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California Joins Majority in Finding No Direct Physical Loss from COVID-19

Another Planet Entertainment, LLC operated venues for live entertainment. Having suffered pandemic-related business losses when its venues closed, it submitted a claim to its insurer, Vigilant Insurance Company. Vigilant denied coverage and Another Planet sued in federal court, alleging that the actual or potential presence of the COVID-19 virus at its venues or nearby properties caused direct physical loss or damage to property.

The district court granted Vigilant's motion to dismiss for failure to state a claim. Another Planet appealed. The Ninth Circuit certified a question to the California Supreme Court: "Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?"

Lower California courts had issued conflicting decisions on this issue. The California Supreme Court answered "No." Consistent with the vast majority of courts nationwide, the court held that the actual or potential presence of COVID-19 on an insured's premises generally is not a direct physical loss or damage to property.

Under California law, direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property that results in an injury. The court emphasized that the physical alteration need not be visible to the naked eye, but it must result in some injury to or impairment of the "property as property." Here, the court reasoned, while the COVID-19 virus allegedly bonded or interacted with property on a microscopic level, there was no allegation that any such alteration resulted in injury to the property itself.

The allegation that the presence of the virus rendered the property unfit for its intended use was also insufficient to show a direct physical loss. The court acknowledged that, in rare situations, a property may suffer direct physical loss where it is not damaged in a conventional sense but where the source of the property's un-usability or uninhabitability was sufficiently connected to the property itself – for example, when the effect of the contaminant or odor is so lasting and persistent that the risk of harm is inextricably linked or connected to the property. But the facts alleged fell short of this standard.

For these reasons, the Court concluded that the actual or potential presence of COVID-19 on an insured's premises generally is not a direct physical loss or damage to property under California law.

The case is *Another Planet Entertainment, LLC v. Vigilant Ins.,* S277893 (Cal. May 23, 2024).

New Jersey Supreme Court Holds That Scooter Operator Is Not a Pedestrian Under No-Fault Act

David Goyco was operating a low-speed electric scooter when he was struck by an automobile. Goyco sought personal injury protection (PIP) benefits under his own auto policy with Progressive. Progressive's policy tracked the requirements of the New Jersey No-Fault Act. Progressive denied Goyco's claim because the scooter was not an "automobile" and Goyco was not a "pedestrian."

Goyco sued contending that scooter riders should be considered pedestrians entitled to PIP benefits. As bicyclists are considered pedestrians, so too should scooter riders, Goyco argued. The trial court and New Jersey Appellate Division disagreed with Goyco and denied him relief.

The New Jersey Supreme Court affirmed.

The No-Fault Act requires auto insurers to provide PIP benefits (1) when the covered individual is "occupying, entering into, alighting from or using an automobile"; or (2) when the covered individual is a pedestrian.

The Act defines "pedestrian" as "any person who is not occupying, entering into, or alighting from a vehicle propelled by other than muscular power and designed primarily for use on highways, rails and

tracks." The court considered three parts of the definition: (1) whether the scooter is a vehicle; (2) whether it is "propelled by other than muscular power"; and (3) whether it is "designed primarily for use on highways, rails and tracks."

Goyco focused on the word "vehicle" in the definition of "pedestrian," a term not defined in the No-Fault Act. He pointed to a definition of "vehicle" in another chapter of New Jersey's motor vehicles law that would exclude low-speed electric scooters. But the court found that the No-Fault Act was contained in a different subtitle. The section Goyco relied on did not apply to No-Fault claims. In fact, certain terms, including "pedestrian," were defined differently in the No-Fault Act than in the section on which Goyco relied because the two chapters served different purposes (rules of the road versus insuring motor vehicles). The court then looked to the ordinary meaning of the word "vehicle" and concluded that a scooter was a "vehicle" for purposes of the No-Fault Act.

The court next determined that Goyco's scooter was "propelled by other than muscular power" because it had an electric motor and rechargeable battery. And as the scooter could reach speeds of 15.5 miles per hour, had a headlight, brake light, and speedometer, the court found that the scooter was designed mainly for use on highways.

Thus, Goyco was not a pedestrian within the meaning of the No-Fault Act.

The court also rejected Goyco's argument that because certain regulations applying to bicycles also apply to low-speed electric bicycles and scooters, and because bicyclists have been found to be pedestrians under the No-Fault Act, that Goyco should receive PIP benefits. The court disagreed that the regulations applied to the No-Fault Act and said that it was up to the legislature, not the court, to expand the definition of "pedestrian" to include low-speed electric scooters.

The case is *Goyco v. Progressive Ins. Co.*, No. 088497 (N.J. May 14, 2024).

Fifth Circuit Finds No Possibility That Theft of Bitcoin Claim Could Assert Negligence

Steven Kowalski sued Hiu Lam Cookie Choi and Brandon Ng for stealing 1,400 of his Bitcoin (worth more than $80 million) through a malware attack. He alleged civil conspiracy, civil theft, conversion, and unjust enrichment. Choi and Ng sought a defense under their homeowners and personal-liability umbrella policies.

The policies applied to suits for damages incurred due to an 'occurrence' resulting from negligent personal acts." "Occurrence" was defined as "an accident … which results, during the policy period, in … 'property damage.'" The insurer filed a declaratory judgment action in federal court in Texas seeking to get clear of any duty to defend.

The trial court found that the insurer had no duty to defend because the complaint alleged intentional conduct, but the policies covered only negligent conduct. Intentional theft of Bitcoin, the court observed, constitutes neither negligent nor accidental conduct.

The Fifth Circuit affirmed on appeal.

The insureds made two arguments as to why they should be entitled to a defense.

First, they argued that one paragraph in the complaint alleged in the alternative that Choi and Ng were not the original thieves, even though stolen Bitcoin was transferred to their accounts. But the court found this allegation contained no description of accidental or negligent conduct and went only to the elaborate scheme Choi and Ng participated in to steal Bitcoin. The court refused to interpret that paragraph as claiming negligence.

Second, Choi and Ng contended that the complaint asserted unjust enrichment, which did not require proof of intentional acts. In upholding the trial court, the Fifth Circuit found that the facts supported only intentional conduct. It alleged that Choi and Ng conspired to steal and afterward wrongfully retained the valuable cryptocurrency.

The court found that there was no possibility that a claim based on theft of property could be transformed into a negligence case. The insurer thus had no duty to defend or indemnify.

The case is *Nationwide Mut. Ins. Co. v. Choi*, No. 23-20405 (5th Cir. May 13, 2024).

Indiana Federal Court Rescinds Professional Liability Policy for Insured's Material Misrepresentation

Brenda Stephens, a real estate appraiser and president of a consulting group, performed a desktop appraisal of an Indiana single-family home. A desktop appraisal is virtual and does not require a physical inspection of the property. The homeowners later filed a consumer complaint with the Indiana Attorney General alleging that the appraisal was egregiously inaccurate. The attorney general's office investigated and requested documents from Stephens.

Stephens and the consulting group had a professional liability claims-made policy with Great American Assurance Company. The policy required Stephens to report in writing any claims or disciplinary actions against her during the policy period or extended reporting period. She did not report the consumer complaint or the attorney general's investigation to Great American.

About six months later, she applied to renew the professional liability policy. The renewal application asked about complaints or disciplinary action, or investigations over the past 12 months. Stephens answered that there were none.

About eight months later, the attorney general filed a complaint against Stephens before the Real Estate Appraiser Licensure and Certification Board (REAB). The attorney general's complaint referenced the consumer complaint and sought disciplinary sanctions for Stephen's alleged incompetence.

Stephens requested that Great American defend her in the REAB proceeding. Great American refused because Stephen's did not notify Great American about the consumer complaint until a year later. Great American denied coverage because Stephens was late in reporting and did not tender the proper notice within the policy period. Great American also asserted that the REAB proceeding was not a "claim" but rather a disciplinary action and that Stephens could not invoke the extended reporting period. Ms.

Stephens retained her own counsel and ultimately prevailed before the REAB, which determined that in performing the desktop appraisal, she "was at least minimally competent."

Stephens then sued Great American for breach of contract and bad faith. Great American counterclaimed for rescission because Stephens made a misrepresentation in her renewal application.

The court agreed with Great American that the misrepresentation was material. The court explained that the consumer complaint led directly to the attorney general's investigation, which led directly to the REAB complaint. The court said a direct line is easily traced from the consumer complaint to the REAB complaint to Stephen's expenses. The court noted that Indiana law disregards intent, so she made a material misrepresentation whether she meant to or not.

The court found that Great American was entitled to rescind the policy unless some kind of waiver or estoppel applied. Stephens argued that Great American wrongfully breached its duty to defend by denying for late notice, and thus waived any defenses or is otherwise estopped from asserting them. But the court found that neither of those doctrines applied as Great American had no duty to defend Stephens in the REAB proceeding.

Thus, Great American was entitled to rescind the policy because of Stephen's material misrepresentations in the insurance applications.

The case is *Accent Consulting Grp., Inc. v. Great Am. Assur. Co.,* No. 1:22-cv-01767-JMS-CSW (S.D. Ind. May 20, 2024).

Ohio Appellate Court Rules that Violence Was the Natural and Expected Consequence of Chiquita Sending Protection Money to Known Terrorist Group to Protect Its Employees, Precluding Coverage for Civil Liability Claims

From 1989 to 2004, Chiquita Brands International, Inc. allegedly made payments to a known terrorist group, the Armed Revolutionary Forces of Colombia or "FARC," in Columbia to protect its employees in the country. During that time, FARC kidnapped and killed six Americans.

Representatives of the victims sued Chiquita under the civil liability provisions of the federal Anti-

Terrorism Act, alleging that Chiquita committed an actionable “act of international terrorism” by funneling money to FARC. Chiquita sought insurance coverage from its insurers, Travelers Property Casualty Corporation and Federal Insurance Company. The insurers filed a declaratory judgment action against Chiquita for a determination that they owed no coverage to Chiquita for the ATA claims. The trial court granted summary judgment to the insurers. Chiquita appealed, arguing that Travelers and Federal failed to meet their burden to adduce facts that Chiquita expected or intended to injure the ATA Plaintiffs.

The Ohio appellate court affirmed. The policy required an “accident” which, under Ohio law, means a harm that is “unexpected as well as unintended.” The doctrine of inferred intent allows a court to infer an insured's intent to injure as a matter of law where the insured's act “necessarily results” in the harm. Ohio courts have held that an insured's intentional act necessarily results in its “natural and expected consequences.”

Applying that test, the court ruled that Chiquita's intentional actions necessarily resulted in the injuries to the ATA plaintiffs. The court held that the “natural and expected consequences” of sending protection money to a terrorist group engaged in a campaign of violence is that the group would use the money to continue that violent campaign “but select different targets.” The court also observed that Chiquita’s salutary motive to protect its employees would not have negated a criminal *mens rea* to show a crime under the ATA.

For these reasons, the court held, the trial court properly inferred the intent of Chiquita to injure the ATA plaintiffs and properly concluded the harm to the ATA plaintiffs was not an "occurrence" covered under the policies.

The court also observed that it was harmless error for the trial court to rely on the “substantial certainty” doctrine previously rejected by the Ohio Supreme Court. The lower court’s decision made clear that it would have reached the same outcome under the correct test.

The case is *Travelers Prop. Cas. Corp. v. Chiquita Brands Int'l, Inc.*, C-230095 (Ohio Ct. App. May 10, 2024).

Case Note: This decision may further discourage insureds from doing business in places with terrorist activity, as paying ransoms could expose a company to civil liability. Chiquita will likely appeal this decision as it has a lot at stake. In fact, on June 10, in the first bellwether trial, a Florida federal jury awarded plaintiffs over $38 million in damages.