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Rejecting "Elective Stacking," California Appeals Court Orders Access to Excess Policies Decided Policy by Policy

An appellate court in California has rejected a manufacturer's contention that it could "electively" stack all of its excess policies and has ruled, instead, that access to those policies had to be decided on a policy-by-policy basis depending on their particular provisions.

The Case

From 1947 to 1982, Montrose Chemical Corporation of California manufactured the pesticide dichloro-diphenyl-trichlorethane ("DDT") at a facility in Torrance, California.

In 1990, the federal government and the state of California sued Montrose in the U.S. District Court for the Central District of California under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The CERCLA action alleged that Montrose's operation of its Torrance facility had caused environmental contamination that had damaged land, water, and wildlife in the Los Angeles Harbor and neighboring waters.

Montrose said that it entered into partial consent decrees in the CERCLA action through which it incurred damages in excess of $100 million – and that additional future damages could approach or exceed that amount.

From 1960 to 1986, Montrose had purchased "layers" of primary and excess commercial general liability ("CGL") insurance policies from various insurance carriers to cover its operations at the Torrance facility. According to Montrose, because the policies provided for different amounts of coverage in different years, the layers of excess coverage were not uniform.

Montrose asked a state court in California to decide how its liabilities should be allocated across the more than 100 excess policies that it had been issued over the years. In particular, in a motion for summary adjudication on one cause of action, it sought a declaratory judgment that it could "electively stack" its excess policies – that is, that it could access any excess policy issued in any policy year as long as the lower-lying policies for the same policy year had been exhausted.

All of the excess insurers opposed Montrose's motion; many of the excess insurers also sought, through a cross-motion for summary adjudication, a ruling that no excess insurer had a duty to pay a covered claim until Montrose had "horizontally exhausted" its lower-lying excess policies in all triggered policy years.

The trial court rejected "elective stacking" in favor of "horizontal exhaustion," ordering that higher level excess policies could not be accessed until lower level policies had been exhausted for all policy years. Accordingly, it denied Montrose's motion for summary adjudication and granted the excess insurers' cross-motion for summary adjudication.

Montrose appealed.

The Appellate Court's Decision

The appellate court agreed with the trial court that "elective stacking" was inconsistent with the language of the excess policies as a matter of law and, as a result, that the trial court had properly denied Montrose's motion for summary adjudication.

The appellate court, however, did not agree with the trial court that policies had to be horizontally exhausted at *each* coverage level and for *each* year before higher level policies could be accessed. It pointed out that there was "tremendous variation among the policies at issue," and it declined to adopt a single exhaustion scheme that applied to Montrose's entire coverage portfolio.

The appellate court ruled that the sequence in which policies could be accessed had to be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy. The appellate court acknowledged that "allocating more than $200 million in liability across more than 100 policies covering nearly 25 years" was "likely to be a complicated process." It concluded, however, that that complexity was not relevant to its analysis and that it could not, "in the service of expediency," impose obligations that were "inconsistent with the terms of the contracts Montrose itself negotiated."

The case is *Montrose Chemical Corp. v. Superior Court of California*, No. B272387 (Cal. Ct. App. Aug. 31, 2017).

Finding No Conflict in Policies' "Other Insurance" Clauses, Mississippi Supreme Court Rules That One Insurer Was Primary and the Other Excess

The Mississippi Supreme Court has resolved an apportionment dispute between two insurance companies, ruling that one provided primary coverage, and the other excess coverage, for the insured loss.

The Case

As Greg Peters and Mike Williams were attempting to position Peters' fishing boat on its trailer, the winch handle recoiled, struck, and seriously injured Williams.

Peters, who owned the truck, the trailer, and the boat, had two liability insurance policies covering bodily injury: his truck and trailer were insured by one insurer, and his boat was insured by another insurer. Both policies contained "other insurance" clauses.

Ultimately, the insurers settled with Williams for $460,000, each paying $230,000 toward the total settlement.

The insurers had not agreed on apportionment, and the question of apportionment reached the Mississippi Supreme Court. There, the insurer for the boat argued that the $250,000 limits in the policy insuring the truck and trailer had to be exhausted before its coverage was triggered. The insurer for the boat contended, therefore, that because the insurer for the truck and trailer had paid only $230,000, it was entitled to recover the $20,000 difference.

For its part, the insurer of the truck and trailer argued that the "other insurance" clauses were in conflict and, therefore, that Mississippi law required a pro rata apportionment.

The Mississippi Supreme Court's Decision

The court ruled in favor of the boat's insurer.

In its decision, the court found that the policies' "other insurance" clauses did not conflict. In the court's view, the "other insurance" clause in the policy insuring the truck and trailer had not been triggered, because the policy insuring the boat did not provide "other collectible liability insurance." Indeed, the court observed, the "other insurance" clause in the policy insuring the boat provided that where "any other available insurance" would "apply in the absence of this policy," its coverage applied as excess coverage.

Having concluded that the policy insuring the truck and trailer was the primary policy and that the policy insuring the boat was the excess policy, the court rendered judgment in favor of the boat insurer in the amount of $20,000.

The case is *Continental Cas. Co. v. Allstate Prop. & Cas. Ins. Co.,* NO. 2016-CA-00359-SCT (Miss. Sup. Ct. Aug. 24, 2017).

Parents Not Covered for Children's Allegedly Intentional Acts of Vandalism

An appellate court in North Carolina has ruled that homeowner's insurance policies did not cover claims brought against the insured parents for damage their minor children allegedly caused by vandalizing and breaking into four homes.

The Case

Plum Properties, LLC, sued the mothers of two minors it believed had vandalized four houses it owned or managed in High Point, North Carolina, for negligence and negligent supervision of their minor children.

Plum subsequently asked a North Carolina court to declare that the damage it allegedly had suffered was covered by the mothers' homeowner's insurance policies.

The trial court granted the insurer's motion for summary judgment, and Plum appealed. It argued that summary judgment had not been proper because there was ambiguity in the policies' language as to what constituted an occurrence and because the parents had not intended that their children vandalize Plum's properties.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the question was not whether some interpretation of the facts could possibly bring Plum's alleged injury within the coverage of the policies "but whether the facts, as alleged in the complaint and taken as true, [were] enough to bring the injury within the [p]olicies' coverage."

The appellate court ruled that the vandalism allegations did not qualify as an occurrence as applied to the parents, reasoning that the policies could not be read "to cover intentional damage knowingly caused" merely because the parents had not intended the damages allegedly inflicted by their children. The parents, the appellate court said, had not purchased, and the insurer had not provided, coverage to "protect against the intentional destructive acts of their children."

Therefore, the appellate court concluded, the actions that allegedly had caused Plum's damages did not fall within the coverage of the policies.

The case is *Plum Properties, LLC v. North Carolina Farm Bureau*, No. COA16-1078

(N.C. Ct. App. Aug. 1, 2017).

Parent Not Covered for Damage Allegedly Caused by Child's Chokehold

An appellate court in Wisconsin has affirmed a trial court's decision dismissing an insurer from a personal injury action against its insured, concluding that allegations that the insured's minor child had choked another boy did not constitute an "occurrence."

The Case

Renata Brandenburg and her minor son sued Jayne Christian and her minor son, as well as the defendants' insurer, alleging that Christian's son had injured Brandenburg's son by choking him with a wrestling move that had caused him to lose consciousness, fall, and hit his head. The complaint also alleged that Christian had negligently supervised her son.

The trial court ruled that Brandenburg's son's injuries had not been the result of a covered occurrence because Christian's son's use of a chokehold on him had been an intentional act and, therefore, not an accident. The trial court further held that any failure of Christian to stop the intentional act of her son was not an "independent concurrent cause" of Brandenburg's son's injuries and, therefore, not covered by her insurance policy. The trial court dismissed the insurer from the lawsuit, and Brandenburg and her son appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court first found that the defendants' insurance policy did not provide coverage for Christian's son's alleged conduct "because the chokehold constituted an intentional act."

Moreover, the appellate court added, the claim of negligent parental supervision also was not covered by the defendants' policy given that the underlying act that Christian allegedly failed to prevent her child from committing did not constitute an "occurrence."

Finally, the appellate court concluded that the independent concurrent cause rule was inapplicable because Christian's alleged failure to properly supervise her son did not constitute an independent occurrence or insured risk as it required the alleged occurrence of her son's excluded conduct: the chokehold.

The case is *Rosenthal v. Christian*, No. 2016AP444 (Wis. Ct. App. Aug. 10, 2017).

Parents Lose Bid for Uninsured Motorist Benefits for Son Shot and Killed While Driving Car

The Supreme Judicial Court of Maine has ruled that uninsured motorist benefits were not available to parents of a son who was shot and killed while driving one of their cars.

The Case

After Timothy Austin Davison was shot and killed while he was driving his father's sport utility vehicle, his parents sued three of their automobile insurers, seeking to recover uninsured motorist ("UM") benefits for their son's death.

The insurers moved for summary judgment, asserting that the losses arising from the Davisons' son's death were not covered by the UM provisions in their policies because his death had not been caused by an "auto accident."

The trial court granted summary judgment to the insurers, and the dispute reached the Supreme Judicial Court of Maine.

The Supreme Judicial Court of Maine's Decision

The court affirmed, concluding that the Davisons' son's death had not been caused by an "auto accident" within the meaning of the insurance policies.

In its decision, the court explained that the term "auto accident" in a UM provision of an automobile insurance policy meant "an unintended and unforeseen injurious occurrence involving an automobile."

It then reasoned that the Davisons' son's death had not been "unintended" but, rather, had resulted from the assailant's "deliberate and purposeful conduct." Indeed, the court added, describing an intentional act – such as an intentional killing – as an "accident" stretched the plain meaning of that word "too far."

Accordingly, the court ruled as a matter of law that the loss occasioned by the Davisons' son's death was "not an accident that would invoke UM coverage."

The case is *Allocca v. York Ins. Co. of Maine*, No. Cum-16-305 (Maine Aug. 29, 2017).

Pollution Exclusion Precluded Coverage of Carbon Monoxide Poisoning Claim, Eighth Circuit Rules

The U.S. Court of Appeals for the Eighth Circuit has ruled that a pollution exclusion in a boat dealer's insurance policy precluded coverage of a claim that a person had been injured when

carbon monoxide had been released from the boat's engine into the engine compartment and wheelhouse.

The Case

Christopher Klick alleged that he had been injured when carbon monoxide was released from the engine of his friend's fishing boat into the engine compartment and migrated into the wheelhouse in which he was standing.

Klick sued the boat dealer. The boat dealer's insurer, relying on its policy's pollution exclusion, which provided that the policy did not cover liability for injuries "arising out of" the movement of pollutants into "atmosphere," asked the U.S. District Court for the District of Minnesota to declare that its policy did not cover liability for Klick's injuries.

The district court ruled in favor of the insurer, and Klick appealed to the Eighth Circuit.

The Eighth Circuit's Decision

The circuit court affirmed.

In its decision, the circuit court explained that the parties had agreed that carbon monoxide was a "pollutant" under the exclusion.

It then decided that the movement of the carbon monoxide from the engine compartment into the wheelhouse where Klick was standing was a "release," "dispersal," or "migration" of a pollutant for purposes of the exclusion. The circuit court declared that the pollution exclusion was "not limited to liability arising out of an *initial* 'release' of pollutant or a 'dispersal' or 'migration' of the pollutant from an *original* source."

Moreover, the circuit court decided, the release of the carbon monoxide into the wheelhouse was causally connected to Klick's injuries because it had caused him to lose consciousness and fall into the engine compartment, where he had suffered most of his injuries. That the release of carbon monoxide from the engine into the engine compartment also was a cause of Klick's injuries did not make the exclusion inapplicable, the circuit court explained, because an injury could "arise out of multiple causes with varying degrees of proximity to the injury."

Finally, the Eighth Circuit rejected Klick's contention that even if the boat dealer's liability would arise out of the release of carbon monoxide into the wheelhouse, the wheelhouse did not contain "atmosphere." The circuit court explained that the wheelhouse was wide open and that air flowed to and from the surrounding environment. It found that a reasonable person in the position of the insured would have understood that a person in the wheelhouse was in "atmosphere."

Accordingly, the Eighth Circuit concluded, the insured boat dealer's liability for Klick's injuries would arise out of the release, dispersal, or migration of a pollutant into atmosphere, and the pollution exclusion applied.

The case is *Travelers Property Casualty Company of America v. Klick*, No. 16-4000 (8th Cir. Aug. 14, 2017).

Policy's Exclusion of Coverage for Invasion of Privacy Excluded Coverage of TCPA Claims, Ninth Circuit Decides

The U.S. Court of Appeals for the Ninth Circuit has ruled that an exclusion in an insurance policy for invasion of privacy claims precluded coverage for a lawsuit alleging that the insured had violated the federal Telephone Consumer Protection Act.

The Case

While attending a Los Angeles Lakers basketball game at the team's home arena, David Emanuel observed a message on the scoreboard that invited fans to send a text a message to a specific number. He said that he sent a text message to the number, hoping that the Lakers would display the message on the scoreboard, and that in response he received the following text message:

> Thnx! Txt as many times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts. Msg&Data Rates May Apply. Txt STOP to quit. Txt INFO for info

Emanuel sued the Lakers, alleging that the team had sent the response text message using an "automatic telephone dialing system" in violation of the federal Telephone Consumer Protection Act ("TCPA").

The Lakers notified its insurer, which denied coverage and declined to defend the team, concluding that Emanuel had brought an invasion of privacy suit, which was specifically excluded from coverage under the policy.

The Lakers sued its insurer, which moved to dismiss. The U.S. District Court for the Central District of California granted the motion, and the Lakers appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The circuit court affirmed.

In its decision, the Ninth Circuit explained that the Lakers' policy excluded from coverage claims "based upon, arising from, or in consequence of . . . invasion of privacy."

The circuit court found that a TCPA claim was "inherently an invasion of privacy claim." Therefore, the circuit court reasoned, Emanuel's complaint – which asserted claims for negligent violation of the TCPA and knowing/willful violation of the TCPA – asserted invasion of privacy claims.

Accordingly, the Ninth Circuit concluded that the claims asserted in the Emanuel complaint were excluded from coverage under the Lakers' policy.

The case is *Los Angeles Lakers, Inc. v. Federal Ins. Co.*, No. 15-55777 (9th Cir. Aug. 23, 2017).

"Owned-Property" Exclusion Barred Coverage for Environmental Clean-Up Costs, Tenth Circuit Says

The U.S. Court of Appeals for the Tenth Circuit has ruled that an insurer did not have to indemnify its insured for costs it incurred in abating contamination on its own property.

The Case

After Taos Ski Valley, Inc. ("TSV") discovered that an oil-and-water separator on its federally leased property had released hydrocarbon contaminants into the soil at the company's ski resort in New Mexico, it spent over $1 million to abate the contamination and to protect nearby ground and surface water.

TSV, arguing that it had cleaned up the site because it was subject to immediate third-party liability to state and federal environmental authorities, sought indemnification for its cleanup expenses under its commercial general liability insurance policy. The insurer denied coverage under the policy's "owned-property" exclusion, which excluded coverage for the costs of restoring the insured's property "for any reason, including prevention of . . . damage to another's property."

In response, TSV contended that the owned-property exclusion did not apply because it was seeking indemnification for its costs in abating third-party public and environmental injuries rather than first-party injury to its own property. After the insurer again denied coverage, TSV sought declaratory relief in the U.S. District Court for the District of New Mexico.

The district court granted the insurer's motion to dismiss, and TSV appealed to the Tenth Circuit. TVS contended that the owned-property exclusion excluded coverage for first-party property damage but not coverage for third-party liability arising from an event on the insured's property that caused first-party property damage.

The Tenth Circuit's Decision

The circuit court affirmed.

In its decision, the Tenth Circuit rejected TSV's interpretation of the exclusion. The circuit court explained that, to be covered, an insured's liability could not be for damage to property that the insured party owned, rented, or occupied. Thus, it continued, the exclusion defeated coverage for TSV's remediation costs incurred because of soil contamination on the resort's land, "no matter that the reason for the costs was third-party liability."

Moreover, the circuit court added, the coverage limitation created "no irreconcilable conflict with the insuring clause" but "simply create[d] an exclusion to it."

Accordingly, the circuit court concluded that the owned-property exclusion was not ambiguous, did not conflict with public policy, and reached "the kind of environmental clean-up effort in which TSV engaged."

The case is *Taos Ski Valley, Inc. v. Nova Casualty Co.*, No. 16-2118 (10th Cir. Aug. 25, 2017).

Rivkin Radler Comment

Other courts also have ruled that the same owned-property exclusion precluded coverage for clean-up costs incurred because of property damage to the insured's property, no matter whether done to prevent property damage to third parties or for any other reason. *See, e.g., Pioneer Expl., L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503 (5th Cir. 2014); *Clarinet, LLC v. Essex Ins. Co.*, 712 F.3d 1246 (8th Cir. 2013); *Castle Vil. Owners Corp. v. Greater N.Y. Mut. Ins. Co.*, 64 A.D.3d 44 (N.Y. 1st Dep't 2009); *Watertown Tire Recyclers, LLC v. Nortman*, 788 N.W.2d 384 (Wis. Ct. App. 2010) (unpublished table decision).

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