Appraisal, Virus Coverage Update

August 15, 2024

Appraisal – Eleventh Circuit (Florida Law)

Biscayne Beach Club Condo. Assoc., Inc. v. Westchester Surplus Lines Ins. Co.
No. 23-10467, --- 4th ---, 2024 WL 3659584 (11th Cir. Aug. 6, 2024)

The U.S. Court of Appeals for the Eleventh Circuit determined that Westchester Surplus Lines Insurance Company (Westchester) remained liable for a $13.8 million appraisal award because Westchester did not timely challenge the partiality of the appraiser selected by Biscayne Beach Club Condominium Association, Inc. (Biscayne).

Biscayne sought coverage from Westchester after suffering losses from Hurricane Irma in September 2017 and Tropical Storm Phillippe in October 2017. Westchester issued payments for the losses, but Biscayne Beach was unsatisfied with the payments and sued Westchester in state court. Westchester removed the action to the U.S. District Court for the Southern District of Florida, which abated the action when Biscayne exercised its right to appraise the amount of the losses.

Biscayne initially selected its public adjuster, Lester Martinez, to act as its appraiser on a 10% contingency fee. Westchester objected to Martinez's appointment on the grounds that the contingency fee agreement created a conflict of interest with regard to Martinez's competency and partiality. As such, Biscayne selected Blake Pyka to act as its appraiser. Westchester selected its appraiser, and they, in turn, selected an umpire.

On Feb. 3, 2020, when the appraisal panel met for final negotiations, Pyka disclosed for the first time to the panel that he was working for Biscayne Beach on a contingency fee, but it would not influence or bias his assessment of the damages. Westchester did not immediately object to Pyka's disclosure and any effect it may have on Pyka's partiality. Instead, Westchester waited more than two months after Pyka's disclosure and almost a month after the appraisal award was issued on March 12, 2020 to object. Westchester then challenged the appraisal award in court, in part based on alleged partiality.

Because Westchester had an opportunity to challenge Pyka's partiality when he made his disclosure during the appraisal proceedings and before any appraisal award was issued, the appellate court agreed with the district court that Westchester waived its right to object to Pyka's partiality. The appellate court disagreed with Westchester's claim that it would have been wasteful to object to Pyka's disclosure when he first made it, noting that the choice to wait to ask the court to start the process over again was more costly to the parties. Accordingly, the appellate court affirmed the district court's confirmation of the $13.8 million appraisal award.

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Virus Coverage – California

John's Grill, Inc. v. Hartford Fin. Servs. Grp., Inc.
No. S278481, --- P.3d ---, 2024 WL 3736798 (Cal. Aug. 8, 2024)

The California Supreme Court held that the policy issued by the defendant, Sentinel Insurance Co., Ltd., (Sentinel), to John's Grill, Inc. (John's Grill) was not illusory and did not provide coverage for losses sustained in connection with the COVID-19 pandemic.

In March 2020, John's Grill sought first-party coverage from Sentinel for business losses due to the COVID-19 pandemic. Sentinel denied coverage because, among other reasons, the insured did not identify any direct physical loss to any property at the scheduled premises. After receiving the denial, John's Grill sued Sentinel in April 2020. Throughout the litigation, John's Grill argued that Sentinel was liable for pandemic-related losses under the Limited Fungi, Bacteria or Virus Coverage endorsement regardless of the cause because the specified cause of loss limitation set forth in the endorsement "rendered any promise of coverage illusory."

At the trial court level, Sentinel challenged the sufficiency of the complaint filed by John's Grill. The trial court agreed with Sentinel, finding that the policy was not illusory because virus-related coverage could be afforded under the specified circumstances set forth in the limited fungi, bacteria or virus coverage endorsement and John's Grill failed to establish otherwise. Since the endorsement was not illusory, the trial court enforced it as written and determined that there was no coverage for the pandemic-related losses.

The California Court of Appeal (First District, Division 4) reversed the trial court's decision, holding that the language in the limited fungi, bacteria or virus coverage endorsement potentially encompassed the business loss claim since it has customized language that triggers coverage for a virus. The appellate court determined that the specified cause of loss clause in the endorsement, when applied broadly, renders the "limited grant of coverage for virus-caused 'loss or damage' into an empty promise" and therefore is unenforceable under the illusory coverage doctrine.

The California Supreme Court reversed the appellate court's finding that a reasonable insured would understand that there was no coverage for virus-related damage unless it was caused by one of the specified perils. John's Grill, therefore, could not invoke "the illusory coverage doctrine to transform the policy's limited virus-related coverage into unlimited virus-related coverage." Since John's Grill could not avoid the specified cause of loss limitation set forth in the endorsement and because it admitted that none of those specified causes of loss were present, John's Grill could not have a reasonable expectation of coverage for its losses. Without a reasonable expectation of coverage, the illusory

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coverage doctrine did not apply. Accordingly, the Supreme Court concluded that there was no coverage under the policy for pandemic-related losses per the unambiguous and enforceable terms of the policy.

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