

Young, Pam

From: Foggan, Laura <LFoggan@crowell.com>
Sent: Wednesday, April 26, 2017 5:49 PM
To: 'Tom Baker'; 'Kyle Logue'
Cc: 'Stephanie Middleton (smiddleton@ali.org)'; 'richard.revesz@nyu.edu'; 'RLLIcomments@ali.org'
Subject: RE: ALI Restatement: Law of Liability Insurance, Section 47

Dear Tom and Kyle:

I write to supplement earlier comments submitted with respect to what is now numbered Section 47 of the Restatement draft, and titled "Insurance of Known Liabilities." I continue to endorse the earlier comments, but wanted to focus your attention on two additional points that have not been adequately discussed. Specifically, these points are (1) the statements in Comment (g) that the known liability doctrine (as described in this Section) is "inapplicable to claims-made forms of coverage;" and (2) the proposed requirement under Section 47(2) that the policyholder must know that an adverse judgment establishing liability "in an amount that would reach the level of coverage provided under the policy" is substantially certain.

First, I am aware of absolutely no support for the position taken in Comment (g) that the known loss doctrine (and here, Section 47) is "[i]napplicable to claims-made forms of coverage." In fact, both of the cases cited in the Reporters' Notes to Comment (g), Cahow and Buckeye Ranch, actually suggest exactly the opposite, i.e., that the doctrine does apply to claims-made forms of coverage but may be no broader than limitations and exclusions contained in many such policies. Further, there is substantial case law recognizing that the fortuity (or known liability concept as articulated in a more limited form here) is fundamental to all liability insurance. It would be a dramatic change to hold that fortuity and known loss are not understood to underlie claims-made liability insurance. The argument that a claims-made insurer theoretically could protect itself by asking questions in the application process, or through incorporation of targeted policy terms, proves too much – it could be made as to any form of liability insurance and has not to date stopped the clear majority of courts addressing these doctrines from applying them. Unless I have somehow missed a substantial body of law, I don't think that Comment (g) and the Reporters' Notes to Comment (g) can stand. Respectfully, I recommend you simply delete them.

Second, with respect to the language of Section 47(2) providing that the policyholder must know with substantial certainty of an adverse judgment establishing liability "in an amount that would reach the level of coverage provided under the policy," I am not aware of cases specifically refusing to apply the known loss doctrine on the grounds that the known liability, not disclosed to the insurer, was not substantially certain (in the insured's subjective judgment) to reach the amount triggering the level of coverage provided by the policy. I agree that there is some case law refusing to bar coverage on grounds of a known loss where there remains basic uncertainty about liability and that such case law states, inter alia, that unknown aspects of the liability include that the policyholder does not know if a judgment will be entered, as to which plaintiffs, or in what amount -- or words to that effect. However, I am not aware of any case finding coverage for amounts where the policyholder knew with substantial certainty, and failed to disclose to the insurer before coverage was issued, that it faced an adverse judgment establishing liability but not that it would reach the level of coverage provided under the policy. I don't believe the Restatement should adopt a new test tying the substantial certainty of liability to the level where the coverage would attach, particularly when combined with the subjective standard you endorse in Comment d. I hope you will give further thought to the combined effect of the various standards adopted in this Section, which in the aggregate may have unintended consequences.

As always, thank you for your consideration of these new points.

With best regards,
Laura Foggan

Laura A. Foggan
Crowell & Moring LLP
1001 Pennsylvania Ave NW
Washington, DC 20004
lfoggan@crowell.com
202-624-2774
Follow me on twitter @LauraFoggan

Download my v-card:
<https://www.crowell.com/Professionals/Laura-Foggan/vcard>

This message may contain privileged and confidential information. IF IT WAS SENT TO YOU BY MISTAKE, DO NOT READ IT. Instead, please notify the sender (or postmaster@crowell.com) by reply e-mail, and delete this e-mail. Unauthorized dissemination, forwarding or copying of this e-mail is strictly