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Seventh Circuit Reverses Prior Ruling After Reexamining Exclusion Clause

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After a panel rehearing, the Seventh Circuit in Emmis Communications Corp. v. Illinois National Insurance Co., No. 18-3392 (7th Cir. Aug. 21, 2019), vacated a prior judgment and withdrew an opinion issued in July 2019, finding upon second review that Emmis Communications was entitled to summary judgment in its favor with regard to a breach of contract claim against Illinois National Insurance Co. The litigation involved Illinois National's denial of insurance coverage to Emmis, a media company best known for its radio broadcasting services, for a lawsuit that was filed against Emmis in 2012.

Events pertinent to the Seventh Circuit's decision began in 2010 when Emmis' CEO and largest shareholder attempted to buy out other shareholders and go private. Between a group of stockholders who disputed the terms of stock conversions and the withdrawal of vital financing, the 2010 attempt to privatize the company was unsuccessful. Seven lawsuits alleging violations of fiduciary duties were ultimately filed on behalf of Emmis stockholders against the company and its directors and officers. Emmis held a D&O liability policy from Chubb Insurance, which covered claims made between October 1, 2009, and October 10, 2010. Each of the various stockholder suits as filed in 2010 were reported to Chubb, which accepted coverage under a reservation of rights.

Two years later in 2012, Emmis faced further legal issues. This time, suit was brought against Emmis and its officers and directors by five preferred shareholders alleging violations of various federal securities laws, state corporate laws, and additional counts regarding breaches of fiduciary duty. In this 2012 litigation, both the initial complaint and an amended complaint referenced and set forth allegations surrounding the 2010 failed attempt to go private. By this time, Emmis had purchased another D&O liability policy from Illinois National. The policy provided certain insurance for claims first made from October 1, 2011, through October 1, 2012.

Emmis gave notice of the 2012 litigation to both Illinois National and Chubb. Both insurers denied coverage. In its denial, Illinois National relied on a "specific event exclusion" within the policy, which set forth the following:

> Specific Investigation/Claim/Litigation/Event or Act Exclusion
>
> [I]nsurer shall not be liable to make any payment for Loss in connection with: (i) any of the

> Claim(s), notices, events, investigations or actions listed under EVENT(S) below; or (ii) the prosecution, adjudication, settlement, disposition, resolution or defense of: (a) Event(s); or (b) any Claim(s) arising from the Event(s); or (iii) any Claim alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an Interrelated Wrongful Act. …

The "events" referenced in the above section were defined to include:

1. Events contained within Note 10 of the 10-Q released on July 15, 2010, titled "All Regulatory, Legal and Other Matters" and sub-titled Shareholder Litigation.
2. All notice of claim or circumstances as reported under policy number 8181-0668 issued to Emmis Corporation by Chubb Insurance Companies.

Illinois National argued that its policy did not cover the 2012 litigation, as the suit was expressly excluded from coverage by the exclusion as set forth in the terms of the policy issued in October 2011. Ultimately, it was found that Illinois National failed to satisfy its burden of proving the affirmative defense of a coverage exclusion, and Emmis was therefore entitled to judgment as a matter of law on the breach of contract claim.

The Seventh Circuit adopted the reasoning in the district court's summary judgment order, in which the district court disagreed with Illinois National's argument that the 2012 litigation was excluded by the second portion of the "events" definition as set forth in the policy. This definition explained that "events" would include "[a]ll notice of claim or circumstances as reported under [the Chubb policy]." While Illinois National took the position that this language was unambiguous and was intended to include *any claim* reported under the Chubb policy *at any time*, the court did not agree. Instead, the district court found that the definition covered only claims that had been reported under the Chubb policy at the time the Illinois National policy went into effect in October 2011. In supporting this position, the court pointed out that "the term is written in the past tense, and thus should be read as referring to events that had already occurred at the time of drafting." The court additionally noted that under Illinois National's reading of the "events" definition, "any report under the Chubb Policy made by anyone at any time – presumably even a report made by mistake – would … exclude coverage."

The court also turned to the *contra proferentem* rule, which in Indiana mandates that if policy terms are ambiguous, the language therein is to be construed against the insurer. Quoting a prior decision in *Bradshaw v. Chandler*, 916 N.E.2d 163 (Ind. 2009), the court noted "[t]his is especially true with respect to a policy's exclusion of coverage." Illinois National asserted that Emmis – a "sophisticated corporate insured" – had equal bargaining power in the negotiation of exclusion terms, but the court found the record evidence was devoid of any facts showing that Emmis held this alleged bargaining power or exercised any such position in the course of term negotiations. As a result, the *contra proferentem* rule applied and supported a reading that the exclusion referred only to claims that had already been reported under the Chubb policy on the date the Illinois National policy went into effect.

The court also rejected Illinois National's argument that the 2012 litigation stemmed from Emmis' 2010 legal issues and was therefore excluded under the subsection referencing any claims "arising from" the events. While Illinois National asserted that the 2012 shareholder litigation was a result of the failed go-private attempt that had taken place in 2010, the court disagreed, holding that "[t]hose previous *cases* simply were not the cause" of the 2012 litigation. The fact that the complaints in the

cases shared some of the same factual allegations was “simply irrelevant to the inquiry of whether the earlier cases were a *cause*” of the 2012 litigation.

It is important to note that the Indiana judiciary’s construction of the phrase “arising out of” likely played a key role in this decision. Within Indiana courts “the phrase ‘arising out of’ as used in insurance policies long has been construed to mean that one thing must be the ‘efficient and predominating’ cause of something else.” Thus, it is unclear whether *Emmis* will have any impact outside of cases governed by Indiana law.

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