PLUNKETT COONEY

Covered Loss, Duty to Notify Insurer, Late Notice Coverage Update

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Covered Loss – Eleventh Circuit (Georgia Law)

AEGIS Elec. & Gas Int'l Servs. Ltd. v. ECI Mgmt. LLC
--- F.3d. ---, 2020 WL 4359610 (11th Cir. July 30, 2020)

The U.S. Court of Appeals for the Eleventh Circuit found that AEGIS Electric & Gas International Services Limited (AEGIS) was obligated to defend its insured, ECI Management LLC (ECI), in a case in which the underlying plaintiff demanded attorney's fees under the Georgia statute governing security deposits because that was a covered loss not excluded under the policy.

ECI was a manager of several residential properties in the state of Georgia. AEGIS had issued a real estate services professional liability insurance policy to ECI, which required AEGIS to defend ECI against claims alleging a "Loss" under the policy. The policy's definition of "Loss" excluded "punitive, exemplary, treble damages or any other damages resulting from the multiplication of compensatory damages."

In May 2017, a former tenant in one of ECI's buildings commenced a putative class action against ECI, alleging that ECI had wrongfully withheld the security deposits of current and former tenants in violation of Georgia's statute governing security deposits. That statute imposed a measure of damages of three times the sum improperly withheld plus reasonable attorney's fees. ECI sought coverage from AEGIS for the putative class action, but AEGIS denied coverage on the basis that the putative class action did not allege a "Loss." In the ensuing lawsuit, the trial court agreed with AEGIS's denial, finding that AEGIS had no duty to defend ECI because none of the requested relief in the putative class action qualified as a "Loss" as defined in the policy.

The appellate court overturned the trial court's decision, however, finding that the putative class action's request for attorney's fees fell within the policy's definition of "Loss," and that it was not excluded as "damages resulting from the multiplication of compensatory damages." The appellate court noted that "while it is true that an award of attorney's fees under the statute, as a practical matter, rises and falls with the award of treble damages, it does not directly flow from those damages. Rather, both the treble damages and the attorney's fees flow from a finding that the landlord acted intentionally. ..." Because the request for attorney's fees did not flow from the statute's multiplier of damages, it could

be considered a "Loss" such that AEGIS was required to defend its insured in the putative class action.

Duty to Notify Insurer of Claim – Eighth Circuit (Nebraska Law)

Topp's Mechanical, Inc. v. Kinsale Ins. Co.
--- F.3d ---, 2020 WL 4460026 (8th Cir. Aug. 4, 2020)

The U.S. Court of Appeals for the Eighth Circuit recently ruled that insurer Kinsale Insurance Company (Kinsale) had no duty to indemnify its insured, Topp's Mechanical, Inc. (TMI), in a pollution-related worker's injury case because TMI failed to timely notify Kinsale of the potential claim. The claims-made insurance policy at issue only covered pollution incidents that were discovered by TMI within seven days and reported in writing to Kinsale within 45 days. In TMI's case, it did not report its worker's injury to Kinsale until almost 18 months later.

The underlying case arose from a tank at a TMI plant that released a hot cloud of gas, injuring an employee who was standing nearby. TMI learned of the incident within a week of its occurrence, and subsequently called Kinsale. Kinsale's representative told TMI that TMI could not report the incident as a claim until the employee himself filed a formal demand or lawsuit. Accordingly, TMI did not report the claim to Kinsale until 18 months later, when the employee made a formal demand, and TMI forwarded it to Kinsale to request indemnification. Kinsale disclaimed coverage for the claim based on the policy requirement that TMI report a claim within 45 days. Subsequently, TMI sued Kinsale for breach of contract.

The appellate court ruled in Kinsale's favor, finding that TMI's waiver and estoppel argument, which rested on the fact that Kinsale told TMI it could not report a claim until a demand or suit was filed, could not be used to expand or modify coverage under a claims-made policy where timely notice invokes coverage. The appellate court made it clear that under a claims-made policy, the insured's duty to notify an insurer "defines the limits of the insurer's obligation – if there is no timely notice, there is no coverage."

Late Notice – Southern District of Indiana (Indiana Law)

Mapleton at Countryside Condo. Assoc., Inc. v. Travelers Indemn. Co.
--- F. Supp. 3d ---, 2020 WL 4448458 (S.D. Ind. Aug. 3, 2020)

The U.S. District Court for the Southern District of Indiana held that an insurer did not owe coverage for an approximately $2.5 million hail damage claim because the insured failed to provide timely notice of the alleged hail damage. The claim at issue involved two separate alleged hail storms at a condominium complex. Travelers Indemnity Company (Travelers) initially declined coverage for both claims on the

basis that the insured had failed to establish that the condominiums sustained damage as a result of the storms. The insured later filed suit, alleging breach of contract and bad faith. Travelers then moved for summary judgment, arguing that the insured failed to provide timely notice of the claims and failed to prove that the condominiums sustained damage during the policy periods.

The trial court agreed with Travelers, finding that the insured failed to provide timely notice of the claims because notice seven months after the first storm and 11 months after the second storm was untimely as a matter of law. The trial court held that under Indiana law, prejudice to an insurer is presumed when an insured unreasonably delays in notifying the carrier of an accident or claim. In order to rebut that presumption, the trial court held that the insured must establish evidence that the prejudice did not occur in the particular situation. Noting that Indiana courts have held that delays of more than six months are unreasonable as a matter of law, the trial court held that in this situation, the insured's notice was not given in a reasonable time, and the insured failed to provide any evidence that Travelers was not prejudiced by the delay. Accordingly, Travelers did not owe coverage for the hail losses as a matter of law.

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