# "Particular Part" Exclusion Barred Coverage of Claim for Damage to Electrical Transformer, Eighth Circuit Rules

The U.S. Court of Appeals for the Eighth Circuit has ruled that a commercial general liability insurance policy did not provide coverage for damage the insured allegedly had caused to an electrical transformer while working on it.

**The Case**

After the Louisville Gas and Electric Company purchased a used electrical transformer, it hired Electric Power Systems International to move it from Wisconsin to Kentucky.

During that process, Electric Power allegedly sought to remove a bushing bolted to a lead cable inside the transformer without removing one of the bolts connecting the bushing to the lead cable. According to Louisville Gas, when Electric Power then tried to lift the bushing with a crane, the lead cable was pulled up, which pulled on the core and coil, damaging it.

Louisville Gas asserted a claim against Electric Power for the damage to the core and coil. Electric Gas tendered the claim to its commercial general liability insurance carrier.

The insurer denied coverage, relying on the policy's "particular part" exclusion. The exclusion barred coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it."

In response, Electric Power sued the insurer for breach of contract.

The U.S. District Court for the Eastern District of Missouri granted summary judgment in favor of the insurer. It reasoned that, at the time the coil was damaged, the part of the transformer on which Electric Power was working included the bushing, lead cable, and coil. According to the district court, because the damage to the coil allegedly was caused by Electric Power's incorrect performance of its work – failing to detach the lead cable from the bushing – the particular part exclusion in the policy applied to exclude coverage for the damage to the coil.

Electric Power appealed, arguing that the district court had erred by including the core and coil as a component of the "particular part" of the transformer on which it had been working.

**The Eighth Circuit's Decision**

The circuit court, applying Missouri law, affirmed.

In its decision, the Eighth Circuit explained that the particular part exclusion excluded coverage for property damage to a particular part of any property on which Electric Power performed work if its work was incorrectly performed on that particular part.

The circuit court then concluded that a Missouri court would find that the "particular part" of the transformer on which Electric Power was working included the core and coil. "Disconnecting the bushing from the lead cable and core and coil was the first step of the job of disassembling the bushing, and it was an integral part of the job," the circuit court said.

Because the damage to the coil allegedly was caused by Electric Power's faulty performance of its work in detaching the lead cable from the bushing, the Eighth Circuit said that it agreed with the district court that the particular part exclusion applied and there was no coverage for the claim asserted by Louisville Gas against Electric Power.

The case is *Electric Power Systems Int'l, Inc. v. Zurich American Ins. Co.*, No. 16-3927 (8th Cir. Jan. 26, 2018).

## Pollution Exclusion Precluded Coverage for Costs of Remediating Heating Oil Spill in Home's Basement, According to Pennsylvania District Court

A federal district court in Pennsylvania has ruled that a pollution exclusion in a homeowners' insurance policy precluded coverage for the costs of remediating a heating oil spill in the basement of the insureds' home.

**The Case**

After heating oil spilled from a hole in their basement oil tank, homeowners sought reimbursement for the costs of remediating the spill from their insurance company.

The insured denied the claim. Among other things, it relied on the policy's pollution exclusion.

The homeowners sued, and the insurer moved for summary judgment.

The homeowners argued that the policy did not specifically define heating oil or petroleum products as pollutants. As a result, they contended that the policy was ambiguous as to whether heating oil constituted a pollutant for purposes of the policy's pollution exclusion.

**The Court's Decision**

The court granted the insurer's motion.

In its decision, the court explained that the record in this case contained "extensive evidence" that heating oil was a contaminant within the meaning of the pollution exclusion. The court observed that, to clean up the spill, the homeowners had engaged the services of an environmental services firm, rather than an ordinary construction contractor. Moreover, the court added, the soil and other materials that had been removed from the home were contaminated by ethyl benzene, isopropyl benzene, naphthalene, toluene, 1,2,4 trimethylbenzene and 1,3,5 trimethylbenzene – substances "recognized as pollutants."

Accordingly, the court concluded, the pollution exclusion precluded coverage of the

homeowners' claims.The case is *Barg v. Encompass Home & Auto Ins. Co.*, No. 16-6049 (E.D. Pa. Jan. 19, 2018).

## Insurer's Failure to Raise Priority of Coverage with Co-Insurer Doomed Its Equitable Subrogation Action, Florida District Court Concludes

A federal district court in Florida has ruled that an insurer had waived its right to seek equitable subrogation from a co-insurer.

**The Case**

Two attorneys sued Alan Dershowitz, alleging that he had made defamatory statements about them from his home during an interview broadcast on international media outlets, including CNN.

Privilege Underwriters Reciprocal Exchange ("PURE"), which had issued a homeowners' insurance policy to Dershowitz, agreed to provide a defense to Dershowitz, subject to a reservation of rights.

Hanover Insurance Group, which had issued a business owner's policy to Dershowitz, believed that it might have a duty to defend, so it provided a defense under a reservation of rights.

The case ultimately settled, with PURE and Hanover contributing to the settlement.

PURE then filed an equitable subrogation action, seeking to recover the amount it had contributed to the settlement from Hanover.

Hanover argued that PURE had waived its right to seek subrogation, and that PURE had been a volunteer when it contributed toward the settlement. Hanover pointed out that PURE had not raised priority of coverage at any point during the lawsuit. Also, PURE had not obtained any agreement from Hanover that issues involving priority of coverage would be resolved after the settlement was finalized. Hanover further noted that nothing in the settlement agreement, or in any other agreement, had preserved PURE's ability to recover its defense costs and indemnity contribution from Hanover.

**The District Court's Decision**

The district court granted judgment to Hanover, ruling that PURE had volunteered its settlement funds and had waived the right to seek subrogation against Hanover.

In its decision, the district court explained that the insurers had not entered into a subrogation agreement during the underlying lawsuit. Moreover, the district court continued, PURE had not entered into an agreement, either oral or written, preserving a cause of action against Hanover for indemnity, contribution, or equitable subrogation – and PURE had not sent any letters to Hanover in which it denied liability for the claims against Dershowitz and demanded that Hanover provide coverage.

The district court pointed out that PURE had sent its reservation of rights letter only to its insured, Dershowitz, had never raised priority of coverage in the letter, and had "never raised it while the underlying lawsuit was pending despite ample opportunity to do so."

PURE funded its portion of the settlement without ever raising priority of coverage with Hanover and without preserving its right to subrogation, the district court concluded. Under these circumstances, the district court ruled, PURE had volunteered its contribution to the settlement and had waived any right to seek equitable subrogation from Hanover.

The case is *Privilege Underwriters Reciprocal Exchange v. Hanover Ins. Group*, No. 16-cv-61742-BLOOM/Valle (S.D. Fla. Jan. 19, 2018).

## Primary Policy's Severability Clause Was Not Incorporated into Excess Policy, California District Court Decides

A federal district court in California has ruled that a severability provision in a primary insurance policy was inconsistent with the excess policy issued to two named insureds and, as a result, the severability provision was not incorporated into the excess policy.

**The Case**

The primary insurance policy issued to Western Milling, LLC, excluded coverage for losses of personal property in the "care, custody or control" of "the" insured. The primary insurance policy's separation of insureds provision (the "severability provision") stated that the policy applied "[a]s if each Named Insured were the only Named Insured." Accordingly, each of the two named insured's actions had to be evaluated independently under the care, custody or control exclusion.

The care, custody or control exclusion in Western Milling's excess insurance policy was different from the primary policy's exclusion. The excess policy's exclusion precluded coverage for losses to personal property in the care, custody or control of "any" insured. The excess policy also provided that it incorporated the primary policy's provisions unless they were "inconsistent" with the excess policy's provisions.

After a coverage dispute arose and litigation ensued, the parties asked the court to determine whether the primary policy's severability provision was incorporated into the excess policy and, if so, whether that rendered the care, custody or control exclusion of the excess policy ambiguous. If the excess policy did not incorporate the primary policy's severability provision, then its care, custody or control exclusion barred coverage for the property damage claim at the heart of the case.

**The District Court's Decision**

The district court ruled that the primary policy's severability provision was not incorporated into the excess policy because it was inconsistent with the excess policy's care, custody or control exclusion.

The district court explained that the severability provision of the primary policy treated each insured's coverage separately, while the exclusion of the excess policy applied collectively regardless of which of the two insureds was claiming the loss and which of the two insureds had control of the property that allegedly had been damaged.

This inconsistency, the district court found, was "apparent on the face of the primary and excess policies." Because the excess policy incorporated only those provisions of the primary policy that was not inconsistent with the provisions of the excess policy, this inconsistency prevented the severability provision of the primary policy from being incorporated into the excess policy, the district court decided.

The district court concluded that because the severability provision of the primary policy was not incorporated into the excess policy, there was no ambiguity created by the primary policy's interplay with the care, custody or control exclusion in the excess policy. Therefore, the care, custody or control exclusion in the excess policy applied to exclude coverage for the claimed loss under that policy.

The case is *Praetorian Ins. Co. v. Western Milling, LLC*, No. 1:15-cv-00557-DAD-EPG (E.D. Cal. Feb. 2, 2018).

## Criminal Action Was Not a "Suit," and Potential Fine Was Not "Damages," Alaska District Court Confirms

A federal district court in Alaska has ruled that an insurer owed no coverage to an insured criminally charged by the federal government with violating a federal law.

**The Case**

In 2016, the federal government brought criminal charges against Rosemary Libert, d/b/a/ Lynch and Kennedy Dry Goods, Inc. ("L&K"), under a federal law making it unlawful to knowingly display or sell any good "in a manner that falsely suggests it is Indian produced."

L&K hired defense counsel, and, after a trial, Libert was acquitted of the misdemeanor charges.

The successful defense of Libert cost L&K over $100,000. L&K subsequently notified its insurer of the litigation, asking to recover its attorneys' fees based on the policy's liability coverage for advertising injury.

The insurer denied coverage. Among other things, it pointed out that the government had not brought any "suit" against Libert, but rather, had prosecuted her for a violation of a federal statute. Moreover, the insurer said, the government had not sought damages for any injury incurred because of Libert's alleged conduct, but rather, had sought only to impose the fine or imprisonment authorized under the law.

L&K asked the federal district court in Alaska to declare that the insurer had a duty to defend Libert and that it had to cover the defense costs associated with her criminal trial.

The insurer moved for summary judgment.

**The District Court's Decision**

The district court granted the insurer's motion.

In its decision, the district court explained that the policy "unambiguously" stated that the insurer had a duty to defend civil suits seeking damages. Because the federal government had brought a criminal prosecution against Libert, the district court ruled, there was no "suit" to

trigger the insurer's duty to defend under the policy.

The district court also decided that the criminal fines that L&K risked having to pay because of the charges brought against Libert did "not constitute damages." The district court reasoned that, in bringing the criminal charges, the government had not been seeking to compensate an individual for harm suffered as a result of Libert's alleged violation but to enforce the purpose behind the statute; *i.e.,* to require those who marketed art and crafts to honestly represent the degree of Indian involvement. The statutory penalties were established to deter improper conduct and were not "damages," the district court concluded.

The case is *Lynch and Kennedy Dry Goods, Inc. v. American Fire and Casualty Co.*, No. 1:17-CV-00006 JWS (D. Alaska Jan. 2, 2018).

## Rejection of Proof of Loss under Flood Insurance Policy Triggered One-Year Statute of Limitations, Third Circuit Holds

The U.S. Court of Appeals for the Third Circuit has ruled that although the rejection of a proof of loss under a standard flood insurance policy was not a *per se* denial of the proof of loss in whole or in part, it constituted a denial if the policyholder treated it as such by filing a lawsuit against the insurance carrier.

**The Case**

Several months after a home insured by a standard flood insurance policy ("SFIP") issued under the National Flood Insurance Program ("NFIP") was damaged by Superstorm Sandy in October 2012, the homeowner submitted a proof of loss to the insurer that had issued the policy.

On July 15, 2013, the insurer responded with a letter to the homeowner titled "Rejection of Proof of Loss." The letter stated that the homeowner's proof of loss "cannot be accepted" because the amount claimed was "not an accurate reflection of covered damage."

The insurer's letter also stated, "This is not a denial of your claim."

The homeowner sued the insurer in July 2015. The insurer then moved for summary judgment, arguing that the suit was barred by the one-year statute of limitations required by federal law to be included in the SFIP. The insurer contended that its July 15, 2013 letter rejecting the homeowner's proof of loss was a "written denial of all or part of the claim," which triggered the statute of limitations. Because the homeowner had filed his lawsuit almost two years after he had received the letter, the insurer argued that his claim was time-barred.

The homeowner countered that the letter rejecting his proof of loss was not a "written denial of all or part of the claim" because it explicitly said it was not a denial of his claim. In fact, the homeowner asserted, he had never received a written denial of his claim, so the statute of limitations had never begun to run.

The U.S. District Court for the District of New Jersey granted summary judgment in favor of the insurer, and the homeowner appealed to the Third Circuit.

**The Third Circuit's Decision**

The Third Circuit affirmed, holding that the written rejection of a proof of loss constituted a denial of the claim for purposes of a SFIP if, based on the written rejection, the policyholder sued the insurer that issued the policy, "thereby accepting the written rejection of a proof of loss as a written denial of the claim."

The circuit court said that although the rejection of a proof of loss was not a *per se* denial of the insured's claim, in this case, the insured's "very act of bringing suit" signaled that, to his mind, "his claim had been denied." In other words, the circuit court reasoned, by suing, the "insured himself held out the July 15 letter rejecting his proof of loss as a denial of his claim," and he could "not now argue otherwise."

The circuit court reasoned that because a policyholder could not sue under a SFIP until the policyholder's claim has been denied in writing, the insured "must have accepted that this had occurred when he brought suit." Given that the only writing in the record that the insured could have construed as a denial of his claim was the July 15, 2013 letter rejecting his proof of loss, the insured, by bringing suit, had acknowledged that the letter constituted a written denial of his claim, the Third Circuit concluded.

The case is *Migliaro v. Fidelity National Indemnity Ins. Co.*, No. 17-1434 (3d Cir. Jan. 29, 2018).

## In Absence of Actual Conflict of Interest, Insured Was Not Entitled to Independent Counsel, Illinois Appeals Court Decides

An appellate court in Illinois, affirming a trial court's decision, has ruled that an insured was not entitled to have its insurer pay for independent counsel because it defended a lawsuit against the insured under a reservation of rights.

**The Case**

Ontel Products Corporation sued Bean Products, Inc., alleging that Bean had marketed and sold home-gym products in violation of copyright and trademark rights held by Ontel.

Bean tendered the suit to its insurer, which represented Bean under a reservation of rights, and ultimately secured a settlement with Ontel.

Bean, however, also retained independent counsel throughout the case, incurring litigation costs. Bean then filed a lawsuit against its insurer, seeking to have it pay for its independent counsel because the insurer's reservation of rights letter had created a conflict between Bean's interests and the insurer's interests.

The trial court found that Bean was not entitled to independent counsel in Ontel's suit because no conflict of interest existed, and Bean appealed.

**The Illinois Appellate Court's Decision**

The appellate court, applying Illinois law, affirmed, finding no conflict of interest from the insurer's reservation of rights letter.

First, the appellate court rejected Bean's contention that the insurer's reservation of the right

to disclaim coverage for punitive damages had triggered a conflict of interest entitling it to independent counsel. The appellate court ruled that no actual conflict existed to entitle Bean to independent counsel based simply on the fact that Ontel's complaint sought punitive damages. The appellate court declined to hold that an insurer's punitive damages reservation automatically triggered a right to independent counsel, explaining that, considering the frequency of general punitive damages demands in litigation, "such a trigger would eviscerate an insurer's right to control the defense of its insured."

Then, the appellate court rejected Bean's argument that the "open ended" nature of the insurer's reservation of rights letter had created a conflict of interest because it had allowed the insurer to "lay the groundwork" for a later denial of coverage while still controlling the defense of Ontel's lawsuit. According to the appellate court, Bean had not shown that the insurer's reservation letter made it apparent that the parties' interests diverged.

The appellate court concluded that only "actual" and not merely "potential" conflicts entitled an insured to independent counsel.

The case is *Bean Products, Inc. v. Scottsdale Ins. Co.*, No. 1-17-0421 (Ill. Ct. App. Jan. 22, 2018).

## Policies Did Not Cover Property That May Have Lost Value But That Suffered No "Physical Injury," Eighth Circuit Says

The U.S. Court of Appeals for the Eighth Circuit has ruled that insurance policies did not cover claims that property had lost value as a result of the insured's actions where the property had suffered no "physical injury."

**The Case**

Plastic bags sold by Decker Plastics Corp. to Al's, Inc., which Al's filled with landscaping materials, allegedly deteriorated because Decker had not manufactured the bags with an ultraviolet inhibitor. Al's sued Decker, alleging negligence, breach of warranty, and defective product.

Decker's insurer refused to defend or indemnify Decker under its commercial general liability and umbrella/excess liability insurance policies. After Decker paid $125,000 to settle Al's claims, Decker sued its insurer.

The U.S. District Court for the Southern District of Iowa concluded that there was no covered property damage, defined in the policies as "[p]hysical injury to tangible property." Decker appealed to the Eighth Circuit.

**The Eighth Circuit's Decision**

The Eighth Circuit affirmed.

In its decision, the circuit court explained that Al's property – the landscaping materials – had suffered no "physical injury." The fact that the landscaping materials had mixed with small shreds of plastic that could not be economically removed meant only that the landscaping materials had suffered a "diminution in value," according to the circuit court.

Accordingly, it concluded, Decker's claims had been properly dismissed because there had been no property damage triggering coverage under any of its insurance policies.

The case is *Decker Plastics Corp. v. West Bend Mutual Ins. Co.*, No. 17-1319 (8th Cir. Jan. 29, 2018).

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