PLUNKETT COONEY

Bad Faith, Owned Property Exclusion Coverage Update

February 1, 2021

Extra-Contractual, Consequential Damages – Florida

Citizens Prop. Ins. Co. v. Manor House, LLC
No. SC19-1394, 2021 WL 208455 (Fla. Jan. 21, 2021)

The Florida Supreme Court held that Florida apartment buildings, Manor House, LLC, Ocean View, LLC, and Merritt, LLC (collectively Manor House) were not entitled to extra-contractual, consequential damages from its insurer, Citizens Property Insurance Corporation (Citizens) for its lost rental income after Hurricane Frances damaged the apartment buildings. Manor House brought a cause of action in the trial court against Citizens for breach of contract and fraud. In its breach of contract claim, Manor House sought to recover, inter alia, extra-contractual damages related to lost rental income, which it alleged were a result of the delay in appraising and repairing the apartment complex. The trial court granted Citizen's motion for partial summary judgment, holding that there was nothing in the insurance policy which provided coverage for lost rent. On appeal, the U.S. Court of Appeals for the Fifth District reversed partial summary judgment and certified the question of whether Florida law allows an insured to recover extra-contractual consequential damages for a first-party breach of insurance contract.

The Florida Supreme Court answered that question in the negative, reasoning that in a breach of contract claim, "the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the policy." The Supreme Court recognized that the subject policy provided coverage for property damage, but not for lost rental income. The Supreme Court stated, "the parties must rely on what they actually have pursuant to the express terms and conditions of the insurance policy" and that a court "must give effect to the express terms of the subject insurance policy, which does not provide lost rental income coverage." The Supreme Court noted that extra-contractual damages are available in bad faith actions, but Citizens, as a governmental entity and not a private insurance company, is statutorily immune from first-party bad faith claims. Thus, there was no avenue of recovery for Manor House, and Citizens was not liable to cover Manor House's lost rental income.

Owned Property Exclusion – Ohio

Garrett Well LLC v. Frick-Gallagher Mfg. Co.
--- N.E.3d ---, 2021 WL 232452 (Ohio App. Ct. Jan. 11, 2021)

Plaintiff Garrett Well LLC (Garrett Well) sought reimbursement for remediation work performed at the Frick-Gallagher Manufacturing Company (Frick) site in Wellston, Ohio (Site) from Arrowood Indemnity Co. and Firemen's Fund Insurance Company of Ohio (collectively, Insurers). Frick used the site from approximately 1930 to 2004 to manufacture metal storage products, which included cleaning the metal with certain chemicals. After Frick closed its business, the site was abandoned and fell into disrepair.

Out of concern for migration of contaminants off-site and to allow for future development of the site, the City of Wellston (Wellston) took steps to remediate the groundwater contamination. This included entering into a partnership with Garrett Well, which agreed to remediate part of the site. Pursuant to that partnership, Garrett Well was assigned the right to initiate an action against Frick, a defunct entity, for reimbursement of all costs. It did so and obtained default judgment against Frick. Garrett Well then filed an action against the Insurers for payment of the default judgment.

During trial, the evidence showed that the contamination was limited to the site. Though Wellston indicated that it began the remediation process out of a concern for migration of contaminants off-site, investigations revealed that no such migration occurred. Accordingly, the trial court ruled that the owned property exclusion applied to preclude coverage for the costs of environmental remediation.

The Ohio Court of Appeals upheld the trial court's finding that remediation was only performed to the site and, therefore, the owned property exclusion applied to preclude coverage. In particular, the appellate court noted that costs incurred "to protect and mitigate the threat of harm to the public and the environment" did not "overcome the owned property exclusion." Garett Well's evidence that remediation was performed off-site was "speculative at best." Rather, the evidence supported the trial court's ruling that the owned property exclusion applied.

Business Income Coverage – Northern District of Ohio (Ohio Law)

Henderson Road Rest. Sys. Inc. v. Zurich Am. Ins. Co.
1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021)

The Northern District Court of Ohio ruled that Zurich American Insurance Company (Zurich) must cover the COVID-19 pandemic-related business income losses of some of its restaurant policyholders. Policyholder Henderson Road Restaurant System and its related companies (Henderson Road) own steak and seafood restaurants in several states, including Michigan, Ohio, Pennsylvania, Indiana and Florida. Their businesses were comprised of almost exclusively indoor dining and, as a consequence, the restaurants were forced to close as a result of the orders. Henderson Road sought insurance coverage for the losses sustained by the closures, but Zurich denied the claim. Henderson Road then sued Zurich for breach of contract and bad faith, seeking recovery for the lost income.

The case was removed to federal court, where both parties moved for summary judgment. Zurich argued that tangible structural damage to the restaurants was required in order to satisfy the threshold requirement that business losses be tied to direct physical loss or damage to the property. Zurich further argued that even if this requirement was met, coverage would be barred under the microorganism and "loss of use" exclusions.

The court, however, agreed with Henderson Road's argument that the business income coverage provision was ambiguous. Specifically, the policy states that "it will pay for 'direct physical loss of or damage to 'real property.' Based on this language, Plaintiffs argue that physical loss of the real property means something different than damage to the real property, and this is a valid argument." The court distinguished this policy language from other courts that held direct physical loss caused by COVID-19 was required in order for coverage to exist. "Here, Zurich's policy does not expressly limit coverage to physical loss to property; it extends coverage to direct physical loss of property as well." Because governmental orders forced Henderson Road to suspend the operation of its restaurants for in-person dining, which was the primary or only way of serving customers, the companies suffered a covered loss.

The court determined that the microorganism exclusion "was plainly to exclude coverage for damage caused by microorganisms *at* the Plaintiffs' properties." Because there were no confirmed or suspected cases of COVID-19 at any of the properties, the court reasoned that the exclusion did not apply. With respect to the "loss of use" exclusion, the court stated that it would "vitiate" the loss of business income coverage if it applied, making such coverage illusory. Lastly, the court ruled against the restaurants on their bad faith claim, explaining that courts across the country have disagreed about the availability of insurance coverage for pandemic-related losses.

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