PLUNKETT COONEY

Physical Alteration of Property, Choice of Law and Virus Exclusion Coverage Update

December 15, 2021

Physical Alteration of Property – Seventh Circuit (Illinois Law)

Sandy Point Dental, PC. v. Cincinnati Ins. Co.
--- F.4th. ---, No. 21-1186, 2021 WL 5833525 (7th Cir. Dec. 9, 2021)

Mashallah, Inc. v. West Bend Mut. Ins. Co.
--- F.4th. ---, No. 21-1507, 2021 WL 5833488 (7th Cir. Dec. 9, 2021)

Crescent Plaza Hotel Owner, LP v. Zurich Am. Ins. Co.
--- F.4th. ---, No. 21-1316, 2021 WL 5833485 (7th Cir. Dec. 9, 2021)

Bradley Hotel Corp. v. Aspen Specialty Ins. Co.
--- F.4th. ---, No. 21-1173, 2021 WL 5833486 (7th Cir. Dec. 9, 2021)

The U.S. Court of Appeals for the Seventh Circuit held in four separate cases that each policyholder was not entitled to coverage for pandemic-related losses, as there was no physical alteration of the insured's property.

Each insured was required to close or dramatically scale back its operations in response to a series of executive orders issued by Illinois Gov. J.B. Pritzker in an effort to curb the spread of the coronavirus in the state. The insureds held materially identical commercial-property insurance policies. The policies provided coverage for income losses sustained on account of a suspension of operations caused by "direct physical loss" to the covered property. The policies also provided coverage for income losses sustained because of an action of civil authority prohibiting access to covered property when such action was taken in response to "direct physical loss" suffered by other property.

Each insured filed a claim, which were denied by the insurance provider and litigation ensued. The insureds each brought separate suits for breach of contract and sought declaratory judgments for payment of their losses. In each case, the district court granted the insurer's motion to dismiss for failure to state a claim upon which relief could be granted.

The appellate court found in favor of the insurers, holding that the term "direct physical loss" as used in commercial property policies requires a physical alteration to property in order to provide coverage to

the insureds. The appellate court further held that the insureds were not able to show that the coronavirus caused any physical alteration of their properties. The insureds could merely show that their operations were limited or temporarily closed by the executive orders. There was no showing that the presence of the virus or resulting closure orders physically altered the insured's property. For these reasons, the appellate court affirmed the dismissal of each case against the insurers.

The Seventh Circuit joins the Sixth, Eighth, Ninth, and Eleventh circuits, which have all decided pandemic coverage suits in favor of the insurer.

By: Michael Hanchett

Choice of Law and Forum Selection Clauses – New York

N. Am. Elite Ins. Co. v. Space Needle, LLC
--- N.Y.S.3d ---, 2021 WL 5702283 (N.Y. App. Div. Dec. 2, 2021)

The New York Supreme Court for the First Judicial Department recently ruled that New York choice of law and forum selection clauses in an insurance policy were void. Space Needle, LLC (Space Needle) entered into an insurance contract with North American Elite Insurance Company (Elite), which provided that New York law "'shall govern the construction and interpretation' of the policy and that the parties submit to the 'exclusive jurisdiction' of New York State courts."

In March 2020, Space Needle notified Elite of a loss, and further elaborated in January 2021 that the claim was for losses associated with governmental COVID-related closure of the Space Needle. Space Needle requested a coverage determination under Washington law. In March 2021, Elite commenced an action in New York County seeking a declaration that it does not owe coverage to Space Needle for its COVID-related losses. The New York Supreme Court denied Elite's motion for preliminary injunction and found that it did not show a "likelihood of success on the merits or the balance of equities in seeking to enforce the New York exclusive forum selection clause."

The appellate court agreed with the Supreme Court, finding that Elite "did not demonstrate either a likelihood of success on the merits of its claim for an anti-suit injunction based on the contractual choice-of-law and forum selection clauses of the parties' insurance contract, or a balancing of the equities in its favor." The appellate court reasoned that Elite is authorized to sell insurance in Washington, and thus, is required to comply with the Washington Insurance Code, which prohibits choice-of-law and forum selection clauses in insurance policies sold in Washington.

The appellate court further reasoned that Elite failed to demonstrate that the "equities tip in its favor," that Washington has clearly specified that "no forum selection clause is valid in a particular kind of contract," and that Elite has failed to demonstrate "New York policy favoring the right of parties to

include contractual clauses choosing New York law and New York as the exclusive forum for coverage disputes under an insurance contract takes precedence over the Washington state statute prohibiting the inclusion of those clauses in this type of insurance contract." Finally, the appellate court noted that while Space Needle is a sophisticated buyer of insurance, Elite knew or should have known that by participating in the Washington insurance market, the choice of law and forum selection clauses would have been void. Thus, the appellate court affirmed the lower court's ruling.

By: Danielle Chidiac

Virus Exclusion – Ohio

The Nail Nook, Inc. v. Hiscox Ins. Co. Inc.
2021-Ohio-4211, 2021 WL 5709971 (Ohio Ct. App. Dec. 2, 2021)

The Ohio Court of Appeals held that plaintiff, The Nail Nook, Inc. (Nail Nook) was not entitled to coverage for coronavirus-related damages due to the virus exclusion in Nail Nook's commercial business owners insurance policy (policy) issued by Hiscox Insurance Company Inc. (Hiscox). As a result of an Ohio emergency executive order issued in March 2020, Nail Nook was forced to close its nail salon business, resulting in business losses. In response, Nail Nook filed a claim under its policy, but Hiscox denied coverage.

In June 2020, Nail Nook filed its complaint for declaratory judgment and breach of contract against Hiscox, alleging that it was entitled to coverage under the policy for its business losses resulting from the executive order. Hiscox filed a motion for judgment on the pleadings, contending that the policy's virus exclusion was applicable to Nail Nook's claim. Nail Nook opposed the motion and argued that the policy was ambiguous based on the "direct physical loss of or damage to Covered Property" language in the policy. However, Nail Nook did not address the policy's virus exclusion. The trial court held that the policy's exclusion applied because it excluded coverage for any loss or damage caused directly or indirectly by a virus, and Nail Nook did not dispute that the coronavirus was a virus under the exclusion.

The Ohio Court of Appeals affirmed, agreeing that the exclusion was unambiguous and excluded losses resulting from the coronavirus. The appellate court explained that this finding comported with other courts that have addressed substantially similar exclusions. Additionally, the appellate court addressed the business income provision in the policy. Citing to recent federal case law, the appellate court held that Nail Nook did not have a valid claim for coverage because it could not prove "direct physical loss of or damage to Covered Property."

By: Joshua LaBar

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