

Client Alert

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Migrating Sand Triggers Separate Policy Limits for CGL Policy's Personal Injury and Property Damage Coverages

An Indiana appellate court recently held in *FLM, LLC v. The Cincinnati Insurance Company, et al.*, No. 49A02-1401-PL-17 (Ind. App. Ct. Dec. 29, 2014), that claims arising from the migration of foundry sand from property owned by the insured triggered coverage under a general liability policy, implicating both the \$1,000,000 per occurrence limit for "personal injury" and the \$1,000,000 per occurrence limit for "property damage." The decision is a good reminder of the breadth of coverage available under standard form general liability policies.

Background

FLM, LLC, leased property to International Recycling, Inc. (IRI), which used the property for the storage of recycled foundry sand. When IRI ceased operations, it abandoned more than 100,000 tons of sand at the site. CSX Transportation, Inc. (CSX) owned and operated an adjacent railroad right-of-way. CSX complained that sand from FLM's property migrated onto its property and interfered with its railroad operations. The Indiana Department of Environmental Management (IDEM) and the City of Indianapolis (the City) issued notices of violation to FLM and IRI, among others, and ordered that they remove the sand. FLM sought indemnity from IRI under the parties' lease.

IRI was insured by Cincinnati Insurance Company (Cincinnati) under a comprehensive general liability (CGL) policy and an umbrella policy. Cincinnati denied the claim and FLM brought suit, seeking a declaration that Cincinnati owed coverage for IRI's indemnity obligation to FLM. Cincinnati filed a third-party complaint, naming Chrysler, IRI, IDEM, and the City as indispensable parties. CSX cross-claimed against FLM and IRI, alleging trespass and nuisance related to the migration of foundry sand onto its property. Cincinnati then moved for summary judgment that its policy did not cover the claims of IDEM, the City, Chrysler or FLM against IRI. The trial court granted Cincinnati's motion.

FLM and Chrysler appealed. While the appeal was pending Cincinnati settled with CSX. A divided panel of the court of appeals found that the abandonment of sand constituted "wrongful entry" or "invasion of the right of private occupancy," both of which were within the scope of the CGL policy's "personal injury" coverage. The panel minority concurred in the result on the ground that the claims triggered coverage for "property damage" under the policies.

The trial court asked that the parties submit proposed orders consistent with the court of appeals ruling. FLM submitted a proposed order that found coverage under *both* the personal injury and property damage provisions of the policy. Cincinnati filed an interpleader motion paying \$1.7 million representing the personal injury coverage limits under its CGL and umbrella policies. FLM argued in response to the interpleader that it is entitled to additional policy limits for "property damage." The trial court disagreed and entered an order that the \$1.7 million fully satisfied the judgment. The trial court explained that the court of appeals majority found only that the abandonment claims implicated "personal injury" coverage under the policy.

Holding

The court of appeals found it was an abuse of the trial court's discretion to interpret the court of appeals' ruling as foreclosing coverage for property damage. The court of appeals held, therefore, that in addition

to the \$1,000,000 limits available for claims implicating the CGL policy's personal injury coverage, FLM also was entitled to \$1,000,000 under the CGL policy's coverage for "property damage."

Having found that the claims against FLM implicated multiple coverages under the policy, the court concluded that FLM would be entitled to recover a separate per occurrence limit for each triggered coverage. The court focused on the absence of an aggregate policy limit in the policy. The court contrasted the absence of such an aggregate in the CGL policy with the explicit inclusion of an aggregate in the umbrella policy. The court concluded, therefore, that the explicit absence of an aggregate in the CGL policy was evidence of intent that multiple policy limits could apply to the same loss event. The court also noted that it was aware of no rule of law that would prevent the insurer from providing overlapping coverage under the same policy.

Finally, the court rejected Cincinnati's argument that the CGL policy's "anti-stacking" provision limited recovery to only a single coverage. The provision stated that where multiple "coverage forms" are implicated, the maximum insurance available was that of the highest limit under any one "coverage form." Cincinnati argued, therefore, that only one limit could apply to the loss. The court rejected Cincinnati's argument, finding that "coverages" under the policy are distinct from "coverage forms," and that nothing in the policy operates to limit recovery under multiple "coverages" that might be available under a single "coverage form." In contrast, the court explained that the provision relied upon by Cincinnati would be implicated only when, for instance, coverage was triggered under both the general liability coverage form and the policy's automobile liability coverage form. Additionally, the court noted that according to its plain language, the "anti-stacking" provision applies only to an "occurrence," which relates specifically to property damage coverage, and not to an "offense," which is the triggering mechanism under the policy's "personal injury" coverage.

Implications

FLM illustrates that policyholders may be entitled to recover more than a single per occurrence policy limit when the claims against them implicate multiple coverages under a CGL policy that either contains no aggregate limit, or an aggregate limit that is greater than the individual coverage limits. The decision also serves as a reminder that CGL policies are comprehensive, affording multiple types of insurance, more than one of which may apply to a particular loss. It is important, therefore, that policyholders determine all potentially applicable coverages when a claim arises and pursue recovery under all potentially applicable coverages.

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