PLUNKETT COONEY

Prior Publication Exclusion, Economic Loss, Direct Physical Loss Coverage Update

August 15, 2019
The e-POST

Prior Publication Exclusion – Fourth Circuit (North Carolina Law)

Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Beach Mart, Inc.,
--- F.3d ---, 2019 WL 3483167 (4th Cir. Aug. 1, 2019)

The U.S. Court of Appeals for the Fourth Circuit held that an insurer must continue defending a beach apparel company in a trademark infringement suit brought by another retailer. In the underlying case, Beach Mart Inc. (Beach Mart) was sued by L&L Wings Inc. (L&L) for improperly using L&L's trademarked name in displays and advertisements in its apparel shops. Beach Mart sought coverage for the suit from its liability insurer, Pennsylvania National Mutual Casualty Insurance Company (Penn National). Penn National agreed to defend Beach Mart under a reservation of rights and thereafter filed a declaratory judgment action in the U.S. District Court for the Eastern District of North Carolina, seeking a ruling that the prior publication exclusion in Beach Mart's policies applied to preclude coverage.

The trial court agreed with Penn National and held that the prior publication exclusion applied to relieve Penn National of its duty to defend Beach Mart. Specifically, the trial court found that the exclusion applied because Beach Mart's alleged violations began before the effective date of the first Penn National policy. However, the appellate court reversed the decision and held that the prior publication exclusion did not apply. The appellate court noted that L&L alleged that Beach Mart misused L&L's trademark in new ways after the first policy took effect. Accordingly, the appellate court held that "a prior publication exclusion will not bar coverage for offensive publications [1] made during the policy period [2] which differ in substance from those published before commencement of coverage." Therefore, Penn National was not relieved of its duty to defend Beach Mart in the underlying suit.

Economic Loss – Fifth Circuit (Alabama Law)

Greenwich Ins. Co. v. Capsco Indus., Inc.
--- F.3d ---, 2019 WL 3773450 (5th Cir. Aug. 12, 2019)

The U.S. Court of Appeals for the Fifth Circuit held that an insurer had no duty to indemnify an insured construction contractor for a lawsuit brought by one of its subcontractors seeking, as damages, the value of the work it performed under the theory of *quantum meruit*. In the underlying case, the aggrieved subcontractor, Ground Control, sought damages against Greenwich Insurance Company's (Greenwich) insured, Capsco Industries, Inc. (Capsco), after Capsco fired it from a construction project at the Margaritaville Spa and Hotel in Biloxi, Mississippi, and then refused to pay for Ground Control's work on the project. The trial court ultimately voided the contract between Ground Control and Capsco, and held that Ground Control could only proceed against Capsco under the theory of *quantum meruit* to recover for the value of the services it provided to Capsco for which it was not paid. Ground Control ultimately accepted a judgment against Capsco in the amount of $199,096.

While the underlying case was pending, Capsco's insurers, including Greenwich, filed a declaratory judgment action in federal court, seeking a finding that they had no duty to defend or indemnify Capsco for the underlying case on the basis that the *quantum meruit* claim was for purely economic loss, rather than for "property damage" caused by an "occurrence." Ground Control, in turn, argued that Capsco was covered because the amounts that it was seeking in the underling case were related to its repair and replacement of damaged property on the construction project.

The district court agreed with Greenwich and found that any connection between the property damage and Ground Control's quantum meruit claim was too tenuous to create a duty to defend, and it was simply a claim for economic loss. The appellate court agreed, reasoning that the *quantum meruit* claim was not a claim for damage to property or loss of use, but rather it was a claim for "payment of work." The appellate court held that a claim for "[p]ayment for work is a step removed from paying for property damage that necessitated the work," and was, therefore, a claim for purely economic loss. Accordingly, Greenwich owed no duty to indemnify Capsco for the *quantum meruit* judgment

---

Direct Physical Loss to Covered Property – Seventh Circuit (Illinois Law)

Windridge of Naperville Condo. Ass'n v. Philadelphia Indem. Ins. Co.,
--- F.3d. ---, 2019 WL 3720876 (7th Cir. Aug. 7, 2019)

The U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the U.S. District Court for the Northern District of Illinois, which held that Philadelphia Indemnity Insurance Company (Philadelphia) was required to cover the replacement of all siding at a development owned by Windridge of Naperville Condominium Association (Windridge), even though only portions of the buildings' siding were damaged.

During a wind and hail storm in May 2014, several buildings at Windridge's development experienced damage to the aluminum siding on their south and west sides. Philadelphia, which issued a property policy to Windridge, agreed to cover replacement of the damaged siding, but not the undamaged

siding on the north and east sides of the buildings. However, Windridge could not find replacement siding to match the undamaged panels, meaning that the siding would not be uniform. Windridge requested that Philadelphia cover the cost to replace all four sides of the buildings, but Philadelphia refused. In the ensuing lawsuit, the district court granted summary judgment in favor of Windridge.

The appellate court agreed with the district court's ruling that Philadelphia was required to cover replacement of siding for all four sides of the buildings. The appellate court reasoned that, as a replacement-cost policy, the end result should be that the insured is made whole, as if the covered loss had never happened. The appellate court held that the phrases "direct physical loss" and "covered property" were potentially ambiguous, because their definitions did not answer the question of whether the undamaged portions must be replaced. The appellate court held that "[t]he district court's conclusion that the buildings as a whole were damaged – and that all of the siding must be replaced to ensure matching – is a sensible construction of the policy language as applied to these facts. Philadelphia Indemnity's interpretation – pay to replace only the specific panels of siding that were directly hit by hail, leading to two-tone buildings – is less reasonable."

Plunkett Cooney's insurance coverage update, The e-Post, is published bi-monthly via email. To receive your copy when it is issued, simply email - subscribe@plunkettcooney.com. Please indicate in the email that you would like to be added to the marketing list for the e-POST.