PLUNKETT COONEY

Covered Causes of Loss, Retroactive Date in Claims-Made Policy Coverage Update

March 15, 2022

Covered Causes of Loss – Fourth Circuit (West Virginia Law)

Uncork & Create LLC v. Cincinnati Ins. Co.
--- F.4th ---, No. 21-1311, 2022 WL 662986 (4th Cir. Mar. 7, 2022)

The U.S. Court of Appeals for the Fourth Circuit, in its first opinion addressing business losses stemming from the COVID-19 pandemic, upheld the dismissal of a putative class action seeking insurance coverage. The insured, Uncork and Create LLC (Uncork), filed suit against its general liability insurer, Cincinnati Insurance Company (Cincinnati), seeking coverage for its lost business income and expenses due to an executive order from the governor of West Virginia that temporarily suspended business operations. In support thereof, Uncork alleged that it lost "use," "access," and "functionality" of its locations, which qualified as "direct physical loss or damage" under the policy. Alternatively, Uncork argued that the COVID-19 virus caused a covered "loss" as it prevented Uncork from using its locations for their intended purposes.

The appellate court rejected Uncork's arguments, and instead upheld the dismissal in favor of Cincinnati. In so ruling, the appellate court explained that the terms "physical loss" and "physical damage," as used to define "Covered Causes of Loss," were unambiguous: "physical" means "relating to natural or material things;" "loss" means "the state or fact of being destroyed or placed beyond recovery: destruction, ruin;" and "damage" means "injury or harm … to property."

Applying those plain meanings, the appellate court ruled that neither the executive order, nor the COVID-19 virus, prohibited Uncork from accessing its property. Rather, "under the closure order, businesses with fewer than five individuals working at the premises were permitted to do so." The limitation on the number of individuals working at each of Uncork's locations did not equate to a "loss" of access to such properties.

Further, in upholding dismissal of Uncork's claims, the appellate court cited to similar rulings from other jurisdictions, noting that its decision was "consistent with the unanimous decisions by our sister circuits, which have applied states' laws to similar insurance claims and policy provisions."

Retroactive Date in Claims-Made Policy – Illinois

Illinois Union Ins. Co. v. Medline Indus., Inc.
--- N.E.3d ---, 2022 IL App (2d) 210175, 2022 WL 633310 (Ill. App. Ct. 2d Dist. Mar. 4, 2022)

The Appellate Court of Illinois held that the defendant, Medline Industries, Inc. (Medline), was not entitled to insurance coverage under its claim-made premises pollution liability insurance policy issued by the plaintiff, Illinois Union Insurance Company (Illinois Union), for claims of bodily injury resulting from the emission of a carcinogenic and mutagenic gas known as ethylene oxide (EtO).

On Sept. 29, 2008, Medline acquired its Waukegan facility, which sterilized medical instruments. The sterilization process resulted in the emission of EtO. Around the time that Medline acquired the facility, it also purchased the policy from Illinois Union, which contained a retroactive date of Sept. 29, 2008. The date in the policy specified the date of the earliest occurrence to be covered, regardless of when the claim is made. The policy covered claims arising out of a "pollution condition," but it further specified that this only applied to such conditions that "first commence, in their entirety, on or after the retroactive date and prior to the expiration of the 'policy period.'"

In 2019, persons who lived near the facility sued Medline for bodily injury allegedly caused by the emissions from the Waukegan facility. The underlying complaints alleged that the Waukegan facility had been releasing EtO since 1994. Illinois Union declined to defend or indemnify Medline, asserting that the emissions first commenced prior to the retroactive date of the policy. Medline filed suit and sought a declaratory judgment against Illinois Union, claiming that the underlying complaints alleged discrete emissions, and each separate pollution condition that occurred on or after the retroactive date was covered. The trial court granted Illinois Union's motion for judgment on the pleadings.

On appeal, the appellate court declined to accept Medline's argument that each separate release of an emission after the retroactive date was a new "pollution condition" covered under the policy. The underlying complaints had clearly alleged that the emissions began in 1994 and continued at least to when the underlying lawsuits were filed. Therefore, the underlying complaints did not allege that the "'pollution condition,' as defined in the policy, commenced in its entirety, after the retroactive date."

By: Joshua LaBar