

Court of Appeals Finds "Earth Movement" Exclusion Ambiguous

Pioneer Tower Owners Ass'n v. State Farm Fire & Cas.
N.Y. Court of Appeals (April 30, 2009)

The standard "earth movement" exclusion is a fixture in property insurance policies and excludes from coverage losses caused by "the sinking, rising, shifting, expanding or contracting of earth." In an April 30, 2009 decision by the Court of Appeals, however, a version of this exclusion was found to be ambiguous in connection with a claim involving damage to a condominium apartment building. In *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.* (April 30, 2009), the plaintiff's apartment building shifted and settled, resulting in cracks, separations, and open joints. The damage was caused by excavation work on the lot next door. The underpinning that had been erected to protect the foundation of the plaintiff's building during the excavation was flawed, causing earth to slide away beneath the building. The sliding earth destabilized the building, causing damage.

State Farm denied coverage for the loss, relying primarily on the "earth movement" exclusion as well as the exclusion for "settling, cracking, shrinking, bulging or expansion." Both exclusions applied "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss."

The plaintiff challenged State Farm's denial, contending that the exclusions were

Court Affirms Well-Established Principle That Negligence Cause Of Action Against Insurer Cannot Stand

Sorenson v. Aurora, Inc., et. al.
Supreme Court, Albany County
(March 17, 2009)

Plaintiff commenced a lawsuit against his insurer and insurance agent alleging breach of the insurance contract and negligence after his carriage house sustained damage as a result of excessive ice and snow buildup. Plaintiff's insurer denied the claim on the basis that the insurance policy did not cover the carriage house because it was not connected to the insured dwelling, it was not listed on the declarations page of the insurance policy, and damage caused by snow and ice was not a named peril listed in the insurance contract.

ambiguous and did not apply when the earth movement and the resulting settling and cracking was caused by excavation.

"Plaintiff argues . . . that a literal reading of the words does not give the meaning that an ordinary reader would assign to those exclusionary clauses. As to the earth movement exclusion, plaintiff stresses the examples of earth movement given in the policy – "earthquake, landslide, erosion and subsidence." Plaintiff argues that an excavation – the intentional removal of earth by humans – is a different kind of event from an earthquake and the other examples given; plaintiff suggests that, when specific examples are mentioned, those not mentioned should be understood to be things of the same kind. . . . Similarly, plaintiff argues that the settling or cracking exclusion would not be thought, by an ordinary reader, to apply to settling or cracking that is the immediate and obvious result of some other event, such as the intentional removal of earth in the vicinity of the building."

Declaring that "[t]his case is a close one," the Court of Appeals concluded "that both plaintiff's and defendant's readings of the clauses are reasonable." This conclusion, of course, resulted in a finding that the exclusions were ambiguous, and obligated the court to apply the *contra proferentem* rule and adopt the reading that resulted in coverage for the plaintiff's loss.

Plaintiff then commenced a lawsuit against the insurer and its agent for breach of contract and negligence. Plaintiff's negligence cause of action was based on his allegations that the insurer knew or should have known that plaintiff intended to include coverage for the carriage house when the policy was issued, and the insurer negligently failed to cover it. The insurer moved to dismiss plaintiff's negligence cause of action on the basis that it did not owe plaintiff a duty to ensure proper coverage and it owed no duty to plaintiff independent from those arising under the terms of the insurance contract.

The Supreme Court, Albany County, agreed with the insurer and dismissed plaintiff's negligence cause of action. The Court

Oddly, the court chose not to discuss the phrase "includes but is not limited to" that immediately preceded the list of examples of earth movement provided in the policy. Instead, the court faulted State Farm for not making that list more exhaustive, or more inclusive, or perhaps just more to the court's liking on this particular day. After all, reasoned the court, "if the drafter of the policy intended to bring excavation – an obvious and common way of moving earth – within the meaning of the exclusion, why was it not listed as an example while less common events were listed?"

Practice Pointer: It should be noted and emphasized that not all earth movement exclusions are the same, and that the court's decision was based on the specific language of the State Farm policy. The same exclusion in the ISO HO-3 Homeowners policy (1999 edition) excludes coverage for earth movement "caused by or resulting from human or animal forces or any act of nature . . ." Arguably, had the State Farm policy contained a reference to "human . . . forces," the court's decision would have been altogether different. Yet, as many insurance companies have learned over the years, a finding of "ambiguity" in the well-established and time-honored exclusionary language of an insurance policy is an easy way for a court to find coverage in a particular claim or case. Unfortunately, it is difficult to know precisely when the court will choose to pull the ambiguity rabbit from its hat.

concluded that "as plaintiff is only seeking recovery for his economic loss and has not alleged that the . . . defendants breached a duty independent of the contract, such claim is a breach of contract action and a viable negligence claim does not exist."

Practice Pointer: Courts routinely should dismiss negligence claims against a property insurer if a tort independent of the insurance contract is not alleged. If an insurer is served with a complaint alleging negligence, but the complaint fails to allege a duty independent of the insurance contract, a motion to dismiss should be contemplated in order to prevent unnecessary discovery and to limit the issues in the case.

Plaintiff's Move To A New Permanent Residence Vitiates Coverage For Damaged Truck
Perry v. Farmers New Century Ins. Co.
Supreme Court, Chemung County
(March 23, 2009)

Plaintiff brought a lawsuit against her insurer to recover damages to a truck, owned by her husband, that was damaged by fire. Although plaintiff co-signed the truck loan, she was not listed on the title or registration. Plaintiff also testified at an examination under oath that prior to the fire, she moved into an apartment that she intended to make her permanent residence.

The insurer denied plaintiff's claim because she lacked an insurable interest in the subject vehicle. Plaintiff's claim also was denied because she was no longer an insured under the policy of insurance after she moved out of her husband's home. After plaintiff filed a lawsuit, the insurer moved for summary judgment seeking the dismissal of plaintiff's complaint.

The Supreme Court, Chemung County, agreed with the insurer and dismissed plaintiff's complaint in its entirety. The court held that because plaintiff was (1) not a named insured under the insurance policy; (2) not the titled or registered owner of the vehicle; and (3) not in

possession of the vehicle, she no longer was an insured under the policy. The Court also rejected plaintiff's efforts to create an issue of fact by changing her sworn examination under oath testimony by way of an affidavit she submitted in connection with her opposition to the insurer's motion for summary judgment.

Practice Pointer: The failure of an insured to have an insurable interest in the property that is the subject of a loss is fatal to an insured's claim. Changes in an insured's residency may be indicative of an insurable interest issue and should be explored fully during a claim investigation.

Fourth Department Concludes That Storage Of Business Items Not Considered Use For Business Purposes
R. B. Woodcraft, Inc. v. Acadia Ins. Co., et. al.
2009 N.Y. Slip Op 2399 (March 27, 2009)

Plaintiffs owned a residence and detached pole barn that were insured by State Farm. The pole barn contained personal property and business items that were being stored in the barn, and those contents were destroyed when the pole barn was damaged by fire. State Farm issued payment to the plaintiffs for their personal property located inside the pole barn, but denied plaintiffs' claim with respect to the pole-barn itself based on policy language that excluded coverage for losses to other structures used in whole or in part for business purposes.

Plaintiffs sued, and the trial court denied State Farm's motion for summary judgment. On appeal, the Fourth Department modified the trial court's order and determined that plaintiffs were entitled to judgment as a matter of law and that State Farm was obligated to pay plaintiffs' claim. The Fourth Department rejected State Farm's contention that the storage of business items in the pole barn established that the barn was being used for business purposes and that the policy exclusion applied. The Court held that the phrase "business purposes" contained in the insurance contract was ambiguous, and therefore must be construed in favor of the insureds.

Practice Pointer: Although the Fourth Department held that the storage of business items did not constitute "business purposes," the court's decision hinged on the fact that the phrase "business purposes" was not defined in the insurance policy. This case is unlikely to apply to the denial of claims where the phrase "business purposes" is defined in the insurance contract and makes specific reference to the storage of items constituting business activity

Insurer is Estopped from Relying on Limitations Defense After Issuing Payment
New York Central Mut. Fire Ins. Co. v. Edwards
U.S. Court of Appeals Second Circuit
(January 30, 2009)

In *New York Central Mut. Fire Ins. Co. v. Edwards*, the Second Circuit found that the insurance carrier was estopped from asserting the two-year contractual limitation period as a defense to the plaintiff's action. Following a loss, the insurance carrier acknowledged coverage and issued a check in full payment of the claim. That check went uncashed and became stale, prompting the carrier to issue a second check, again for the full amount. The second check contained language indicating that it remained valid until a date beyond the expiration of the contractual limitations period. That check also went uncashed, and became stale. When the carrier balked at issuing a third check, the insured's bankruptcy trustee sued. The carrier moved to dismiss on the basis of the two-year contractual limitation period in the policy. The bankruptcy court and the district court both found in favor of the insured, and the carrier appealed to the Second Circuit.

On appeal, the Second Circuit found that the carrier had breached its contract with the insured and was estopped from asserting the two-year limitation period as a defense to her action. The court relied on the doctrine of equitable estoppel, which requires a showing of "reliance . . . on the alleged misrepresentations as the cause of [the] failure sooner to institute action . . . and . . . justification for such reliance."

"There is no indication that NY Central ever raised any objection to the validity of Edwards's claim or provided any indication that, having already acquiesced completely to its liability, it would assert a limitations defense in the event Edwards neglected to present a check for payment before the period expired. A reasonable person, considering these actions, almost certainly would assume that NY Central

had abandoned all defenses and had no intent to ever assert a limitations defense."

The court went on to conclude that the carrier breached the contract with the insured, despite having issued two separate checks for the full amount of the claim. "Under New York law," wrote the court, "a tender of a check alone does not constitute payment." Payment is effected only when the drawee bank actually pays on the check. Therefore, "[a]s Edwards never cashed either of the checks that she received, NY Central has not, as a matter of law, paid her the amount she is owed."

Practice Pointer: Although the court relied on the carrier's willingness to pay the original claim "without any apparent reservation" as a basis for concluding that it "had abandoned all defenses and had no intent to ever assert a limitations defense," the logic of this conclusion is highly suspect. Under New York law, the contractual limitation period does not even exist as a defense to the claim until two years after the date of the loss, and insurance carriers are under no obligation to reserve their rights to assert it in the future or to warn insureds of its impending expiration unless they affirmatively deny the claim. The decision in *Edwards* appears to suggest that a carrier may not rely on the limitation defense to dismiss an untimely action unless it previously adopted an adverse coverage position or warned the insured that it was not waiving its future right to do so. It is not clear from the decision whether the Second Circuit actually intended to redefine the limitations defense in this fashion, or whether it simply wanted to achieve a particular outcome in this case.

Thanks to everyone who attended the 2009 First-Party Property Claims Seminar. If you would like extra copies of the materials that were available or information about any of the topics covered, please feel free to contact Marco Cercone at cercone@rupbbaase.com.