PLUNKETT COONEY

Damages Because of Bodily Injury, Direct Physical Loss Coverage Update

March 1, 2021

Damages Because of Bodily Injury – Northern District of Illinois (Illinois Law)

McDonald's Corp. v. Austin Mut. Ins. Co.
No. 1:20-cv-05057 (N.D. Ill. Feb. 22, 2021)

The U.S. District Court for the Northern District of Illinois denied Austin Mutual Insurance Company's (Austin Mutual) motion to dismiss a lawsuit brought by its insured, McDonald's Corporation and McDonald's USA LLC, and the fast food restaurant's franchise owners, Lexi Management LLC and DAK4, LLC, (the plaintiffs). The plaintiffs sought coverage under the Commercial General Liability (CGL) policies that Austin Mutual issued to them for a lawsuit in which the plaintiffs were accused of public nuisance and negligence due to their decision to "remain open during the COVID-19 pandemic without enhanced health and safety standards." (the Massey suit).

Austin Mutual argued that the plaintiffs were not entitled to coverage for the Massey suit because it did not seek "(1) 'damages' (2) 'because of'; (3) 'bodily injury'" where "the nature of [the] Plaintiffs' expenditure is not to remedy bodily injury to third-persons." The plaintiffs countered that "but for" COVID-19 and SARS-CoV-2, which they argued are bodily injuries, they would not have sustained the damages associated with the mandatory injunction in the Massey suit. The plaintiffs further argued that any money spent to conform to the mandatory injunction constituted damages "'because of' exposure to [COVID-19 and SARS-CoV-2]."

In analyzing both arguments, the court held that the mandatory injunction in the Massey suit constituted damages because it would require the plaintiffs "to expend money to remediate the continuous and ongoing exposure to [COVID-19 and SARS-CoV-2]." Moving onto whether the damages were "'because of' 'bodily injury,'" the court held that the plaintiffs proved that "but for" the individuals in the Massey suit contracting and exhibiting symptoms of COVID-19, the plaintiffs' would not have incurred damages, including money losses, related to the mandatory injunction.

The court rejected Austin Mutual's argument that the CGL policies are only meant to cover damages paid to a third-party, stating that the argument is "untethered to any language in the policy." Finally, in deciding whether there was bodily injury, the district court stated that "[n]o one disputes – or even could dispute – that [COVID-19 and its corresponding symptoms] is a 'bodily injury.'" As a final note, the district court stated that had Austin Mutual wanted to exclude damages related to COVID-19, it

could have included a virus exclusion in its CGL policies. Thus, because the plaintiffs' complaint alleged facts that potentially give rise to coverage, Austin Mutual's motion to dismiss was denied.

Direct Physical Loss – Northern District of Ohio (Ohio Law)

Brunswick Panini's LLC v. Zurich Am. Ins. Co.
No. 1:20-CV-1895, 2021 WL 663675 (N.D. Ohio Feb. 19, 2021)

The U.S. District Court for the Northern District of Ohio granted an insurer's motion to dismiss a lawsuit filed by a restaurant alleging that the insurer had wrongfully denied the restaurant's business interruption claim. The court's decision contrasts with a decision last month by District Judge Dan Aaron Polster, also of the U.S. District Court for the Northern District of Ohio, that found that an insured restaurant chain was entitled to coverage for its business income losses stemming from the closure of its restaurants due to the COVID-19 pandemic.

Zurich American Insurance Company (Zurich) issued a first-party property insurance policy to Brunswick Panini's LLC and Kent Entertainment Group (collectively, Brunswick) for a group of restaurant/bar facilities operated by Brunswick in Ohio. On March 15, 2020, the state of Ohio restricted restaurants to carry-out and delivery orders only, and Brunswick halted all operations in accordance with that order. Brunswick submitted a claim to Zurich for, among other things, loss of business income stemming from the state's order. Zurich denied coverage and Brunswick commenced a lawsuit, alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

Zurich moved to dismiss Brunswick's complaint and District Judge Christopher A. Boyko Sr. granted the motion. The court found that Zurich's policy required direct physical loss of or damage to "real property" and "personal property" at the insured's premises as a precondition to coverage for loss of business income. Under the "*Twombly-Iqbal* analysis," the court found that Brunswick failed to allege direct physical loss to its property because it "conclusorily allege[d] ... 'COVID-19's **actual or suspected** physical presence at or in the vicinity of Plaintiffs' Property,'" and that "[b]ased on the prevalence of the virus in northeast Ohio, it is **probable** that Plaintiffs sustained direct physical loss of or damage." (emphasis in decision). As a result, the court concluded that the "allegations regarding the physical presence and/or impact of the coronavirus are insufficient."

The court found that Zurich's policy language was unambiguous, even though the pertinent terms were not defined in the policy, concluding that "neither the COVID-19 virus nor the state government orders caused 'direct physical loss of or damage to' [Brunswick's] Insured Property." The court further held that, even if the insuring agreement were to apply, the policy's microorganism exclusion, which defines microorganism to include "any type or form of organism of microscopic or ultramicroscopic size including ... virus," precluded coverage for Brunswick's claims under Zurich's policy.

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