PLUNKETT COONEY

Pollution Exclusion, Direct Physical Loss, Insurer's Duty to Settle Coverage Update

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Pollution Exclusion – Sixth Circuit (Kentucky Law)

Barber v. Arch Ins. Co.
--- Fed. Appx. ---, No. 20-6307, 2021 WL 2828021 (6th Cir. July 7, 2021)

The U.S. Court of Appeals for the Sixth Circuit found that a pollution exclusion absolved Arch Insurance Co. (Arch) from covering six former employees of insured Armstrong Coal Company (Armstrong) who were indicted for conspiring to submit fraudulent coal dust samples to federal regulators. The U.S. Department of Justice indicted these former employees for conspiracy and the criminal cases are still pending. The employees sought defense from Arch for the criminal proceedings and Arch denied their claims. The trial court granted summary judgment in favor of Arch.

The appellate court held that under the terms of Armstrong's directors, officers and organization liability policy with Arch, coal dust is a pollutant subject to the pollution exclusion in the policy. The appellate court explained that the "scope of this pollution exclusion is broader than usual because it includes claims arising from Armstrong's regulation of contaminants and irritants. Because coal dust contaminates and irritates, and because it is regulated by Armstrong, it fits comfortably within the exclusion's intended scope." As a result of the application of the exclusion, the appellate court concluded that the alleged criminal conduct of Armstrong's former employees is not covered under the policy because it was connected to the company's required submission of dust samples to the U.S. Department of Labor's Mine Safety and Health Administration (MSHA).

The employees argued that coal dust is not a pollutant because it never left the mine. However, the appellate court disagreed, finding that MSHA required Armstrong to monitor and report coal dust levels at the mine to prevent workers from contracting black lung disease. MSHA could fine or halt operations at the mine for harm to the workers alone, so there was not a requirement that the dust leave the mine. The employees also argued that coverage was available because the criminal charges against them were not caused by Armstrong's duty to regulate coal dust. The appellate court held that there was a causal connection between charges and Armstrong's duty to monitor coal dust because Armstrong could ultimately be sanctioned for failing to comply with MSHA regulations. "Absent the MSHA's regulations, the employees would not have had to monitor or submit samples at all, and, therefore, would not have conspired to commit fraud against the United States." As a result, the appellate court

affirmed summary judgment in favor of Arch.

By: Michael Hanchett

Direct Physical Loss or Physical Damage – Eighth Circuit (Iowa Law)

Oral Surgeons, P.C. v. Cincinnati Ins. Co.
--- F.4th ---, 2021 WL 2753874 (8th Cir. July 2, 2021)

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of Oral Surgeons, P.C.'s (Oral Surgeons) claim for coverage under the business income and extra expense coverage form of its general liability policy issued by The Cincinnati Insurance Company (Cincinnati). The policy provided coverage for loss of business income and extra expense due to the necessary suspension of operations caused by "direct physical loss of or damage to property" at the insured premises. Oral Surgeons alleged that it lost income because it had to suspend non-emergency procedures as a result of the restrictions imposed by the governor of Iowa in response to the COVID-19 pandemic. According to Oral Surgeons, its loss of income constituted a "direct physical 'loss' to property" because it was unable to fully use its office. Oral Surgeons also asserted that the policy's definition of "loss" was ambiguous because it defined the term in the disjunctive, as either "physical loss" or "physical damage."

The appellate court disagreed with Oral Surgeons, reasoning instead that the policy's requirement of "physical loss" or "physical damage" clearly required "some physicality to the loss or damage of property – e.g., a physical alteration, physical contamination, or physical destruction." Because Oral Surgeons was not alleging any physical alteration to the premises, it could not obtain lost business income coverage.

Insurer's Duty to Settle – Tenth Circuit (Utah Law)

Owners Ins. Co. v. Dockstader
--- Fed. Appx. ---, No. 19-4156, 2021 WL 2662251 (10th Cir. June 29, 2021)

The U.S. Court of Appeals for the Tenth Circuit held that an insurer's duty to settle is not absolute. Third-party plaintiff Thomas Brooks (plaintiff) suffered a traumatic brain injury during a fight in a Utah gym when Owners Insurance Company's (Owners) insured, Jacob Dockstader (Dockstader), hit him in the head with a dumbbell. Dockstader plead guilty to aggravated assault in a criminal case and was sued for assault and battery in a civil case. Dockstader requested coverage from Owners under a homeowner's insurance policy that Owner's issued to Dockstader's parents. Owners accepted the defense but contended that the policy did not cover Dockstader's conduct because the policy only covered "damages … caused by an occurrence," which was defined as "an accident that results in

bodily injury." Further, the policy specifically excluded coverage for intentional acts causing "bodily injury … reasonably expected or intended by the insured." Dockstader insisted that he did not intend to hit the plaintiff with the dumbbell.

Owners filed a complaint for declaratory relief, requesting a declaration that the policy did not cover Dockstader's intentional conduct. Thereafter, the plaintiff made three settlement demands to Owners for the policy limit. Owners conditionally accepted the first two offers, stating that if coverage is found, then it would pay the policy limit. Owners did not respond to the third offer, and, thereafter, filed a motion for summary judgment, reiterating the arguments it made in the declaratory judgment action. The district court granted Owners' motion for summary judgment, holding that the bodily injury was "nonaccidental as a matter of law," and, thus, Owners had no duty to defend Dockstader.

In the meantime, the plaintiff and Dockstader entered into their own agreement, which included, in part, an assignment to the plaintiff of all of Dockstader's "rights, benefits, interests, and claims against Owners." Subsequently, the plaintiff filed a third-party complaint against Owners, alleging that it breached its fiduciary duties and the implied covenant of good faith and fair dealing by failing to settle with the plaintiff within its policy limits. Owners moved for summary judgment on the plaintiff's third-party complaint, which the district court granted, reasoning that there was no basis for a bad faith claim for refusal to settle because Owners followed Utah law, which required it to accept its insured's defense and then seek declaratory judgment as to coverage. The plaintiff appealed.

On appeal, the appellate court noted that Owners did what it had to do, under Utah law, in order to avoid liability and a claim for bad faith –namely, it brought a declaratory judgment action asking the district court to determine coverage. The appellate court noted that Utah law requires that an insurer defend its insured until doubts of coverage are resolved; however, the appellate court noted that the question in this case turns to whether the duty to defend includes an absolute duty to settle. The appellate court answered that question in the negative, reasoning that Utah law simply requires reasonableness, and that Owners had acted reasonably by filing a declaratory judgment action, and allowing the district court to find that no coverage existed. Thus, the appellate court affirmed the district court's grant of summary judgment in favor of Owners.

By: Danielle Chidiac

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