PLUNKETT COONEY

Direct Physical Loss or Damage, Notice Coverage Update

September 15, 2021

Direct Physical Loss or Damage – Eleventh Circuit (Georgia Law)

Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.
--- Fed. Appx. ---, 2021 WL 3870697 (11th Cir. Aug. 31, 2021)

In the wake of the COVID-19 pandemic, the plaintiff, Gilreath Family & Cosmetic Dentistry, Inc. (Gilreath), sought business-disruption coverage from its insurer, Cincinnati Insurance Company (Cincinnati). After Cincinnati denied the claim, Gilreath filed a lawsuit, alleging breach of contract. The U.S. District Court for the Northern District of Georgia dismissed the complaint because Gilreath had not alleged any "direct physical loss or damage" to property as required under the policy. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

After Georgia's governor declared a public health state of emergency and later ordered residents and visitors to "shelter in place," Gilreath adhered to CDC guidance that healthcare providers postpone non-urgent dental visits. This resulted in the loss of a "substantial portion" of Gilreath's usual income. To recover the loss, Gilreath filed a claim for business-interruption coverage with Cincinnati. The claim hinged on three provisions in the policy: (1) the "Business Income" provision, (2) the "Extra Expense" provision, and (3) the "Civil Authority" provision. The first two required a "direct physical loss or damage" to the insured's premises. The third required damages to property other than the insured's premises.

The appellate court concluded that, in order for there to be a showing of direct physical loss or damage to property, there must be an actual change in the insured's property that either makes the property unsatisfactory for future use or requires repairs to be made. Gilreath, however, did not allege anything that could qualify, "to a layman or anyone else," as physical loss or damage. The shelter-in-place order did not damage or change the property in a way that required repair or precluded its future use.

Additionally, the appellate court held that the presence of virus particles did not cause physical damage or loss to the property. Finally, the appellate court held that the "Civil Authority" provision did not apply because there was no damage to any property off the business premises.

By: Joshua LaBar

Notice – Illinois

Evanston Ins. Co. v. OnPoint Cas Solutions, LLC
2021 IL App (1st) 200899-U, 2021 WL 4032874 (Ct. App. Sept. 3, 2021)

The Appellate Court of Illinois, First District, upheld a lower court's grant of summary judgment to the insureds, finding that the insurer had a duty to defend the insureds in an underlying personal injury case and that the insureds did not breach the policy's notice provision.

Evanston Insurance Company (Evanston) issued a specified medical professions insurance policy to OnPoint Cas Solutions, LLC (OnPoint) for the policy period beginning Dec. 27, 2017, with a retroactive period dating to Dec. 27, 2012. The policy required Evanston to cover claims made within the policy's effective period for activities occurring after the retroactive date. The policy did not apply if the insured, prior to the policy's effective date, had "knowledge of such act, error or omission or any fact, circumstance, situation or incident which may lead a reasonable person in the Insured's position to conclude that a Claim was likely."

OnPoint and its employee, Patrick Glavin (Glavin), were named as defendants in a suit commenced by Nathan Brinn (Brinn) arising out of a surgery that took place on Oct. 14, 2016. Brinn named the hospital as an original defendant when the suit was first filed, but not OnPoint or Glavin. Nevertheless, OnPoint notified Evanston of the lawsuit on June 7, 2018. Onpoint and Glavin were added as defendants in the amended complaint filed on Oct. 15, 2018. OnPoint sought coverage for Brinn's lawsuit, but Evanston denied coverage on the basis that OnPoint had knowledge of Brinn's potential claim before the policy's effective date.

In the declaratory judgment lawsuit that followed, Evanston and the insureds filed cross-motions for summary judgment. The trial court granted the insureds' motion, finding that there was no indication prior to the policy's effective date that OnPoint or Glavin would have any liability for Brinn's alleged injuries.

The appellate court agreed, finding that "there is nothing to suggest that OnPoint and Mr. Glavin had *any* reason to conclude that Mr. Brinn was going to file a claim against *them* until he filed the underlying lawsuit on Oct. 15, 2018. And it is noteworthy that although the initial complaint filed by the Brinns did not name OnPoint and Mr. Glavin, OnPoint notified Evanston of the possibility that it could yet be named." The appellate court rejected Evanston's argument that Glavin's testimony that, during the surgery, he thought something might have been done incorrectly constituted knowledge of potential liability. The appellate court upheld the finding that Evanston had a duty to defend OnPoint and Glavin in the underlying lawsuit.

By: Stephanie Brochert

Direct Physical Loss – U.S. District Court for the District of Oregon (Oregon Law)

Nue, LLC v. Oregon Mut. Ins. Co
No. 3:20-CV-01449-HZ, 2021 WL 4071862 (D. Or. Sept. 4, 2021)
Nari Suda, LLC v. Oregon Mut. Ins. Co
No. 3:20-CV-01476-HZ, 2021 WL 4067684 (D. Or. Sept. 6, 2021)
North Pacific Management v. Liberty Mut. Fire Ins. Co.
No. 3:20-CV-00404-HZ, 2021 WL 4073278 (D. Or. Sept. 7, 2021)
Hillbro LLC v. Oregon Mut. Ins. Co
No. 3:20-CV-00382-HZ, 2021 WL 4071864 (D. Or. Sept. 7, 2021)

In four separate actions proposed to be a class action, the U.S. District Court for the District of Oregon found in favor of the insurers, ruling that four business policyholders' properties did not suffer physical damage from government shutdown orders.

Oregon Mutual Insurance Company and Liberty Mutual Fire Insurance Company issued insurance policies to various restaurants, which filed claims with the insurers for losses resulting from government shutdown orders in response to the COVID-19 pandemic. The pandemic orders initially only allowed for carryout or delivery service, but eventually permitted limited capacity with enhanced cleaning protocols.

The four restaurants initiated proposed class actions after their respective insurers denied their claims for pandemic-related losses. The restaurants claimed coverage under the policies' civil authority, business interruption and extra expense provisions. The insurers brought motions for summary judgment, arguing that the claims were properly denied as there was no "direct physical loss of or damage to" property to invoke coverage.

The district court agreed with the insurers, holding that each insured had to show that their properties were harmed or destroyed by the pandemic orders in order to obtain coverage. The district court further held that the policies' failure to define the phrase "direct physical loss or damage" did not require the insurers to cover the losses. Instead, the district court found that the phrase was unambiguous and not broad enough to provide coverage. The district court further ruled that an ordinance or law exclusion in the policies also barred coverage "even if the property has not been damaged." Therefore, the district court granted each insurer's motion to dismiss in each individual case.

By: Michael Hanchett

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