PLUNKETT COONEY

Occurrence, Direct Physical Loss Coverage Update

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"Occurrence" – Illinois

General Cas. Co. of Wisconsin v. Burke Eng'g Corp.
--- N.E.3d ---, 2020 IL App. (1st) 191648, 2020 WL 5514189 (Ill. App. Ct. Sept. 14, 2020)

The Appellate Court of Illinois held that an insurer did not owe a defense or indemnity for numerous pollution-related claims that ultimately resulted in an $18.3 million settlement. The underlying actions involved claims by numerous residents of the Village of Crestwood, Illinois (Village), alleging that the Village knowingly pumped millions of gallons of contaminated well water into the Village's water supply, and that Burke Engineering Corporation (Burke) worked in concert with the Village to falsify records to conceal evidence of use of the well water. Burke's insurer, General Casualty Company of Wisconsin (General Casualty), denied coverage for the claims, primarily on the bases that the alleged misconduct did not constitute an "occurrence," because the falsification of records was not an "accident," and based on the application of the policies' intentional acts exclusions.

Following an $18.3 million settlement, General Casualty initiated a declaratory judgment action seeking a declaration that it did not owe a defense or indemnity for the underlying actions because the underlying actions only alleged intentional conduct. The trial court agreed, holding that the underlying allegations did not allege an accident and, therefore, there was "no potential coverage and no duty to defend."

The appellate court affirmed, reasoning that, notwithstanding the fact that the underlying actions contained negligence counts, courts are to look at the factual allegations rather than the count's label. The appellate court held that the factual allegations in the underlying actions clearly alleged that Burke knew that the well water was contaminated, and intentionally concealed the fact that the Village was using contaminated water to supply tap water to Village residents. Accordingly, the appellate court held that General Casualty did not owe a defense for the underlying actions or indemnity for the $18.3 million settlement. Notably, while recognizing that its decision would result in foreclosing recovery for the Village residents, the appellate court commented that "[i]n applying insurance law, though, the amount of harm is not, and should never be, taken into consideration. Otherwise, the law becomes unpredictable, totally arbitrary, and dependent on the whim of the individual judge, all of which is repugnant to the rule of law."

Direct Physical Loss (COVID-19) – Northern District of Illinois (Illinois Law)

Sandy Point Dental, PC v. Cincinnati Ins. Co.
No. 20-cv-2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020)

The U.S. District Court for the Northern District of Illinois granted dismissal of a lawsuit against Cincinnati Insurance Company (Cincinnati) seeking first-party insurance coverage for losses related to an insured's suspension of operations because of COVID-19. Cincinnati issued an insurance policy to Sandy Point Dental, PC (Sandy Point), providing first-party property and business interruption coverage for direct physical loss to covered property (the Policy). The Policy also provided Civil Authority coverage for loss stemming from government orders that "prohibit access to the 'premises' due to direct physical 'loss' to the property, other than at the 'premises', caused by or resulting from a Covered Cause of Loss." Sandy Point alleged that it was "effectively forced to shut down" operations pursuant to an executive order issued by the governor of Illinois and commenced a lawsuit seeking a declaration that it was entitled to coverage under the Policy.

The court granted Cincinnati's motion to dismiss Sandy Point's complaint, finding that the closure of Sandy Point's office did not constitute direct physical loss to covered property as required under the Policy. For there to be direct physical loss, the court held, Sandy Point was required to demonstrate "physical alteration or structural degradation" of its property, or, alternatively, the presence of the novel coronavirus on its property's surfaces. The court found, "the words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure." Because Sandy Point did not demonstrate either of these conditions, Cincinnati was not required to provide coverage.

The court also found that Sandy Point failed to show that it was entitled to Civil Authority coverage because it could not show that a "civil authority order, (1) prohibit[ed] access to the premises due to (2) direct physical loss to property, other than plaintiff's premises, caused by or resulting from any Covered Cause of Loss." Not only had Sandy Point failed to demonstrate direct physical loss to property other than its own property, the court found that "while coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises."

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