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Completed-Operations Hazard Limited Insurer's Exposure to Asbestos Claims, Fourth Circuit Affirms

The U.S. Court of Appeals for the Fourth Circuit has ruled that asbestos-related bodily injury claims based on injuries that allegedly occurred during the insured's operation, which had been completed prior to the start of an insurance policy, fell within the policy's completed-operations hazard.

The Case

For decades, the Walter E. Campbell Company ("WECCO") sold, installed, disturbed, and removed insulation materials containing asbestos. Beginning in the mid-1980s, numerous individuals sued WECCO, alleging asbestos-related bodily injury stemming from WECCO's operations.

WECCO's general liability insurers defended and indemnified WECCO against hundreds of asbestos-related bodily injury claims, paying claimants more than $60 million on WECCO's behalf over several decades.

Coverage litigation ultimately ensued involving several primary, umbrella, and excess policies issued by two insurers to WECCO between May 1, 1975 and April 1, 1983.

The U.S. District Court for the District of Maryland ruled that bodily injury that occurred during an insurer's policy period, and that arose from an operation that had concluded prior to the inception of the policy period, fell within the "completed operations hazard" of that policy, and therefore, was subject to the aggregate limits of that policy. The practical effect of this ruling was that bodily injury claims brought by individuals first exposed to asbestos during WECCO operations that concluded prior to a policy's effective date were deemed completed-operations claims under that policy.

The district court subsequently granted summary judgment in favor of the insurers. Among other things, it found that indemnity payments for several claims that WECCO alleged had been mischaracterized had in fact properly been characterized as completed-operations claims, and therefore, were subject to the aggregate liability limits for those claims. In doing so, the district court relied on its finding, based on the "undisputed" evidence, that WECCO had ceased all asbestos-related operations by 1972 – years before any of the insurer's policies had issued.

WECCO appealed to the Fourth Circuit. It argued, among other things, that the district court had erred when it interpreted the completed-operations hazard to apply to bodily injury stemming from an individual's exposure to asbestos during a WECCO operation that was completed at the time the insurance policy took effect, regardless of whether such operation was ongoing when the individual was first exposed. Put differently, WECCO argued that the completed-operations hazard applied only in situations in which the starting point of a claimant's bodily injury occurred after WECCO operations had been completed.

The Fourth Circuit's Decision

The Fourth Circuit affirmed.

In its decision, the circuit court pointed out that it had issued a decision in 2004 in a case involving a company that, like WECCO, had supplied and installed asbestos-containing insulation materials for decades. Under that decision, the circuit court said, "the insurers who issued general liability policies to [WECCO] for time periods *wholly after* [WECCO] completed its asbestos installation work" would only be liable to WECCO to "the extent of the aggregate limit" contained in their policies.

Accordingly, the Fourth Circuit concluded, bodily injury claims arising from asbestos exposure during WECCO operations that had been completed prior to the issuance of a policy were subject to the policy's aggregate limit for completed-operations claims.

The case is *General Ins. Co. of America v. United States Fire Ins. Co.*, No. 17-1585 (4th Cir. March 26, 2018).

Intentional Shooting Was Not an Occurrence, Idaho Supreme Court Rules

The Supreme Court of Idaho has ruled that an insurer had no duty to defend or indemnify its insureds for injuries suffered by a camper who had been intentionally shot by the insureds' caretaker because the shooting was not an "occurrence."

The Case

The caretaker of 200 acres of property in Bonner County, Idaho, shot a camper and was charged with aggravated battery and use of a deadly weapon in commission of a felony. The caretaker pleaded guilty, although without admitting guilt as to all the elements of the crimes, and was sentenced to prison.

The camper sued the owners of the property, who tendered defense of the action to their insurer.

The insurer asked an Idaho court to declare that it did not have a duty to defend its insureds against the camper's claims against them.

The court granted summary judgment in favor of the insurer, and the insureds appealed to the Idaho Supreme Court.

They contended that coverage existed under their policy because the determination of whether an event was an "occurrence" should be viewed from their point of view. They claimed that the caretaker shooting the camper, although intentional from the caretaker's point of view, was an accident from theirs.

The insurer countered that the injuries upon which the camper's claims were based flowed directly from the intentional shooting, and thus could not be an occurrence under its policy.

The Idaho Supreme Court's Decision

The court affirmed, ruling that the shooting was not an occurrence under the insureds' policy.

In its decision, the court explained that the insurance policy required an occurrence to be an accident. In Idaho, the court continued, an accident was an "unexpected event" that was the result of "unintentional conduct" or an intentional act that resulted in "unexpected consequences."

The court then rejected the insureds' argument that the shooting fell in line with the definition of an accident from their perspective, declaring that Idaho law demanded "a contrary interpretation."

The court said that there was "no perspective from which a reasonable person could possibly view [the camper's] injuries as resulting from anything other than an assault in this case."

It concluded that an intentional shooting had caused the injuries, and therefore, the shooting was not an occurrence under Idaho law.

The case is *Farm Bureau Mutual Ins. Co. of Idaho v. Cook*, No. 44897 (Idaho March 30, 2018).

Collector Who Purchased Fraudulent Wine Fails in Bid for Insurance Coverage of His Financial Loss

An appellate court in California has ruled that a valuable possessions property insurance policy did not cover a wine collector's claim for the financial loss he suffered by purchasing fraudulent wine.

The Case

After a collector purchased about $18 million of purportedly rare, vintage wine from Rudy Kurniawan, a law enforcement investigation revealed that Kurniawan had apparently been filling empty wine bottles with his own wine blend and affixing counterfeit labels to the bottles. Kurniawan was convicted of fraud and was sent to prison for 10 years.

The collector filed a claim with his insurance carrier, seeking to recover the "losses" he had sustained due to the fraud. The insurer denied coverage, stating there had been no covered "loss" under the policy.

The collector sued, the trial court ruled in favor of the insurer, and the collector appealed.

He argued that his insurance policy provided "broad protection against all insurable risks," including "crime-related losses" to his investment, whether anything physical had happened to the wine or not.

For its part, the insurer asserted that no loss or damage to "covered property" had occurred because the collector's wine was "in the exact same condition" as it was when the collector first insured it.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court pointed out that the insurance company agreed to insure against any losses to the wine, and not to the collector's finances or to his unrealized expectations as to the value of the wine he had purchased.

The appellate court explained that nothing had happened to the wine that the collector had purchased and insured. When the collector purchased the wine from Kurniawan, it was counterfeit and it remained counterfeit (and essentially worthless) throughout the entire coverage period of the policy, the appellate court observed.

The appellate court suggested that the collector might have a valid claim against Kurniawan for fraud, but it concluded that he could not reasonably expect his insurance policy to reimburse him for his multiple purchases of wine from Kurniawan, which was essentially valueless at the time of purchase.

It concluded that the collector had suffered a diminution in value – he lost the money he had invested in his wine collection – because of the fraud committed by Kurniawan, but the policy the collector had purchased only insured him against potential harms to the wine itself, such as fire, theft, or abnormal spoilage, and not against any potential financial losses.

The case is *Doyle v. Fireman's Fund Ins. Co.*, No. G054197 (Cal. Ct. App. March 7, 2018).

Preventive Removal of Snow from Roofs Was Not Covered by Insured's Policy

A Massachusetts court has ruled that an insured was not entitled to recover the expense of removing snow from the roofs of its buildings from its insurer.

The Case

After spending over $800,000 to remove snow from the roofs of its building at locations throughout Massachusetts to prevent them from being damaged, the insured submitted a claim to its commercial property insurer, seeking to recover its snow removal expenses.

The insurer denied the claim, and the insured sued.

The insurer moved to dismiss the complaint on the ground that it did not allege that any insured property actually had suffered any physical damage as a result of the snowstorms or that any property located in the buildings had been lost or damaged.

The Court's Decision

The court granted the insurer's motion, finding that the policy provision insuring "against risks of direct physical loss of or damage to property" was unambiguous.

In its decision, the court assumed that removing the snow from the roofs of its buildings was a "very prudent, prophylactic step" for the insured to take to avoid possible structural damage to the buildings.

The court then decided that the insured's interpretation of its policy to mean that it covered expenses incurred to prevent "the risk that property will be lost or the risk that it will be damaged" was "not a rationale one."

According to the court, there was no language in the policy that covered the cost of eliminating the risk that property damage would occur. The policy, the court stated, insured "against the risk of loss of or damage to property."

Moreover, the court continued, there was nothing in the policy that defined covered preventative maintenance or how the amount of a claim for preventative maintenance would be determined.

Coverage was triggered, the court concluded, when the risk – loss or injury – materialized.

The case is *Roche Brothers Supermarkets, LLC v. Continental Casualty Co.*, No. 2017-01S9-BLSl (Mass. Super. Ct. March 14, 2018).

Court Rejects Coverage for Trade Secrets Suit

A federal district court in Pennsylvania has ruled that a company was not entitled to insurance coverage for a lawsuit alleging that it stole a competitor's employees and trade secrets in an effort to develop and sell competing products.

The Case

LifeCell Corporation sued TELA Bio, Inc., contending that it stole its employees and trade secrets in an effort to develop and sell competing products. LifeCell asserted claims for misappropriation of trade secrets, misappropriation of proprietary information, unfair competition, tortious interference with contract and prospective economic advantage, civil conspiracy, and unjust enrichment.

TELA Bio sought coverage under the libel or slander provision of the "Advertising Injury and Personal Injury Liability Coverage" section of its commercial general liability insurance policy.

Believing that its insurer would refuse to defend it, TELA Bio asked a federal court to declare that the LifeCell suit was covered by its policy's libel or slander provision.

The insurer moved to dismiss, asserting that none of the factual allegations in the LifeCell suit triggered coverage under the policy's libel or slander provision.

For its part, TELA Bio said that it could be inferred from certain of LifeCell's allegations that TELA Bio had made defamatory statements about LifeCell to LifeCell's employees and potential customers. TELA Bio pointed to allegations that TELA Bio:

- described its own product as the "next generation" of one of LifeCell's products;

- "exploited" or "used" LifeCell's "reputation" and "goodwill" to LifeCell's detriment; and

- induced LifeCell's employees to leave LifeCell and join TELA Bio by telling them that it had a "strategy" to avoid violating their non-competition covenants.

The District Court's Decision

The district court, applying Pennsylvania law, granted the insurer's motion.

In its decision, the district court found that none of LifeCell's allegations cited by TELA Bio supported an inference that TELA Bio had made defamatory statements about LifeCell, such that coverage was triggered under the policy's libel or slander provision.

According to the district court, defamation was not a reasonable inference from the alleged "next generation" statement, which was "no more than a typical marketing phrase about TELA Bio's own product."

The district court also decided that the alleged "exploited" or "used" statements accused TELA Bio of seeking to trade on LifeCell's *good* reputation to market its own competing product, and did not amount to libel or slander of LifeCell.

Next, the district court ruled that the non-competition allegations were not defamatory because they did not impugn LifeCell's reputation.

In any event, the district court said, even if LifeCell's allegations triggered coverage, TELA Bio's insurer had no duty to defend because the LifeCell suit fell within the policy's intellectual property rights exclusion, which precluded coverage for the "entirety of all allegations" in any suit in which there was an allegation of a violation of intellectual property rights, "even if the insurance would otherwise apply to any part of the allegations in the . . . suit." Because LifeCell alleged that TELA Bio had appropriated LifeCell's trade secrets and confidential information, the exclusion precluded coverage for the suit in its entirety, the district court concluded.

The case is *Tela Bio, Inc. v. Federal Ins. Co.*, No. 16-5585 (E.D. Pa. March 16, 2018).

Individual Insurance Adjuster May Be Liable to Insured for Bad Faith and Consumer Protection Act Violations, Washington Appellate Court Decides

An appellate court in Washington, reversing a trial court's decision, has ruled that an individual insurance adjuster may be held liable for bad faith and violations of the Washington Consumer Protection Act.

The Case

After a motorcyclist struck his truck, the insured asked his insurer to pay him the $25,000 limit of his underinsured motorist coverage.

The insurer assigned an adjuster to handle the claim, and offered $1,600 to the insured.

The insured sued. A jury awarded the insured $108,868.20 for his injuries, lost wages, and medical expenses.

The insured then filed a second lawsuit against the insurer, which included claims against the adjuster for bad faith and violation of Washington's Consumer Protection Act ("CPA"), which prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

The trial court dismissed the claims against the adjuster, and the insured appealed.

The Appellate Court's Decision

The appellate court reversed.

In its decision, the appellate court first ruled that insureds may bring bad faith claims against individual insurance adjusters. It explained that Washington law imposed a duty of good faith on "all persons" involved in insurance, including the insurer and its representatives, and said that a person who violated this duty might be liable for the tort of bad faith.

Because the adjuster was engaged in the business of insurance and was acting as the insurer's representative, the appellate court said, the adjuster "had the duty to act in good faith" and could be sued for breaching this duty. The appellate court added that the adjuster also could

not avoid personal liability for bad faith even if she had been acting within the scope of her employment.

The appellate court then rejected the adjuster's contention that she could not be liable under the CPA because she did not have a contractual relationship with the insured. The appellate court explained that, to prevail on a CPA claim, a plaintiff only had to show an unfair or deceptive act or practice that occurred in trade or commerce, a public interest impact, injury to the plaintiff in his or her business or property, and a causal link between the unfair or deceptive act and the injury. There was no requirement that the adjuster have a contract with the insured to be liable under the CPA, the appellate court ruled.

Accordingly, the appellate court concluded that an individual employee insurance adjuster could be liable for bad faith and a violation of the CPA.

The case is *Keodalah v. Allstate Ins. Co.*, No. 75731-8-I (Wash. Ct. App. March 26, 2018).