

Other Insurance Clauses, Economic Losses Coverage Update

October 2, 2023

Other Insurance Clauses – Eleventh Circuit (Georgia Law)

Nat'l Cas. Co. v. Georgia Sch. Bd. Ass'n – Risk Mgmt. Fund

No. 22-13779, 2023 WL 5977299 (11th Cir. Sept. 14, 2023)

The U.S. Court of Appeals for the Eleventh Circuit affirmed the federal district court's decision granting summary judgment in favor of the Georgia School Board Association – Risk Management Fund (the Fund) and against National Casualty Company (National). The Fund and National were both insurers of Georgia public school employees. The issue in the case required determining how coverage applied in light of the “other insurance” clauses in each party's insurance contract.

In this case, several Georgia educators were sued for, among other things, negligence that had caused bodily injury to students. The Fund defended the individuals, but National refused to defend until the Fund's coverage was exhausted. Both insurance policies contained “other insurance” clauses. National's provided, in pertinent part, that the policy was “specifically excess if the insured has other insurance of any kind whatsoever, whether primary or excess, or if the insured is entitled to defense or indemnification from any other source whatsoever, including by way of example only, such sources as state statutory entitlements or provisions.” The Fund's provision provided that “[i]f valid and collectible insurance is available to the Member for a loss covered by [the Fund] under any coverage parts within this Coverage Document, the obligations of [the Fund] are excess over the available and collectible insurance.”

National filed a declaratory judgment action, the Fund counterclaimed, and the parties filed cross-motions for summary judgment. National argued that its “other insurance” clause was more specific and should be excess to the Fund. The Fund argued that the clauses were irreconcilable and canceled each other out, requiring the liability to be evenly divided. The district court agreed with the Fund and granted its motion for summary judgment. On reconsideration, the district court certified to the Georgia Supreme Court the question of whether the Georgia irreconcilable-clauses rule applied to an entity “entrusted with public funds,” like the Fund. The Georgia Supreme Court determined that the rule could apply. The district court then declined to reconsider the issue, and National appealed to the Eleventh Circuit.

The appellate court agreed that the clauses were irreconcilable and that liability had to be divided on a pro rata basis. The appellate court disagreed with National's assertion that because its clause was more specific, it should be excess to the Fund. The appellate court concluded that Georgia law did not

follow a rule that more specific “other insurance” clauses take priority over more general “other insurance” clauses.

By: Joshua LaBar

Economic Losses – Nevada

Starr Surplus Lines Ins. Co. v. The Eighth Judicial Dist. Court of the State of Nevada
No. 84986, --- P.3d ---, 2023 WL 5989929, 139 Nev. Adv. Op. 32 (2023)

On Starr Surplus Lines Insurance Company’s (Starr) petition for writ of mandamus challenging the district court’s denial of its dispositive motion, the Nevada Supreme Court, in a unanimous opinion, overturned the lower court’s decision and ruled that business income coverage under a commercial property policy was not triggered for COVID-19-related losses because there was no “direct physical loss or damage” to property. Even if coverage were triggered, the policy’s pollution and contamination exclusion, which applies to “virus,” precludes coverage.

JGB Vegas Retail Lessee, LLC (JGB) owned the Grand Bazaar Shops, an open-air mall on the Las Vegas Strip and rented spaces therein to others. In March 2020, due to the threat of COVID-19, Nevada’s governor ordered nonessential businesses to close and restricted restaurants to take-out and delivery. JGB’s tenants closed until permitted to reopen with restrictions in June 2020. At the time, Starr insured JGB under an all-risk commercial property insurance policy. On April 17, 2020, JGB filed a claim with Starr seeking coverage for loss of business income and extra expense due to the shutdown. After Starr issued a reservation of rights letter during its investigation and sought additional information from JGB, JGB sued Starr on June 16, 2020.

Starr moved for summary judgment, arguing that coverage was not triggered under the policy because the presence of the virus did not constitute “direct physical loss or damage”. Starr also argued that, even if coverage was triggered, the policy’s pollutants and contaminants exclusion barred coverage. In response, JGB claimed that there was “direct physical loss or damage” because the virus attached to the property or remained suspended in the air and could not be removed with routine cleaning. The trial court denied Starr’s dispositive motion on the coverage issue, finding that a question of fact existed as to whether the virus does or does not physically alter property.

Starr then petitioned Nevada’s high court for a writ of mandamus and the Supreme Court of Nevada accepted the writ. In granting the writ of mandamus and vacating the trial court’s decision, the Supreme Court provided a lengthy discussion on the meaning of “direct physical loss”. The high court determined that the insured’s property was not damaged, lost, altered, or changed due to the presence of the COVID-19 virus in or on the property. The justices noted that, although there is evidence that the virus harms people, there is no evidence that it is harmful to property.

OTHER INSURANCE CLAUSES, ECONOMIC LOSSES COVERAGE UPDATE Cont.

The Supreme Court also noted that there was no evidence of any defects inherent to the property that comprised its essential function. The preventive measures of JGB, including sanitizing and installing plexiglass, addressed the way people pose harm to each other by carrying and transmitting the virus; they were not tantamount to “repairing, rebuilding, or replacing” damaged property. Thus, because there was no direct physical loss or damage to property, coverage was not available under the policy. The Supreme Court also noted that even if coverage was triggered, the pollution and contamination exclusion applied to preclude coverage as the exclusion applied to viruses. Starr, therefore, was entitled to summary judgment.

By: Amy Diviney