may be available under D&O or E&O policies. These policies

generally provide coverage for loss resulting from claims alleging "wrongful acts." "Wrongful acts" is a defined term under most D&O and E&O policies and often is broadly worded to include actual or alleged acts, errors or omissions, misleading statements or breaches of duty.

Given the breadth of this definition, assuming the D&O or E&O policy does not have an exclusion for intellectual property claims (which many do), these policies may respond to patent infringement lawsuits.

For instance, in *American Century Services Corp. v. American International Specialty Lines Insurance Co.*, No. 01 CIV. 8847 (GEL), 2002 WL 1879947, at *7 (S.D.N.Y. Aug. 14, 2002), the court, noting that the D&O policy "sweeps exceedingly broadly," stated that "[p]atent infringement is a wrongful act, and the infringements alleged ... were committed (if they occurred at all) in the ordinary course of" the policyholder's operations.

Ultimately, although many CGL, D&O and E&O policies now expressly exclude patent infringement claims, policyholders should not assume that such coverage is unavailable under their existing policies. Instead, long before a claim is made, policyholders that face NPE risks should assess the terms of their current policies to ascertain the scope of potential coverage for a patent infringement suit.

Defending patent infringement claims is expensive and, absent legislative overhaul, the risk of such claims is not going away. Although far from perfect, insurance coverage is one of the most powerful weapons in a potential defendant's arsenal.

Companies in the NPE cross hairs must know and understand their existing and available insurance options. And they should not go it alone. Experienced coverage counsel and specialized insurance brokers understand the risks, know the market, and represent the best resources for obtaining and maximizing a patent insurance portfolio.

At the end of the day, knowledge is power, and assembling the right team is the first step toward obtaining comprehensive insurance protection against patent troll attacks. WJ

NOTES

[1] A party can generally be sued for patent infringement on two grounds: direct patent infringement (for example, where the party uses, makes, or sells a method covered by a patent) and indirect or induced infringement (where a party induces others to infringe or contributes to their infringement). *See* 35 U.S.C. § 271.

[2] *Commil USA v. Cisco Sys.*, 135 S. Ct. 1920, 1932 (2015) (Scalia, J. dissenting).

[3] Brendan Coffman, *Patent Troll Business Models, Patent Progress* (Nov. 16, 2012), *available at* http://www.patentprogress.org/2012/11/16/patent-troll-business-models/; *see* also Fiona M. Scott Morton & Carl Shapiro, *Strategic Patent Acquisition*, 79 ANTITRUST L.J. 463, 465-68 (2014).

[4] *Id.*; RPX Corp., 2013 NPE Litigation Report, *available at* https://www.rpxcorp.com/wp-content/uploads/2014/01/RPX-2013-NPE-Litigation-Report.pdf (last visited Aug. 7, 2015). Importantly, RPX Corp.'s statistics on NPE identify four distinct entities: PAEs, individual investors, non-competing entities (which assert patents outside of their area of product or service), and universities and research institutes.

[5] Morton & Shapiro at 466-67.

[6] iPISC, http://www.patentinsurance.com/ (last visited Aug. 7, 2015); PRX Corp., http://www.rpxcorp.com/rpx-insurance/ (last visited Aug. 7, 2015).

[7] Patent Litigation Insurance: *The Rational Solution to Patent Litigation Risk*, PRX Corp., *available at* http://www.rpxcorp.com/wp-content/uploads/sites/2/2015/04/RPXIS_Brochure_C-version_FINAL_04.13.15.pdf (last visited Aug. 7, 2015).

[8] *Id.*

[9] iPISC, http://www.patentinsurance.com/ (last visited Aug. 7, 2015); PRX Corp., http://www.rpxcorp.com/rpx-insurance/ (last visited Aug. 7, 2015).

[10] Erin Coe, *Risk of 'Patent Troll' Insurance May Slow Adoption*, LAW360 (Apr. 22, 2013), *available at* http://www.law360.com/articles/434841/risks-of-patent-troll-insurance-may-slow-adoption?article_related_content=1.

[11] RPX Corp., http://www.rpxcorp.com/wp-content/uploads/sites/2/2015/03/RPXIS-Summary-of-Coverage_01.23.15.pdf (last visited Aug. 7, 2015).

[12] *See, e.g., Union Ins. Co. v. Land & Sky Inc.*, 529 N.W.2d 773, 778 (1995).

[13] *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 600 F.3d 1092, 1100 (9th Cir. 2010) (citations and alterations omitted); *see also Mid-Continent Cas. Co. v. Kipp Flores Architects*, 602 Fed. App'x 985 (5th Cir. 2015); *DISH Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d 1010, 1027-1028 (10th Cir. 2011).

Insurers sue Chrysler, U.S. government over California wildfire

By Jason Schossler, Contributor, Westlaw Journals

Federal Insurance Co. and two other insurers have sued Chrysler Group LLC and the U.S. Bureau of Land Management to recover more than $220,000 paid to policyholders for property damage caused by a 2013 brush fire in Southern California.

Federal Insurance Co. et al. v. United States et al., No. 3:15-cv-02355, complaint filed (S.D. Cal. Oct. 19, 2015).

The insurers allege the July 2013 fire, known as the "Chariot Fire," was started when BLM employee Jason Peters drove an allegedly defective Chrysler Jeep through drought-ridden San Diego County.

The fire consumed about 7,055 acres and destroyed 122 residential structures, 29 outbuildings and 66 vehicles, according to the lawsuit filed in the U.S. District Court for the Southern District of California.

The complaint says Chrysler is strictly liable for the fire because the company failed to recall the allegedly defective Jeep.

The BLM, part of the U.S. Interior Department, also is vicariously liable for Peters' allegedly negligent and reckless acts, the suit says.

Along with Federal Insurance, Allstate Insurance Co. and Safeco Co. of Illinois seek to recover about $222,733 paid to three insureds for damages to their Mount Laguna and Ramona, Calif., properties.

The suit follows similar ones filed in May by State Farm General Insurance Co. and United Services Automobile Association. *State Farm Gen. Ins. Co. v. United States et al.*, No. 3:15-cv-01201, *complaint filed*, (S.D. Cal. May 29, 2015) and *United Servs. Auto. Ass'n et al. v. United States et al.*, No. 3:15-cv-01144, *complaint filed* (S.D. Cal. May 21, 2015) (see *Westlaw Journal Insurance Coverage*, Vol. 25, Iss. 35, 25 No. 35 WJINSC 7).

THE FIRE

According to the Federal Insurance complaint, the Chariot Fire broke out July 6, 2013, when Peters drove a BLM-owned 2009 Jeep Wrangler through an area that had experienced a yearslong drought.

While Peters drove the Jeep through the dry vegetation near Julian, Calif., brush accumulated under its chassis area on top of a skid plate, the suit says.

The brush ignited on contact with the Jeep's catalytic converters, and the fire spread across the skid plate, igniting a fuel line to the engine compartment and accelerating as the fuel tank contents drained out of the fuel line, according to the suit.

Peters continued to drive across and around the Great Southern Overland Stage Route area with the undercarriage on fire, igniting several areas along the way, the suit says. Those areas combined to form the Chariot Fire, the suit says.

REUTERS/Noah Berger

Three insurers are seeking reimbursement for damages payouts stemming from the 2013 fire known as the "Chariot Fire," started when a U.S. Bureau of Land Management employee allegedly drove a Chrysler Jeep through drought-ridden San Diego County. This photo shows a firefighter battling a wildfire near San Andreas.

ALLEGED NEGLIGENCE

The insurers say the Jeep was defectively designed because vegetation and debris from outside the vehicle could easily accumulate on the skid plate and undercarriage near the hot catalytic converters.

Chrysler allegedly knew about the dangerous design, which led the company to recall nearly 60,000 2010 Wranglers with similar hazards in 2012, the suit says. Chrysler fixed the recalled vehicles by replacing the skid plate with a skid bar that would not allow debris to collect, according to the suit.

The company, however, "knowingly, willfully, intentionally and recklessly" failed to recall and fix any other Jeep Wrangler model years, including the 2009, even though they had the same or similar design defects, the suit says.

The insurers further allege that BLM breached its duty of care in its management and supervision of the public land where the fire originated.

The federal agency was careless in failing to take reasonable precautions to ensure against the start and spread of a fire, the suit adds.

"BLM knew or should have known that driving over tall and heavy brush in a hazardous fire area would increase the risk of fire," the suit says.

The suit accuses BLM of negligence, trespass to property and private nuisance. Chrysler faces separate causes of action for strict product liability and negligent recall. WJ

Attorneys:
Plaintiffs: Peter A. Lynch and Thomas M. Regan, Cozen O'Connor, San Diego

Related Court Document:
Complaint: 2015 WL 6142260

Property fire claims transferred to West Virginia federal court

By Jason Schossler, Contributor, Westlaw Journals

An insurance company looking to recover nearly $710,000 it paid to a policyholder whose rental property was damaged in a fire allegedly caused by a defective heat pump must pursue its subrogation action in West Virginia, a Virginia federal judge has ruled.

Allstate Indemnity Co. et al. v. General Electric Co. et al., No. 1:15-cv-00509, order issued (E.D. Va., Alexandria Div. Oct. 16, 2015).

Allstate Indemnity Co. asserts in a complaint filed in the U.S. District Court for the Eastern District of Virginia that General Electric Co., Sharp Corp. and subsidiary Sharp Electronics Corp. are strictly liable for the fire damage because the product was "unreasonably dangerous and not safe for its intended use."

In granting the defendants' motion to transfer venue, U.S. District Judge T.S. Ellis III said litigating the case in the U.S. District Court for the Northern District of West Virginia would serve the interest of justice and be more convenient for the parties and witnesses.

Allstate also has not identified any relation between the Eastern District of Virginia and the dispute, Judge Ellis said in an Oct. 16 order.

According to the complaint, the fire occurred in a Martinsburg, W.Va., residential model home purchased by Allstate policyholder Abdul Jalloh and leased to Dan Ryan Builders, which used it for an office and display area.

To provide a heating and cooling source for the residence, Dan Ryan Builders installed a GE Zoneline Model 2100 heat pump unit in the garage in 2007.

Sharp Corp. manufactured the unit and distributed it through subsidiary Sharp Electronics, the suit says.

A fire broke out Oct. 21, 2012, when an arcing failure of the unit's internal heating coils ignited a highly combustible refrigerant in the heat pump's copper tubing, according to Allstate.

The fire spread throughout the residence within minutes, destroying it and severely injuring a Dan Ryan Builders employee, according to the suit.

Allstate seeks to recover $709,955 it paid to Jalloh for the losses, plus pre- and post-judgment interest. The suit alleges the defendants breached the implied warranty of merchantability because the unit "contained unreasonably dangerous internal defects," which caused the fire.

The defendants also were negligent in their duty to manufacture, distribute and sell a product free of such defects, the complaint says.

PROPER VENUE

Moving to transfer venue, GE and Sharp Electronics said in a supporting memo that "it is clear" the case belongs in the Northern District of West Virginia.

"The fire happened there. The property is located there. The relevant witnesses reside there," the companies argued.

They also said the only "conceivable connection" Virginia has to the lawsuit is the fact that Allstate's counsel is located in the state.

Japan-based Sharp Corp. separately moved to dismiss for lack of personal jurisdiction and improper venue or, in the alternative, transfer of venue to the Northern District of West Virginia. The company noted it has no contacts or business in Virginia to warrant jurisdiction in the state (see *Westlaw Journal Insurance Coverage*, Vol. 26, Iss. 3, 26 No. 3 WJINSC 5).

The only "conceivable connection" Virginia has to the lawsuit is the fact that Allstate's counsel is located in the state, GE and Sharp Electronics argued.

Judge Ellis denied Sharp Corp.'s motion to dismiss for personal jurisdiction as moot because the matter is "properly resolved by the transferee forum." WJ

Related Court Documents:
General Electric and Sharp Electronics' memo: 2015 WL 5968322
Sharp Corp.'s memo: 2015 WL 5968322
Complaint: 2015 WL 1786892

Suit says insurer denied doctor's disability claim in bad faith

By Jason Schossler, Contributor, Westlaw Journals

A former Los Angeles gastroenterologist has sued Northwestern Mutual Life Insurance Co. for refusing to pay total disability benefits he says he is owed under his policy.

Rosoff v. Northwestern Mutual Life Insurance Co. et al., No. BC597095, complaint filed (Cal. Super. Ct., L.A. Cty. Oct. 7, 2015).

Dr. Saul Rosoff says the insurer breached an implied duty of good faith and fair dealing by unreasonably denying his claim for benefits after he was diagnosed with Parkinson's disease and narcolepsy, according to the lawsuit filed in the Los Angeles County Superior Court.

"Northwestern subjected plaintiff to cruel and unjust hardship in conscious disregard of his rights," the suit says.

According to the complaint, Rosoff was diagnosed with Parkinson's disease and narcolepsy in the early 2000s after he developed a tremor on the left side of his body, along with severe fatigue, balance issues and other ailments.

He scaled back his gastroenterology practice by 50 percent in 2005 and gave it up altogether four years later, the suit says.

Rosoff filed a claim for benefits under his Northwestern policy and two other disability policies he maintained with other insurance carriers, according to the suit.

In 2009 Northwestern acknowledged Rosoff was partially disabled and paid partial benefits dating back to 2007. However, the insurer refused to acknowledge he was totally disabled from performing in his occupation, the suit says.

In denying the claim for total disability benefits, Northwestern rejected the opinions of Rosoff's treating neurologist, family doctor and other practitioners, who said he was permanently incapacitated from performing his usual duties as a gastroenterologist, the suit says.

The insurer also rejected the conclusion of Rosoff's two other disability insurance carriers who awarded him total disability benefits under their respective policies, according to the suit.

Rosoff says Northwestern's denial has caused him considerable financial and emotional hardship.

"Northwestern's conduct has caused Dr. Rosoff to suffer immense worry, anxiety, fear, frustration, anger and resentment in an amount to be proved at trial," the suit says.

Rosoff seeks general, special and consequential damages on claims of breach of contract and bad faith. He also seeks unspecified punitive damages because the insurer's alleged breaches were committed with "fraud, malice or oppression." WJ

Attorneys:
Plaintiff: William M. Shernoff and Samuel L. Bruchey, Shernoff Bidart, Echeverria Bentley LLP, Beverly Hills, Calif.

Related Court Document:
Complaint: 2015 WL 6161195

Assault exclusion relieved insurer of obligation to pay life insurance benefits

An insurer did not act in breach of contract or bad faith when it refused to pay life insurance benefits based on a policy exclusion related to the commission of an assault, a South Carolina federal judge has ruled.

Gardner v. Prudential Insurance Company of America, No. 6:14-3269, 2015 WL 5954611 (D.S.C., Greenville Div. Oct. 13, 2015).

U.S. District Judge Timothy M. Cain of the District of South Carolina said the evidence showed the insured decedent was involved in an assault before he was fatally stabbed.

Bryant Gardner was covered by a $125,000 in accidental death and dismemberment policy issued by Prudential Insurance Company of America. The policy contained an exclusion for losses resulting from an assault or attempted assault, the judge's order says.

Prudential moved for summary judgment.

Judge Cain said the "crux" of the case is Bryant's statement to the police that he had stabbed himself.

Gardner had argued that, based on that statement, there are fact issues as to whether Bryant had committed an assault at the time of the stabbing.

Gardner argued Bryant's death resulted from an accidental falling onto the knife and the resultant loss of blood, but not that he had committed an assault or attempted assault and M.E. fatally wounded him when she defended herself, the order says.

> "The undisputed fact that the decedent was stabbed twice negates almost any possibility that he fell on the knife and that the stabbing was accidental," the judge said.

Bryant went to a bar Sept. 6, 2013, with a female companion identified in court documents only as "M.E.," and was observed grabbing and pushing her in the bar and in the parking lot, according to the order. M.E. later told police they had left the bar to go to her house and while there, she grabbed a knife and stabbed Bryant twice in self-defense after he lunged at her.

Bryant told the police at the scene that he had fallen on the knife and stabbed himself, the order says. He was taken to a hospital and later died.

The death was ruled a homicide, but no criminal charges were issued against M.E. because the judge overseeing the case determined she had acted in self-defense, the order says.

Yuvani Gardner, Bryant's wife, filed a claim for accidental death benefits in November 2013. Prudential denied the claim in April 2014 based on the assault exclusion, and Gardner sued the insurer for breach of contract and bad faith.

Judge Cain said the evidence shows Bryant had been involved in an assault right before the stabbing.

"Even accepting that the decedent fell on the knife twice, the decedent's stabbing occurred in the context of a simultaneous assault on M.E. and there is no evidence to dispute that," the judge said.

"Moreover, the undisputed fact that the decedent was stabbed twice negates almost any possibility that he fell on the knife and that the stabbing was accidental," he said.

Judge Cain added that Bryant's "highly incredible statement" that he had stabbed himself would not lead a reasonable jury to find that Prudential had breached its contract or acted in bad faith in relying on the policy exclusion.

He granted the insurer's motion for summary judgment. WJ

Related Court Document:
Order: 2015 WL 5954611

Insurer's investigation of water damage claim didn't rise to bad faith

A Pennsylvania federal judge has determined that an insurer did not act in bad faith in investigating and denying a claim for water damage to a commercial building.

Tran v. Seneca Insurance Co., No. 14-5491, 2015 WL 5964996 (E.D. Pa. Oct. 14, 2015).

U.S. District Judge Jan E. DuBois of the Eastern District of Pennsylvania said that even though the investigation took more than a year, the delays were not all attributable to the insurance company.

Judge DuBois said the policyholder can move forward with his contract claim as there are fact issues related to application of the water and maintenance exclusions the insurer relied on in denying coverage.

According to the judge's opinion, Dep Tran owned two commercial properties in Lansdowne, Pa. The buildings are separated by a masonry wall and share a single roof. Tran rents the lower floor of one of the buildings to a nail salon.

On Sept. 4, 2012, the nail salon called the local fire department and reported the building was at risk of immediate collapse, the opinion says.

The firefighters saw that the roof's membranes were bowing and calculated there was about 2,000 gallons of standing water on the flat roof. They used a pump to remove the water and cut holes in the roof to let the water run into the building, the opinion says.

Tran said the incident caused about $135,000 in damage to the property, according to the opinion. He filed a claim with Seneca Insurance Co.

Seneca hired an outside adjuster who investigated the loss a few days after the incident. The insurer also requested police and fire reports and other documents from Tran, the opinion says.

Tran allegedly delayed forwarding requested materials.

In February 2013 Seneca hired an engineering firm to investigate the cause of the loss. The firm concluded the loss was caused by blocked drainage and poor maintenance, the opinion says.

The insurer subsequently denied coverage in December 2013 based on policy exclusions for "[w]ater that backs up or overflows from a sewer, drain or sump" and an exclusion for a loss caused by inadequate maintenance.

Tran sued Seneca for breach of contract and bad faith, and the insurer moved for summary judgment.

Judge DuBois allowed Tran to move forward with his breach-of-contract claim because of fact issues regarding applicability of the exclusions.

The judge concluded the water exclusion is ambiguous. For example, he said, the exclusion is unclear as to whether it applies to any obstruction of any drainage system or only water that is discharged from a drainage system.

As for the maintenance exclusion, Judge DuBois noted that Tran's son testified that he went on the roof on a periodic basis, removed debris and checked the drains.

Consequently, a reasonable jury could find that adequate maintenance was performed on the roof and the drainage system became clogged despite that maintenance, he said.

The judge also pointed out that the parties disagree about the roof's condition. Tran's son testified that the roof was "new" and did not require extensive maintenance, while the engineering firm Seneca hired said the roof was in "poor condition" as a result of chronic neglect.

Judge DuBois rejected the bad-faith claim, finding that Seneca conducted a reasonable investigation. He stressed that the insurer hired an outside adjuster and an engineering firm to investigate the loss, reviewed various documents and requested additional ones, and examined Tran's son under oath.

> "Although the investigation took over a year, the delays were not solely 'attributable to the defendant,'" U.S. District Judge Jan E. DuBois said.

The judge also found no evidence of unreasonable delay. Seneca assigned an adjuster to the claim immediately after the loss, and the adjuster inspected the roof within three days of the loss, he said.

Even though the engineering firm Seneca hired did not start its investigation until six months after the incident, the insurer's adjuster had requested documents from Tran and continued to investigate the claim until it issued the denial in December 2013.

"Although the investigation took over a year, the delays were not solely 'attributable to the defendant,'" the judge said. WJ

Related Court Document:
Opinion: 2015 WL 5964996

Judge green-lights contract, bad-faith claims in Connecticut concrete decay case

Homeowners can proceed with a lawsuit accusing Liberty Mutual Fire Insurance Co. of acting in breach of contract and bad faith by denying coverage for crumbling basement walls, a Connecticut federal judge has ruled.

Metsack et al. v. Liberty Mutual Fire Insurance Co. et al., No. 3:14-CV-01150, 2015 WL 5797016 (D. Conn. Sept. 30, 2015).

U.S. District Judge Vanessa L. Bryant of the District of Connecticut noted this is not the first concrete-decay case in which Liberty Mutual or a related insurer initially denied coverage on one basis and then cited different exclusions in the final claim rejection.

BASEMENT WALLS BUILT WITH 'DEFECTIVE' CONCRETE

According to the judge's order, Stephen and Gail Metsack owned a house constructed in 1992 in Ashford, Conn. The couple insured the property through Allstate Insurance Co. until September 2009, when they contracted with Liberty Mutual for homeowners insurance.

The Metsacks say they noticed water in their basement and horizontal and vertical cracks in the basement walls in spring 2014. They say a contractor told them the cracking was caused by defective concrete from J.J. Mottes Concrete Co. that was used to construct basement walls in the late 1980s and early 1990s, the judge's order says.

The concrete allegedly contained a chemical that caused it to expand over time and turn the concrete into rubble.

The Metsacks filed a claim with Liberty Mutual, and the insurer denied the claim in May 2014 on the basis that the policy does not provide coverage for "settling/earth movement or seepage of ground water."

The Metsacks sued Liberty Mutual for breach of contract, bad faith, and unfair trade and insurance practices under state law. They claim the cost to replace the basement walls would minimally be $125,000.

The policyholders allege Liberty Mutual has "a general business practice" of misrepresenting to insureds that concrete decay of basement walls is not a covered loss, pointing to several similar lawsuits.

They say Liberty Mutual denied their claim even though the company was aware of

"Liberty Mutual could have acted in bad faith by describing a structural wall as a 'foundation' without any inspection of the premises," the judge said.

Connecticut says insurers can't cancel policies because of crumbling foundations

On Oct. 6 the Connecticut Insurance Department issued a notice to all homeowners insurers in the state, warning that they cannot cancel policies for properties that have crumbling foundations.

The department's notice cites recent news reports detailing that houses built in the late 1980s could be experiencing crumbling foundations today. The department said no houses "have abruptly collapsed or caved in as a result of a deteriorating foundation."

According to the statement, the department has received at least one complaint by a homeowner who said his insurer tried to non-renew his policy as a result of a crumbling foundation. The department has since barred insurers from canceling or non-renewing insurance coverage due to "a foundation found to be crumbling or otherwise deteriorating."

Any non-renewal action by an insurer must comply with its underwriting guidelines and department rules, the notice said.

a federal court ruling in another concrete-decay case, *Bacewicz v. NGM Insurance Co.*, No. 3:08-CV-1530, 2010 WL 3023882 (D. Conn. Aug. 2, 2010), in which a judge found a policy exclusion Liberty Mutual cited was susceptible to more than one interpretation.

Liberty Mutual moved to dismiss, arguing that the policy excludes coverage for loss to a "foundation" or "retaining wall." The insurer also questioned whether the damage occurred during the policy period.

The Metsacks added Allstate as a defendant in March.

INSUREDS CAN PROCEED WITH ALL CLAIMS

In allowing the Metsacks to proceed with their contract claim, Judge Bryant stressed

that this court has "persuasively rejected" Liberty Mutual's arguments in three cases.

The policy terms "foundation" and "retaining wall" are ambiguous and should be interpreted in a manner favorable to the policyholders, she said.

As for bad faith, the Metsacks allege the insurer rejected their claim without conducting an investigation and cited inapplicable policy language in an effort to trick them into accepting that there was no coverage for the loss.

Prior courts in this district have found these same allegations sufficient to state a claim for breach of the covenant of good faith and fair dealing," Judge Bryant noted.

She added that this is not the first of these cases in which Liberty Mutual or a related insurer "initially denied coverage on one basis — here based upon language excluding 'settling' or 'seepage' of groundwater — only to later raise arguments that the affected structures were excluded 'foundation[s]' or 'retaining wall[s].'"

"Liberty Mutual could have acted in bad faith by describing a structural wall as a 'foundation' without any inspection of the premises," the judge added.

She also allowed the Metsacks can move forward with causes of action for violation of the Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. § 38a-816, and Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b.

Finally, Judge Bryant rejected the insurer's argument that the question of whether the terms "foundation" and "retaining wall" are ambiguous should be certified to the Connecticut Supreme Court, saying certification would be premature at this point in the proceedings. WJ

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Related Court Document:
Order: 2015 WL 5797016

NEWS IN BRIEF

NORTHROP GRUMMAN UNIT DROPPED FROM BOAT CRASH SUBROGATION SUIT

Northrop Grumman Sperry Marine Asia Inc. has been dropped as a defendant by a group of insurers seeking to recover more than $4.6 million paid to a policyholder whose barge and cargo were damaged in a 2013 boat crash on the Cape Cod Canal. AIG Europe Ltd. and four other insurance companies sued NGSMA and Northrop Grumman Systems Corp. on behalf of Lafarge Building Materials Inc., alleging a defective tug boat steering mechanism the companies designed caused the crash. The complaint alleged the mechanism was defective and unreasonably dangerous at the time the companies placed it into the stream of commerce. According to an Oct. 12 stipulation, the insurers agreed to dismiss without prejudice all claims against the Virginia-based NGSMA. All remaining claims against Northrop Grumman Systems will remain in full force and effect, the stipulation said.

AIG Europe Ltd. et al. v. Northrop Grumman Systems Corp. et al., No. 2:15-cv-06128, stipulation of dismissal filed (D.N.J. Oct. 12, 2015).

Related Court Document:
Complaint: 2015 WL 4757593

JUDGE ORDERS LOUISIANA TO KEEP FUNDING PLANNED PARENTHOOD

A federal judge has blocked Louisiana Republican Gov. Bobby Jindal's administration from cutting Medicaid funding to Planned Parenthood Gulf Coast Inc.'s clinics in the state. In granting the organization's motion for a temporary restraining order, U.S. District Judge John W. deGravelles of the Middle District of Louisiana said terminating the state's Medicaid provider agreements with PPGC would cause "irreparable harm" to nearly 5,200 low-income patients who depend on it for health services including cancer screenings and contraceptive counseling. In August Jindal ordered the state to defund PPGC's clinics, citing videos released by the organization's opponents accusing it of illegally profiting from fetal tissue sales after abortions. In its lawsuit, PPGC denies it profits in any way from the sale of fetal tissue, and it calls the videos "heavily edited and misleading." The restraining order will remain in place while Judge deGravelles makes a final ruling in the case.

Planned Parenthood Gulf Coast Inc. et al. v. Kliebert, No. 3:15-cv-00565, 2015 WL 6122984 (M.D. La. Oct. 18, 2015).

Related Court Document:
Order: 2015 WL 6122984

HONEYWELL FACES SUBROGATION SUIT OVER TRUCK FIRE

Liberty Mutual Insurance Co. says Honeywell International Inc. owes at least $83,000 to compensate it for a vehicle engine fire caused by an allegedly defective turbocharger. The complaint was filed in Texas state court on behalf of Liberty Mutual policyholder Electric Field Services Inc., whose 2008 Ford F750 Super Duty Truck sustained fire damage to its rear section in January 2014. The insurer claims the fire was caused by a faulty GT35 turbocharger that contained damaged parts, including excessively worn bearings and a broken turbine shaft. Honeywell had a duty to provide a product that was free from such latent defects, according to the suit. The complaint alleges causes of action for negligence and manufacturing defect.

Liberty Mutual Insurance Co. v. Honeywell International Inc., No. 201557983, complaint filed (Tex. Dist. Ct., Harris Cty. Sept. 29, 2015).

Related Court Document:
Complaint: 2015 WL 5923491

NEWS IN BRIEF

IDAHO MAN SENTENCED FOR AUTO INSURANCE FRAUD

An Idaho man has been sentenced to 100 hours of community service and ordered to pay a $1,250 fine after pleading guilty to one count of insurance fraud for lying to his insurance carrier about the date of an automobile accident, the state attorney general announced Oct. 19. Jeffrey J. Zausch, 28, wrecked his vehicle Feb. 3, 2014, and had it towed to his home the same day, the attorney general's office said in a statement. The following day, Zausch called his insurance carrier, Geico, to change his policy from liability only to full coverage. Sixteen days after adding the coverage, he contacted Geico to report he was involved in an accident Feb. 18 and filed a claim, according to the statement. As part of his sentence, Zausch also must pay Geico $376 in restitution and serve three years of probation, it said.

NORTH CAROLINA WOMAN ACCUSED OF LYING ABOUT JEWELRY THEFT

The North Carolina Department of Insurance has announced that an Indian Trail woman is facing charges for fraudulently trying to obtain $15,578 from her insurance carrier to cover a purported property theft. Deborah Deberry Stevens, 53, allegedly provided QBE Insurance Corp. with a falsified receipt from a jeweler when she claimed five watches had been stolen from her residence, the department said in a statement. Stevens is charged with one count of insurance fraud and one count of attempting to obtain property by false pretense. She turned herself into the Union County Sheriff's Office Oct. 21 and has been placed under a $5,000 bond, the department said.

HHS: MARKETPLACE CONSUMERS SAVED MONEY BY SWITCHING HEALTH PLANS

Obamacare customers who re-enrolled in the Health Insurance Marketplace for 2015 but switched to a different plan with the same level of coverage saved nearly $33 per month after tax credits, or almost $400 annually, compared to what they would have paid had they remained in the same plan from 2014, according to a new report from the U.S. Department of Health and Human Services. The agency said Oct. 28 that consumers who switched insurers within the same level of coverage fared even better, with an average savings of $41 per month, or $490 annually after tax credits. In a statement, HHS Secretary Sylvia M. Burwell said the report's findings underscore that shopping around for insurance on the Marketplace benefits consumers. She also said the Obama administration expects customers to find similar deals on the Marketplace for 2016.

Urban Outfitters

CONTINUED FROM PAGE 1

Hanover issued the retailer separate CGL and umbrella policies from July 2011 to July 2012, the 3rd Circuit's order said.

The Hanover policies cover "personal and advertising injury" for the period beginning July 7, 2010, but also contained "prior publication" or "first publication" exclusions for any conduct prior to that date.

Hanover agreed to defend Urban Outfitters in the litigation subject to a reservation of rights. It filed a declaratory judgment action in the Eastern District of Pennsylvania, contending it had no duty to cover the underlying suit because the alleged conduct began at least in March 2009.

U.S. District Judge Thomas N. O'Neill Jr. agreed, finding the alleged advertising injuries began prior to the policy inception date. *Hanover Insurance Co. v. Urban Outfitters et al.*, No. 2:12-cv-03961, 2013 WL 4433440 (E.D. Pa. Aug. 19, 2013).

Affirming that ruling, the 3rd Circuit said the only way the "prior publication" exclusions would not apply here is if the underlying complaint contains allegations of "fresh wrongs" that occurred during Hanover's policy periods.

But it is apparent from the Navajo Nation's suit that Urban Outfitters' advertisements, which predated the policy inception date, "share a common objective with those that followed," the panel said.

"Confining our review to the contents of the underlying complaint, we find Navajo Nation's description of Urban Outfitters' allegedly infringing conduct remarkably consistent," the 3rd Circuit said. WJ

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Related Court Document:
Opinion: 2015 WL 6405763

See Document Section A (P. 17) for the opinion.

CASE AND DOCUMENT INDEX