

Bodily Injury, Occurrence Coverage Update

September 15, 2022

Bodily Injury – Ohio

Acuity v. Masters Pharmaceutical Inc.

--- N.E.3d ---, 2022 WL 4086449 (Ohio Sep. 7, 2022)

In a majority decision, the Ohio Supreme Court reversed the Ohio Court of Appeals' ruling that Acuity owed a duty to defend Masters Pharmaceutical Inc. (Masters) in numerous lawsuits brought by cities and counties in West Virginia, Michigan and Nevada for their economic losses caused by the opioid epidemic.

Acuity raised two issues before the Ohio Supreme Court. First, Acuity argued that the commercial general liability policies issued to Masters only cover "bodily injury" that happens to a specific person – the policies do not cover an insured's liability for a government's economic losses in providing more governmental services. Second, Acuity argued that the loss-in-progress provision applies when the insured knows of "bodily injury" that occurred, either in whole or in part, before the policy period – its application does not depend on whether the insured knew of the actual damages incurred by the claimant.

The majority found that Acuity's first issue on appeal was dispositive. Initially, the Supreme Court opined that the phrase "because of" ordinarily means "by reason of" or "on account of." Applying that plain meaning, the majority reasoned that "'damages because of bodily injury' ... requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought." Rather, a sufficient connection will likely exist when the damages sought in the underlying claim are for losses asserted by the person injured, a person recovering on behalf of the injured person, or a person or entity that suffered direct harm because of another's injury – but in such case, "the existence and cause of the injury must be proved."

The majority explained that the governments' alleged economic losses were not tied to bodily injuries incurred by specific individuals. Rather, their alleged losses are "aggregate economic injuries they have experienced because of the opioid epidemic." And therefore, the underlying lawsuits for which Masters sought coverage did not have a sufficient connection between the bodily injury and damages sought.

The dissenting opinion would have affirmed the Ohio Court of Appeals' ruling, reasoning that the governmental entities sought reimbursement of medical expenses and treatment costs, which from the duty to defend overlay, "are arguably 'because of' bodily injury."

Occurrence – Illinois

Acuity v. M/I Homes of Chicago, LLC

--- N.E.3d ---, 2022 WL 4115230 (Ill. App. Ct. Sep. 9, 2022)

The First District Appellate Court of Illinois overturned a finding of summary judgment granted by the trial court in favor of an insurer, finding that the property damage alleged could potentially constitute an occurrence.

Acuity issued a general liability policy to H&R Exteriors Inc. (H&R), a subcontractor of M/I Homes of Chicago, LLC (M/I Homes) on a construction project at a multiple-building residential townhouse development. M/I Homes was named as an additional insured on that policy. Following construction, the owners of the townhouses filed a lawsuit alleging that M/I Homes sold the townhouses with substantial construction defects. M/I Homes requested a defense in the lawsuit from Acuity, which denied coverage.

In the declaratory judgment lawsuit that followed, the trial court granted Acuity's motion for summary judgment, finding that Acuity had no duty to defend because, although damage allegedly occurred to the townhomes outside of the work of the subcontractor insured, H&R, this damage could not be considered damage to other property because "Illinois case law considers a subcontractor's work still within the scope of work of the general contractor."

The appellate court disagreed with the trial court, finding that a duty to defend existed. The appellate court looked at the broad terms used in the underlying complaint for damage to "other property," rejecting Acuity's argument that the other property allegations were not specific enough to trigger a defense duty because the underlying complaint did not identify who owned the "other property." "The allegations of damage to 'other property' can be a reference to the association's own property in the common areas, and there are no allegations that would clearly exclude coverage." While acknowledging that the allegation of damage to "other property" was certainly vague, the appellate court held that "even 'vague, ambiguous allegations against an insured should be resolved in favor of finding a duty to defend." Therefore, the appellate court concluded that since, under Illinois law, a duty to defend exists if the allegations in the complaint even potentially trigger coverage, Acuity had a duty to defend the underlying suit.

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