First Circuit: No Coverage, No Duty to Investigate Alleged Loss Prior to Policy Period

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On April 1, 2020, the First Circuit, applying Massachusetts law, issued a potentially useful decision addressing the *Montrose* "known loss" language in ISO Form CGL policies. In *Clarendon National Insurance Company v. Philadelphia Indemnity Insurance Company*,[1] the court applied this language to allow denial of defense for claims of recurring water infiltration that began before the insurer's policy period, and it found an insurer had no duty to investigate whether the course of property damage might have been interrupted, or whether other property damage might have occurred during the policy period, so as to trigger coverage during a later policy.

In the underlying dispute, a condominium owner (Doherty) asserted negligence claims against her association's property management company (Lundgren) stemming from alleged water infiltration into her condominium. The complaint said leaks developed in 2004 in the roof above Doherty's unit, and repairs were not made in a timely or appropriate manner. The following year, the complaint said, a Lundgren employee notified Doherty that the threshold leading to her condominium's deck was rotting. In February 2006, Doherty discovered a mushroom and water infiltration on the threshold and notified Lundgren. At that time, Lundgren asked its maintenance and repair contractor (CBD) to replace the rotting threshold. According to the complaint, CBD did not do this repair in a timely manner and left debris exposed in Doherty's bedroom.

In March 2006, the complaint said, a mold testing company hired by Lundgren found hazardous mold in Doherty's unit, caused by water intrusions and chronic dampness. Lundgren's attempts at remediation were ineffectual. In September 2008, Doherty's doctor ordered her to leave the condominium and not to return until the leaks were repaired and mold was eliminated.

In February 2009, Doherty filed suit. Lundgren tendered defense to two different insurers: Clarendon, which insured Lundgren from June 24, 2004, to June 24, 2005, and Philadelphia Indemnity (Philadelphia), which insured the company from September 1, 2007, to September 1, 2008. Clarendon agreed to defend under reservation of rights. Philadelphia declined to defend, based on the "known loss" provision in its CGL insuring agreement:

b. This insurance applies to "bodily injury" and "property damage" only if:

. . . .

(3) Prior to the policy period, no insured listed . . . and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

After the underlying case settled, Lundgren assigned its rights to Clarendon, which sued Philadelphia. Clarendon argued that Doherty's complaint could be read to suggest that leaks prior to Philadelphia's policy period had been repaired. It argued that new leaks might have arisen during the period of Philadelphia's policy. At a minimum, Clarendon argued, Philadelphia had an obligation to investigate the underlying allegations before denying defense.

The District of Massachusetts rejected Clarendon's arguments. Clarendon appealed, and the First Circuit affirmed. It found the underlying complaint unambiguously alleged damage resulting from continuing leaks that began prior to the Philadelphia policy's inception, and it found nothing in the complaint was "reasonably susceptible" to an interpretation in which the original leaks were resolved prior to Philadelphia's policy inception.

Finally, and importantly, the First Circuit held that when an underlying complaint does not contain allegations that would implicate coverage, the insurer has no duty to investigate further. An insurer cannot ignore known facts extrinsic to the complaint, but it has no duty to go looking for such facts.

The First Circuit's decision provides helpful guidance for insurers faced with allegations of property damage prior to policy inception, and clarifies – importantly – that an insurer in this situation has no independent duty to investigate for damage during the policy period.

If you have any questions or need more information, contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226), or Austin D. Moody (moodya@whiteandwilliams.com; 617.748.5206).

[1] No. 19-1212, 2020 U.S. App. LEXIS 10257 (1st Cir. Apr. 1, 2020).