PLUNKETT COONEY

Pedestrian, Property Damage (COVID-19) Coverage Update

June 3, 2024

Goyco v. Progressive Ins. Co.
No. 088497, 2024 WL 2140293 (N.J. May 14, 2024)

The New Jersey Supreme Court held that an individual riding a motorized scooter is not a pedestrian within the meaning of New Jersey's No-Fault Act and, therefore, was not entitled to Personal Injury Protection (PIP) benefits after being injured while operating a Low-Speed Electric Scooter (LSES).

This matter arose when the plaintiff, David Goyco (Goyco), was struck by a motor vehicle on Nov. 22, 2021 while operating an LSES. New Jersey law defines an LSES as follows:

> "Low-speed electric scooter" means a scooter with a floorboard that can be stood upon by the operator, with handlebars, and an electric motor that is capable of propelling the device with or without human propulsion at a maximum speed of less than 19 miles per hour. [N.J. S.A. 39:1-1]

At the time of the accident, Goyco was insured under an auto policy issued by the defendant, Progressive Insurance Company (Progressive). Goyco sought PIP benefits from Progressive on the same day as the accident. Progressive denied the plaintiff's claim by letter dated Dec. 23, 2021 on the basis that the LSES operated by Goyco did not qualify as an "automobile" and Goyco was not a "pedestrian" within the meaning of New Jersey's No-Fault Act.

Goyco then filed a complaint and an order to show cause challenging Progressive's denial and arguing that New Jersey law recognizes bicyclists as pedestrians under N.J.S.A. 39:4-14.16(g). The trial court, after hearing oral arguments, denied Goyco's application and dismissed Goyco's complaint, reasoning that the scooter is not a motor vehicle under New Jersey law and that 39:4-14.16(g), which treats LSES the same as bicycles for coverage purposes, is not part of N.J.S.A. 39:6A-4.2, the statute that governs No-Fault benefits.

The New Jersey Superior Court of Appeals upheld the trial court's findings, noting that a "pedestrian" under N.J.S.A. 39:6A-4.2 is "any person who is not occupying … a vehicle propelled by other than muscular power." Because Goyco's LSES was propelled by an electric motor, not "muscular power," Goyco was not a pedestrian at the time of the accident and, therefore, was not entitled to PIP benefits.

The Supreme Court upheld both the trial court and court of appeals, finding that Goyco was not entitled to PIP benefits because the LSES was not a "vehicle" for purposes of the No-Fault Act and that Goyco was not a "pedestrian" within the meaning of New Jersey's No-Fault Act. The Supreme

Court rejected Goyco's reliance on Section 39:4-14.16(g) to establish that his riding the LSES qualifies him as a pedestrian because the LSES was propelled by an electric motor with a rechargeable battery, not "muscular power" and it was equipped with a headlight, brake light, speedometer and other features that underscore the fact that the LSES was designed for use primarily on highways. The supreme court declined to expand the definition of "pedestrian," opining that it was better left to the legislature, and not the courts, to make such a policy decision.

By: Amy L. Diviney

Property Damage (COVID-19) – California

Another Planet Ent., LLC v. Vigilant Ins. Co.
--- P.3d ----, No. S277893, 2024 WL 2339132 (Cal. May 23, 2024)

The California Supreme Court, answering a certified question from the U.S. Court of Appeals for the Ninth Circuit, found that a commercial insurance policy issued to a live entertainment venue operator did not provide coverage for losses sustained by the company's venues following the outbreak of COVID-19.

Another Planet Entertainment, LLC (Another Planet) operates a group of live entertainment venues in California and Nevada. Vigilant Insurance Company (Vigilant) issued a commercial property insurance policy to Another Planet that provided coverage for, among other things, "direct physical loss or damage to [a building or personal property] caused by or resulting from a peril not otherwise excluded," and "reasonable and necessary costs you incur to protect [building and personal property] at the premises shown in the Declarations from imminent direct physical loss or damage caused by or resulting from a peril not otherwise excluded ...."

Another Planet was forced to temporarily close its venues due to the outbreak of COVID-19 in March 2020, and sought insurance coverage for its losses under the policy issued by Vigilant. Vigilant denied coverage on the basis that Another Planet could not show "'physical loss or damage that would implicate coverage in this matter.'" Another Planet filed a lawsuit against Vigilant in federal court.

Vigilant moved to dismiss the complaint, which motion the trial court granted. Upon appeal, the appellate court certified a question of law to the Supreme Court, citing conflicting opinions among lower state courts as to whether allegations like those contained in Another Planet's complaint constituted direct physical loss or damage as required by the policy issued by Vigilant.

The Supreme Court held that Another Planet had not adequately alleged that the actual or alleged presence of the COVID-19 virus constituted direct physical loss or damage sufficient to trigger coverage under its policy with Vigilant. Rejecting Another Planet's chief argument, the Supreme Court

concluded that "while Another Planet alleges that the COVID-19 virus alters property by bonding or interacting with it on a microscopic level, Another Planet does not allege that any such alteration results in injury to or impairment of the property itself." The Supreme Court further resolved the conflict between the lower state courts, holding that “to the extent the Ninth Circuit's question is premised on the split in authority represented on one side by *United Talent*, which held that the actual or potential presence of the virus generally could not cause direct physical loss or damage to property, and on the other by *Marina Pacific*, which held that it could, we further conclude that *United Talent* was correct."