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Supreme Court Nominee to Policyholders: Soto my your claim is not covered

Judge Sotomayor brings a long record of decisions favoring insurers

Immediately after President Obama announced that he had tapped Second Circuit Judge Sonia Sotomayor to fill Justice Souter's soon-to-be-vacant seat on the Supreme Court, all eyes turned to the Judge's record. The media, members of Congress and blogger-types all began to scour Judge Sotomayor's long list of opinions in search of any nugget that might shed light on her views on abortion, capital punishment, affirmative action, same-sex marriage and a host of other weighty social issues.

And *Binding Authority* was also wondering about the Judge's take on important issues: Gun control? Whatever. What's her view on the Pollution Exclusion?

[Answer – *Maska U.S., Inc. v. Kansa General Ins. Co.*, 198 F.3d 74, 84 (2d. Cir. 1999) (Sotomayor, J.) ("We hold that the absolute pollution exclusions in the Zurich policies do not violate any established Vermont public policy, and that Maska has waived its contention that Zurich's failure to comply with the statutory filing requirements voids the exclusions. We further hold that coverage is not available under U.S. Fire's Defender policy because the underlying environmental liability claims were neither asserted against Maska nor reported to U.S. Fire during the policy period.")]

Of course, insurance coverage issues never get to the U.S. Supreme Court. [There is a greater chance of me playing in the NBA than the Supreme Court agreeing to hear a pollution exclusion case.] So I set out just to write a brief piece, for fun only, that looked at Judge Sotomayor's opinions on some popular coverage issues. Given her lengthy time on the bench (District Court and Court of Appeals), she has a long list of insurance coverage cases on her resume.

But what I discovered in the course of looking at Judge Sotomayor's overall body of opinions on coverage issues was far more interesting than any one case. Judge Sotomayor has been very, very insurer-friendly during her time on the bench. In fact, at one point in my review, I actually said to myself, *Has she ever ruled in favor of a*

policyholder? She has, of course, but her record reflects that her decisions have overwhelmingly been in favor of insurers.

I do not have a precise tally of wins and losses as that would require some real in-depth analysis and take way more time that I can spend on this lark. [I have this pesky thing called a job.] But it's insurers by a landslide. Here are a few examples and key quotes from a handful of Judge Sotomayor's opinions in coverage cases that have favored insurers:

Greenidge v. Allstate Ins. Co., 446 F.3d 356, 364 (2d. Cir.) (Sotomayor, J.) ("Unfortunately, it was the Greenidges' own actions, and not Allstate's, that put them at risk of a large adverse judgment. The law of bad faith is not intended to reduce the incentives of insured parties to protect their own interests in situations where they are empowered to do so. In the instant case, the Greenidges had ample opportunity to protect their own interests. Allstate was aware of the options available to the Greenidges, and it was also aware that the Greenidges were represented by private counsel. Allstate was therefore entitled to assume that the Greenidges would take steps to protect their own interests. The Greenidges' failure to do so does not convert Allstate's refusal to accept the Seay plaintiffs' settlement offer into a display 'of recklessness on the part of the insurer.'")

Hugo Boss Fashions, Inc. v. Federal Insurance Co., 252 F.3d 608, 625 (2d. Cir. 2001) (Sotomayor, J., Dissenting): "I am in agreement with the majority on all matters except the duty to defend. The majority holds that even when an insurance policy exclusion unambiguously denies coverage, an insurer will need to defend a suit whenever it is 'uncertain' that this Court would have concluded that the policy exclusion was unambiguous. ... Because I find no such requirement in New York law, I respectfully dissent from Part II.A. of the majority's opinion.")

Tradin Organics USA, Inc. v. Md. Cas. Co., 2009 U.S. App. LEXIS 7918, *1-2 (2d. Cir.) (Summary Order) ("Exclusions like the 'Your Product' exclusion here are 'intended to exclude coverage for damage to the insured's product, but not for damage caused by the insured's product to persons or property other than the insured's own product. … As such, the risk that [Tradin] would be required to make good on its warranty of quality was a contractual or commercial risk that [Maryland] did not intend to insure. The policy provided by Maryland was a liability policy, not a performance bond. Because Tradin's claim was based on damage to Tradin's product--a risk specifically excluded by the 'Your Product' provision--Maryland properly denied coverage of the claim.") (citations and internal quotation marks deleted).

United States Underwriters Ins. Co. v. Affordable Hous. Foundation, 88 Fed. Appx. 441, 441-42 (2d. Cir. 2004) (Summary Order) ("For substantially the reasons discussed by the district court, and after conducting our own close reading of the policy, we conclude that - despite the L-257 endorsement letter - the policy remains unambiguous with respect to the question disputed by the parties. Examining the policy as a whole, we find that the policy, irrespective of whether the conditions of the L-257 letter are met, unambiguously

excludes bodily injuries to the employees of contractors from coverage.") (citations and internal quotation marks deleted).

A.M. v. Royal Ins. Co. of Am., 2000 U.S. App. LEXIS 12036, *2-3 (2d. Cir. 2000) (Summary Order) ("Hazard claims, however, that these exclusions ('the Abuse Exclusions') do not apply because, as the settlement agreement with A.M. and D.M. stipulates, he was criminally insane when he committed the underlying acts against A.M., and an insane individual cannot form legal intent under Vermont law. … We reject this argument. Unlike the 'intentional acts' exclusion in the policy at issue in *Combs*, which barred coverage for intentional conduct by the insured, the Abuse Exclusions in this case do not, on their face, require that the insured have acted intentionally. Moreover, we are unpersuaded by Hazard's claim that the exclusions contain an implicit intent requirement. Given that a separate provision of each policy expressly excludes coverage for injury 'which is expected or intended' by the insured, reading an intent requirement into the 'Abuse Exclusions' as well would render the latter provisions all but superfluous.")

Mount Vernon Fire Ins. Co. v. Chios Constr. Corp., 1996 U.S. Dist. LEXIS 414, *9-10 (S.D.N.Y.) (Sotomayor, J.) (Thus, there is not even a metaphysical possibility that the Doctor injury claim is covered. Although Frka, the Chios employee on site, states that 'no subcontractor was permitted to work at any of the job sites without Chios supervision,' this statement does not magically transform C & T from an independent contractor into a Chios employee or agent. On the factual record before me, it is clear that Chios never treated its subcontractors as employees or agents and that C & T controlled the means and manner by which its work was performed.") (emphasis added).

And the list could go on and on. But don't look for any of them during the Senate Judiciary Committee Confirmation Hearings.

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