PLUNKETT COONEY

COVID-19, Number of Occurrences Coverage Update

May 2, 2022

COVID-19 Business Income Coverage – Massachusetts

Verveine Corp. v. Strathmore Ins. Co.
184 N.E. 3d 1266 (Mass. 2022)

The Supreme Judicial Court of Massachusetts held that losses stemming from the COVID-19 pandemic do not constitute "direct physical loss of or damage to" properties owned by Verveine Corp, 1704 Washington LLC, doing business as Toro, and JKFOODGROUP LLC, doing business as Little Donkey (plaintiffs) and insured by Strathmore Insurance Company (Strathmore). This was the first state high court to issue an opinion on a COVID-19 coverage case.

Plaintiffs owned restaurants, which suffered revenue losses due to the COVID-19 pandemic and resulting government-issued restrictions. Plaintiffs sought insurance coverage for their lost business income from Strathmore, which Strathmore subsequently denied due to the lack of any "physical loss of or damage to" the properties and the virus exclusion in one of the policies at issue. Plaintiffs then filed suit against Strathmore for breach of contract and their insurance broker, Commercial Insurance Agency, Inc. (Commercial), for "negligently failing to procure policies that would have covered damages resulting from the COVID-19 virus." A superior court judge granted Strathmore's motion to dismiss and Commercial's motion for judgment on the pleadings, holding that the insurance policies unambiguously did not cover plaintiffs' losses. Plaintiffs appealed.

On appeal, the Supreme Judicial Court of Massachusetts noted that the Strathmore's policies provided that Strathmore "will pay for direct physical loss of or damage to Covered Property at the [insured] premises ... caused by or resulting from any Covered Cause of Loss…" As such, the question before the Supreme Judicial Court was whether there was any "direct physical loss of or damage to property" at the restaurants due to the COVID-19 pandemic. In answering that question, the Supreme Judicial Court concluded that "'direct physical loss of or damage to' property requires some 'distinct, demonstrable, physical alteration of the property.'" The Supreme Judicial Court reasoned that while the plaintiffs' business income losses may have been caused in some way by the physical properties of COVID-19, "the suspension of business at the restaurants was not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage." The Supreme Judicial Court reasoned that because there were not physical effects on the properties themselves, and because the mere presence of COVID-19 in the restaurants does not amount to loss or damage to the property, there could not be coverage for lost business income under the policies provided by Strathmore. As such, the Supreme Judicial Court affirmed the lower court's holding.

By: Danielle Chidiac

COVID-19 Direct Physical Loss – Iowa

Wakonda Club v Selective Ins. Co. of Am.
--- N.W.2d ---, No. 21-0374, 2022 WL 1194012 (Iowa Apr. 22, 2022)
Jesse's Embers, LLC v. W. Agric. Ins. Co.
--- N.W.2d ---, No. 21-0623, 2022 WL 1194006 (Iowa Apr. 22, 2022)

The Supreme Court of Iowa held in two separate cases that the insured did not suffer a "direct physical loss of or damage to" their property as a result of the temporarily suspension of operations required by COVID-19 disaster proclamations.

The two insureds, a bar/restaurant and a golf course, each made a claim under their respective commercial property insurance policies with their respective insurers for coverage for the time period they were forced to temporarily close in compliance with the Governor's COVID-19 orders. Both claims were denied because the insurers stated that no "direct physical loss of or damage to property" was present to trigger coverage. The district court in each case agreed with the insurers and granted the insurers' motions for summary judgment.

The Supreme Court of Iowa agreed with the district courts in each case, ruling in favor of the insurers. The Supreme Court unanimously ruled that the losses from government restrictions alleged by the insureds needed to contain a "physical aspect." Justice Dana Oxley issued the opinion in both cases, and stated that "Iowa law requires there to be a physical aspect to the loss of the property to satisfy the requirement for a 'direct physical loss of or damage to property'" included in the policies. The mere loss of use of property, without more, does not meet the requirement for a "direct physical loss of" property under the policy. Finding that coverage was not triggered under either policy, the Supreme Court did not address the issue of whether the virus exclusions in the policies applied.

The Supreme Court of Iowa decision was handed down just the day after, and aligns with, an opinion by the Supreme Judicial Court of Massachusetts that economic losses stemming from the COVID-19 pandemic do not constitute a physical loss.

By: Michael Hanchett

Self-Insured Retention Limit – Third Circuit (Pennsylvania Law)

Neville Chem. Co. v. TIG Ins. Co.
No. 21-1616, 2022 WL 1222178 (3rd Cir. Apr. 26, 2022)

The U.S. Court of Appeals for the Third Circuit affirmed the federal district court's summary judgment ruling in favor of defendant, TIG Insurance Company (TIG) and against plaintiff, Neville Chemical Co. (Neville) on the basis that Neville's excess workers' compensation policy was not triggered because Neville's losses did not reach the Self-Insured Retention (SIR) limit – a prerequisite to excess coverage.

Neville, a hydrocarbon resins manufacturer, maintained a self-insured workers' compensation program, which was supplemented by a Specific Excess Workers Compensation Policy (Policy) issued by TIG's predecessor. The policy had an SIR limit of $500,000 per occurrence, and TIG was responsible for indemnifying Neville for all workers' compensation benefits exceeding the SIR limit. Neville's employee, Lawrence Kelley, suffered three back injuries between 1993 and 2003. After the first injury in 1993, Kelley took leave and Neville paid workers' compensation benefits until 1995. Kelley suffered the second back injury in 2001, and he filed a new workers' compensation claim. Neville paid benefits at the 1993 rate, concluding that the second injury related to the original injury. In 2003, Kelley suffered a third back injury. He did not file a third claim, but Neville paid workers' compensation benefits again at the 1993 rate. In 2005, Kelley was deemed fully disabled.

The district court concluded that the 1993, 2000, and 2003 incidents were each a separate accident and, thus, a distinct occurrence for which coverage would only be available if the $500,000 SIR was satisfied regarding each occurrence. The appellate court affirmed the district court's ruling, holding that each injury was a separate occurrence, and the SIR limit was never met for any of the three injuries. In so holding, the appellate court rejected, among other arguments, Neville's assertion that the district court improperly relied on a dictionary to give meaning to the term "accident" used in the policy's definition of occurrence. It also rejected Neville's argument that the interpretation adopted by the district court contravened the Pennsylvania Workers' Compensation Act. The appellate court refused to read terms from the statute into the policy in place of the clear language in order to materially alter the intent of the contracting parties.

By: Joshua LaBar