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Risk Radar: Hot Topics to Watch in the Coming Months

By Michael J. Stoner

Wisconsin

***Strauss v. Chubb Indemnity Insurance Company,* No. 13-2580 (7th Cir. Feb. 10, 2014)**

Hang on to those old first-party property policies. A recent ruling by the Seventh U.S. Circuit Court of Appeals in *Strauss* shows that historical first-party property policies can still have significant value in the right jurisdictions, even if the policy period has passed.

The background facts underlying *Strauss* are not particularly complex. The policyholders had constructed a home in 1994. From 1994 through 2010, water infiltration caused continuous and progressive property damage to their home. The policyholders would not discover the damage to their property until 2010 — meaning that there had been 16 years of continuous and progressive property damage to their home. The question facing the appeals court: Could the policyholders recover under all of the insurance policies on the risk during the continuous property damage, or was recovery limited to the single insurance policy on the risk when the loss became apparent?

The appeals court noted that the outcome of this dispute hinged upon the applicable "trigger of coverage" in the relevant policies. Unsurprisingly, the policyholder and the insurance companies advocated two competing theories. The policyholder advocated for a "continuous trigger." Under a continuous trigger, all policies from the time the loss begins to the time the loss manifests are triggered for coverage. The insurance company, on the other hand, argued that the continuous trigger theory is only applicable in third-party policies. With a first-party property policy, the insurance company took the position that the court should apply a "manifestation trigger." Under a manifestation trigger, a continuous, progressive loss that spans multiple policy periods only triggers the insurance policy in effect when the loss manifests or can be discerned.

Ultimately, the appeals court ruled in favor of the policyholder and adopted a "continuous trigger" under the language of these insurance policies. While the insurance company had cited several cases adopting a "manifestation trigger" in other jurisdictions, they were unable to cite any cases in Wisconsin which so held. Therefore, the court turned to the specific language of the policy to resolve the issue.

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The appeals court noted that the policy applied "only to occurrences that take place while this policy is in effect." Occurrence, in turn, was standardly defined as "a loss or accident to which this insurance applies occurring within the policy period. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence." Given the definition of "occurrence," the court noted that the parties "contemplated a long-lasting occurrence" that could give rise to loss "over an extended period of time." Therefore, the continuing and progressive water damage to the home constituted a single occurrence that lasted over multiple policy periods — and each insurance policy on the risk during that long-lasting period was triggered by that occurrence.

It bears mentioning that the appeals court specifically declined to adopt a bright line rule or universal trigger of insurance. However, given the relatively standard language at issue in the *Strauss* case, it will likely be an important precedent for any policyholder seeking to recover continuing property damage. When faced with a first-party property loss that may arise out of continuing or progressive damage, be sure to give notice to all of your insurance companies — not just the one currently in force. Armed with the *Strauss* case, policyholders can make convincing arguments that they are entitled to coverage under each of their policies in effect during the continuing loss, not just the most recent one.

Connecticut

***Recall Total Information Management Inc. v. Federal Insurance Company,* (SC 19291) (Conn. May 26, 2015).**

If a tree falls in the forest and no one is around to hear it, does it make a sound? Not under a commercial general liability policy governed by Connecticut law. With the Connecticut Supreme Court's affirmation of *Recall*, policyholders seeking damages for data breaches under CGL policies must show more than simply lost data — they must also show that the data was found by someone.

In *Recall*, Recall Total Information Management entered into a vital records storage agreement with IBM whereby Recall agreed to transport and store various electronic media belonging to IBM. Recall thereafter entered into a subcontract with Executive Logistics to provide transportation services for the electronic media. At one point, Ex Log dispatched a transport vehicle to move computer tapes from an IBM facility to another location. During the transport, a cart containing the tapes fell out of the back of the van near a highway exit ramp. Approximately 130 tapes were removed from the roadside by an unknown person and never recovered. These tapes included personal information for many of IBM's past and present employees — including social security numbers, birthdates and contact information. As a result of the lost tapes, IBM spent more than $6 million notifying the former employees and mitigating the potential effects of the lost data. Following a series of settlements between IBM, Recall, and Ex Log, Recall brought a lawsuit seeking to recover this $6 million under the personal injury provisions of Ex Log's CGL and umbrella insurance policies.

After reviewing the facts of the case, the court ruled that there was no coverage under the personal injury provisions of the policy. The policy provided a standard definition of personal injury, which included "injury, other than bodily injury, property damage, or advertising injury, caused by an offense of . . . electronic, oral, written or other publication of material that … violates a person's right of privacy." The *Recall* court ruled that that there was no *publication* to trigger the personal injury coverage. The court drew a distinction between the lost tapes themselves and the information contained within the lost tapes. Because there was no evidence that any third party ever saw the actual information contained within the lost tapes, there was no publication to a third party sufficient to trigger this coverage. The fact that the lost tapes may have triggered mandatory reporting requirements for compromised personal information also did not sway the court to find coverage under the personal injury provision, because "merely triggering a notification statute is not a substitute for personal injury." *Recall* shows the important distinction between a security incident and a data breach. It is disclosure, not merely exposure, of protected information that triggers the personal injury provisions of a CGL policy.

Recall highlights the perils of relying on CGL insurance for data security–related claims. And with new exclusions being added to CGL policies intended to remove insurance for lawsuits arising out of data security, policyholders looking to transfer this risk are relying more and more on cyber-specific policies. However, when negotiating the terms of a cyber-policy, policyholders may want to heed the lesson of *Recall* to determine whether exposure alone is sufficient to trigger insurance for mitigation costs, or whether the policy requires a confirmed publication to a third party.

Georgia

***Piedmont Office Realty Trust, Inc. v. XL Specialty Insurance Company,* No. S15Q0418 (Ga. Apr. 20, 2015)**

Virtually all insurance policies include clauses that require the insurance company's consent before settling. However, under the express terms of many insurance policies, the insurance company promises that its consent "shall not be unreasonably withheld." What protection does this added limitation provide to a policyholder facing an obstinate insurance company who refuses to consent to a settlement? According to the Georgia Supreme Court: none.

In *Piedmont*, the state Supreme Court answered two certified questions from the Eleventh U.S. Circuit Court of Appeals. One question was:

> When an insurance contract contains a "consent-to-settle" clause that provides expressly that the insurer's consent shall not be unreasonably withheld, can a court determine, as a matter of law, that an insured who seeks (but fails) to obtain the insurer's consent before settling is flatly barred — whether consent was withheld reasonably or not — from bringing suit for breach of contract of for bad-faith failure to settle? Or must the issue of whether the insurer withheld unreasonably its consent be resolved first?

The state Supreme Court advised the appeals court that the policyholder's settlement of a lawsuit without the insurance company's consent — irrespective of whether or not the insurance company withheld consent, reasonably or not — constituted a material breach of the policy. Because settling the claim without the consent of the insurance company constituted a breach of the policy, the "no action" clause of the policy (which precludes a lawsuit against the insurance company unless there has been full compliance with the terms of the policy) also barred the lawsuit.

The state Supreme Court relied on previous cases where coverage was denied based upon a policyholder's failure to obtain the insurance company's consent. However, those cases did not involve express policy language whereby the insurance company promised it would not unreasonably withhold consent. This distinction was of no consequence to the court, which stated that the requirement not to unreasonably withhold consent could be implied into the other policies. Accordingly, the Supreme Court simply read the insurance company's promise not to unreasonably withhold consent out of the policy.

The state Supreme Court's analysis is backwards. When the insurance company unreasonably withholds its consent to settle a claim, it breaches the terms of the insurance policy. The reasoning in *Piedmont* gives the insurance company carte blanche to breach this provision in the policy, while still mandating that the policyholder perfectly comply with all of the terms and conditions of the policy in the face of that breach.

Policyholders with policies applying Georgia law now face an unpalatable choice when the insurance company unreasonably refuses to consent to a settlement. They can either (1) settle the case and forfeit insurance coverage, (2) litigate the case through trial and sue the insurance company for any excess loss, or (3) initiate a parallel claim against the insurance company for declaratory relief. In deciding how to proceed with an obstinate insurance company that refuses to consent to a reasonable settlement, the best course of action is to first consult with coverage counsel to evaluate the potential courses of action.

Pennsylvania

General Refractories Company v. First State Insurance Co., Civil Action No. 04-3509 (E.D. Pa. Sept. 6, 2013)

In describing principles of insurance policy interpretation, it is a common refrain in many jurisdictions that "exclusions are to be interpreted narrowly." The Eastern District of Pennsylvania recently demonstrated that principle in *General Refractories,* turning on the meaning of an exclusion for loss "arising out of asbestos."

The dispute between the policyholder, General Refractories Company, and the insurance company, Travelers, involved whether or not bodily injury claims arising out of asbestos-containing products manufactured by GRC fell within the scope of a policy exclusion for loss "arising out of asbestos," (the asbestos exclusion). GRC argued that the asbestos exclusion was only intended to exclude asbestos in its mineral form, and was not drafted to exclude damages arising out of a product that incorporated asbestos. Travelers argued that that the term "asbestos" should be interpreted broadly to include asbestos in any form — whether as a mineral or as a product component — because the asbestos caused the alleged injuries.

While the insurance company's position may have some initial appeal at first blush, GRC effectively introduced historical insurance industry usage as evidence that the insurance industry drew a distinction between asbestos and asbestos-containing products. The evidence included contemporaneous insurance forms used by other companies that differentiated asbestos from asbestos-containing materials. The policyholder also introduced evidence that Travelers previously used a broader version of an asbestos exclusion that specifically excluded asbestos "contained in a product." Finally, the policyholder produced an expert witness who testified that the terms "asbestos" and "asbestos containing product" had distinct meanings in the insurance industry, because they connoted varying degrees of danger and risks associated with a business' production activities and accompanying different products.

Through this historical trade usage, the policyholder was able to convince the court that it had proffered a reasonable interpretation of the asbestos exclusion. The fact that the insurance company's interpretation could be considered reasonable as well was of no importance. The court explained that

> [a]s between the parties' conflicting interpretations of the Asbestos Exclusion, it need not be decided which is the more reasonable. Each is not without its objective reasons. Yet in order to pre-

> vail, Travelers must show not only that its interpretation is reasonable, but also that GRC's interpretation is not reasonable. This has not been done. . . . This requires a ruling that favors insurance protection for the policyholder.

General Refractories highlights how the insurance industry's custom and usage can impact the meaning of an insurance term. Even if a term may seem unambiguous on its face, custom and usage evidence can demonstrate that an exclusion is, in fact, ambiguous. And once the policyholder shows that ambiguity, courts like the one in *General Refractories* should apply the interpretation most favorable to the policyholder. ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ, and Burlington, VT.