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Client Alert

Plews Shadley Racher & Braun LLP Wins Summary Judgment for Policyholder on Damage Claim

A Marion Superior Court has affirmed that a general liability policy extends coverage to damage inadvertently committed by a policyholder's employee on a customer's property.

In *Powe v. American States Insurance Company*, the plaintiff Walter Powe made a liability claim for a loss asserted against his cleaning company by an apartment complex. The carpet damage had occurred when Powe's employee was cleaning the carpets; as he used an upright vacuum attachment to clean stair landings, unbeknownst to the employee, the upright unit was burning the carpet behind him.

The case turned on whether or not the damage was to property in the "care custody and control" of Mr. Powe or whether it was damage to the "particular part" of the property on which Mr. Powe was working. As to the first point, the court held that the property was not in Mr. Powe's "care custody or control." "Care custody and control" connotes a species of ownership, and not a permissive relationship to perform work upon it. With respect to the "particular part" exclusion, the court noted that the damage was not actually to the portion of the carpet that Mr. Powe's employee was cleaning but rather to the carpet behind the employee. Thus it was not occurring on the "particular part" on which Mr. Powe's employee was working. The court held that a narrow construction of the term "particular part" was both reasonable and consistent with Indiana law as well as cases from other jurisdictions.

The court also held that because the insurance company had changed its explanation for denial of coverage from the time of its initial denial letter to the end of the litigation, the "mend the hold" doctrine applied. This doctrine holds that an insurer waives defenses it does not raise when it first denies the claim.

Finally, the insurance company asserted that the burns to the property were not "property damage" or the result of an "accident." The insurance company relied heavily on Indiana cases which denied coverage to contractors which had performed defective work when they later made a claim for liability coverage for property damage. The court held that the injury caused by a contractor which provides defective work is fundamentally different from the damage allegedly caused by Mr. Powe's employee. In Mr. Powe's case, there was physical damage to tangible property, property already in existence at the time Mr. Powe performed his work, and not coming into existence as a result of defective construction or design. In addition, the burning of the carpet constituted an "accident" because it was altogether unexpected and not the "natural and ordinary consequence" of the provision of defective work.



This decision is an important one for anyone facing claims of damage arising out of operations performed in one's business. It shows that careful scrutiny and analysis of the precise policy language is vital in order to obtain the maximum value from one's insurance coverage.