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Insurance Update

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Insurer Did Not Waive Defenses to Insured's Claim by Erroneously Paying Earlier Claim, Louisiana Supreme Court Holds

The Louisiana Supreme Court has ruled that an insurer that paid uninsured motorist ("UM") benefits to an insured by mistake did not waive its defenses to his subsequent claim for UM benefits after another accident.

The Case

After he was injured in a multi-vehicle accident in 2013, the insured recovered UM benefits under his insurance policy. He then sought UM benefits under a policy issued by the same insurer to his mother, with whom he lived.

The insurer denied his claim, citing Louisiana's anti-stacking law, and the insured sued.

The insured contended that the insurer had waived its right to rely on the state's anti-stacking law because, following a 2007 accident, the insurer had paid him UM benefits under his policy and also under his mother's policy.

In response, the insurer contended that its earlier payment to the insured under his mother's policy had been made in error, and therefore, it had not waived its right to deny the insured's claim for his 2013 accident.

The trial court entered judgment for the insured in the amount of $50,000 in damages, plus interest and costs. An appellate court affirmed, concluding that the trial court had not erred in finding that the insurer had waived any defense to the 2013 claim by paying the 2007 claim. The case reached the Louisiana Supreme Court.

The Louisiana Supreme Court's Decision

The court reversed.

In its decision, the court reasoned that an insurer did not, by virtue of making a payment on a claim, waive the right to assert coverage defenses to a subsequent claim.

According to the court, any purported waiver by the insurer of its defenses with regard to the 2007 claim could "not constitute a waiver with regard to the current claim." The court pointed out that accepting the insured's argument would result in the "absurd conclusion" that the insurer was "forever precluded from raising the anti-stacking defense in any future claim filed by [the insured]."

Therefore, the court concluded, the court of appeal had erred in affirming the judgment of the

trial court holding that the insured was entitled to recover beyond the limits of his own UM policy.

The case is *Forvendel v. State Farm Mut. Auto. Ins. Co.*, No. 2017-C-2074 (La. June 27, 2018).

Insured's Preventive Measures Were Not an Occurrence, Ohio Appeals Court Decide

An appellate court in Ohio has ruled that preventive measures taken by an insured aimed at preventing future property damage claims did not qualify as damages caused by an occurrence.

The Case

Several years after a bituminous coal mine in Pennsylvania was closed, "red water" began flowing out of the mine onto nearby properties, and the property owners sued the insured. Its insurer paid the claims.

After an investigation, the Pennsylvania Department of Environmental Resources ("PADER") demanded that the insured pump the mine and treat the polluted water. The insured then constructed a treatment plant and sought coverage under its primary, umbrella, and excess commercial liability insurance policies for the costs of constructing and operating the plant.

The insurers denied the claims, and the insured sued. The insurers moved for summary judgment, arguing among other things that the insured's damaged had not resulted from an "occurrence" under the policies because the treatment of the polluted water discharge was a statutorily mandated, routine business expense that was prophylactic in nature.

The trial court granted summary judgment in favor of the insurers, concluding that the insured's damages claim did "not arise from an occurrence resulting in property damage" for which the insured was legally liable.

The insured appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that routine business expenses differed from damages caused by an occurrence in that business expenses were expected but that damages caused by an occurrence were not. The appellate court then pointed out that the flow of polluted water after the mine was closed was "not unexpected." Indeed, the appellate court observed, a representative of the insured had testified that managing the mine drainage was an "ongoing expense . . . during active mine operations," that the insured allocated "an annual budget" for that expense, and that the insured had a reserve on its books to cover the cost of the mine's obligations after it was closed. The appellate court ruled that the cost of dealing with the drainage was "part of the cost of doing business in the mining industry."

The appellate court noted that costs incurred to prevent future harm generally were "not covered by insurance" as they were "not caused by the happening of an accident, event, or repeated exposure to conditions" but, rather, resulted from the "prevention of such an occurrence."

Finding no evidence demonstrating that the treatment plant was required to resolve the property damage claims of neighboring third parties, the appellate court ruled that the construction and operation of the treatment plant was a "preventive measure aimed at preventing future property damage claims" and did not qualify as damages caused by an occurrence. The insurers, therefore, did not have to indemnify the insured for the costs incurred in the construction and operation of the treatment plant, the appellate court concluded.

The case is *Bellaire Corp. v. American Empire Surplus Lines Ins. Co.*, No. 106243 (Ohio Ct. App. June 28, 2018).

Insured's Alleged Acts of Purchasing Gun and Providing Alcohol to Other Insured, Who Shot Neighbor, Were Not an Occurrence, Oklahoma District Court Rules

A federal district court in Oklahoma has ruled that one insured's alleged acts of purchasing a gun and providing alcohol to a second insured on the day the second insured used the gun to kill a neighbor did not qualify as an occurrence.

The Case

Stanley Majors shot and killed his neighbor and was found guilty of murder in the first degree.

The neighbor's sister sued Majors and Stephen Schmauss, alleging that her brother had died as a result of their negligent and reckless acts or omissions. According to the sister, Schmauss had purchased alcohol for Majors on the day Majors killed her brother. Majors also used Schmauss' gun.

The insurer that had issued a homeowners' insurance policy to Majors and Schmauss and a personal liability umbrella insurance policy to Schmauss asked a federal district court in Oklahoma to declare that neither policy provided coverage for any of the sister's claims against Majors and Schmauss. The insurer moved for summary judgment, arguing that because Majors had intentionally shot and killed the neighbor, there was "no occurrence or loss because the bodily injury was not caused by an accident."

For her part, the sister contended that Schmauss owning the gun and providing alcohol to Majors on the day he killed her brother qualified as an "occurrence" because there was "no way that Schmauss, through those actions, could have intended for [her brother] to be killed."

The District Court's Decision

The district court granted the insurer's motion, finding that neither the homeowners' policy nor the personal liability policy provided coverage for the sister's claims against Majors or Schmauss.

In its decision, the district court pointed out that, as the sister conceded, both policies "clearly" excluded Majors' act of intentionally shooting and killing her brother.

The district court then ruled that, even assuming that Schmauss had been negligent, and viewing his conduct separately from Majors' conduct, Schmauss' alleged acts of purchasing the gun at some point and providing alcohol to Majors on the day Majors killed the neighbor did "not qualify as an occurrence," because those actions did "not comprise the immediately attendant causative circumstances of [the neighbor's] bodily injury."

Rather, the district court ruled, under the homeowners' policy and the personal liability policy, there was no "occurrence" because Majors' intentional act of shooting and killing the neighbor was the "immediate causative circumstance" of his bodily injury, and intentional murder was not an accident.

The insurer, the district court concluded, had no obligation to defend or indemnify Majors or Schmauss against the sister's claims.

The case is *State Farm Fire & Casualty Co. v. Scott*, No. 17-CV-0656-CVE-FHM (N.D. Okla. June 27, 2018).

Subcontractor's Allegedly Faulty Workmanship Was Not an Occurrence, Third Circuit Affirms

The U.S. Court of Appeals for the Third Circuit, affirming a district court's decision, has ruled that an insurer had no duty to defend or indemnify a subcontractor in litigation that arose out of problems experienced by a condominium development in South Philadelphia against allegations of the subcontractor's own faulty workmanship.

The Case

After a condominium association sued the general contractor for the development, asserting contract and warranty claims, the general contractor impleaded the subcontractor, asserting claims for breach of contract and indemnification.

The subcontractor sought defense and indemnification under its commercial general liability insurance policy. The insurer agreed to defend the subcontractor, subject to a reservation of rights, and the subcontractor asked a court to declare that the insurer was obligated to provide a defense and indemnity.

The U.S. District Court for the Eastern District of Pennsylvania concluded that the allegations against the subcontractor were not covered under its insurance policy, so the insurer had no duty either to defend or indemnify the subcontractor. The subcontractor appealed to the Third Circuit. There, the subcontractor contended that the pleadings established occurrences under Pennsylvania law in three ways:

> (1) The damage occurred to areas of the property on which the subcontractor had not worked;

(2) The damage had been caused by work performed by other subcontractors; and

(3) The damage had been caused by defects in the materials that the subcontractor had used rather than by its own faulty workmanship.

The insurer countered that the subcontractor's liability arose from its own allegedly faulty workmanship, which was not covered as an occurrence under the policy.

The Third Circuit's Decision

The Third Circuit affirmed.

In its decision, the circuit court rejected the subcontractor's first argument, explaining that damages that were a "reasonably foreseeable result" of faulty workmanship were not covered, even when such damage occurred to areas outside the work provided by the insured.

The Third Circuit then found that the subcontractor's second argument – that the faulty workmanship of others led to the later failure of its own work – was "similarly unavailing." The circuit court reasoned that although the various pleadings contended that others might be liable for the property damage, they did not allege that the subcontractor should be held liable (in negligence or under any other theory) for the faulty products or poor workmanship of others. The Third Circuit found no error in the district court's conclusion that the subcontractor's own allegedly faulty workmanship was the only legal theory under which the subcontractor, as opposed to other contractors or subcontractors, could be found liable.

Finally, the circuit court found no support in the pleadings for the subcontractor's contention that the property damage had been caused by defects in the materials that had been provided to it. The Third Circuit noted that the subcontractor pointed only to extrinsic evidence to support this argument, and it said that the pleadings did "not contain allegations sufficient to support a claim that the windows, doors, and/or panels" used by the subcontractor had actively malfunctioned, directly and proximately causing the property damage to the project.

The case is *Lenick Construction, Inc. v. Selective Way Ins. Co.*, No. 16-1891 (3d Cir. June 6, 2018).

D&O Policy's Prior Acts Exclusion Precluded Coverage of Bankruptcy Trustee's Claim Against Board Member, Florida District Court Concludes

A federal district court in Florida has dismissed a lawsuit against an insurer brought by the bankruptcy trustee for a homeowner's association after concluding that a prior acts exclusion in a directors' and officers' insurance policy precluded coverage of the trustee's claim against an association board member.

The Case

After a homeowner's association in Florida entered bankruptcy and a Chapter 11 trustee was appointed, the trustee sued a member of the association's board of directors and another

officer, alleging a series of wrongful acts. The board member sought coverage under two directors' and officers' insurance policies.

The insurers denied coverage and the board member settled the trustee's lawsuit, assigning her rights under the insurance policies to the trustee.

The trustee sued the insurers. One insurer moved to dismiss the complaint, arguing that its policy's prior acts exclusion precluded coverage for the trustee's claim against the board member.

The District Court's Decision

The district court granted the motion.

In its decision, the district court explained that the Chapter 11 trustee alleged that the board member had committed acts of misconduct dating back to 2009 but alleged no independent acts of misconduct occurring on or after the date of inception of the insurer's policy, which was August 18, 2015.

In fact, the district court observed, many of the trustee's allegations predated the policy by several years. Any alleged acts of misconduct that occurred after the date of inception of the policy could "not fairly be said to be distinct and separate from those occurring before," according to the district court.

Therefore, it concluded, the prior acts exclusion applied, there was no coverage under the policy.The case is *Smith v. Travelers Casualty and Surety Co. of America*, No. 18-80189-CIV-DIMITROULEAS (S.D. Fla. June 14, 2018).

Manufacturer Did Not Have to Contribute to Allocation of Insurance When Coverage Was Unavailable, New Jersey Supreme Court Holds

The New Jersey Supreme Court, over one justice's dissent, has ruled that a manufacturer of asbestos-containing products did not have to contribute to the allocation of insurance liability based on the time after which insurance coverage had become unavailable in the marketplace.

The Case

For many years, the Bendix Corporation, a corporate predecessor to Honeywell International, Inc., manufactured and sold friction products that contained asbestos. Bendix stopped using asbestos in its friction products in 2001, having continued to manufacture the items even after 1987, when insurance for asbestos-related claims for those products ceased to be available in the marketplace.

Beginning around 1975, Bendix began to receive liability claims asserting that asbestos in its friction products caused bodily injury to users. Claimants sued Bendix in almost all 50 states, and its insurers spent more than $1 billion on indemnity payments.

In 2000, a number of insurers sought declaratory relief concerning the rights and obligations associated with insurance coverage for the asbestos-related bodily injury claims filed against Honeywell as a corporate successor to Bendix.

The trial court, applying New Jersey law on the issue of allocation of liability among insurers, decided that Honeywell did not have to contribute in the allocation of insurance liability based on the time after which coverage had become unavailable in the marketplace (that is, since 1987). An intermediate appellate court affirmed, and the dispute reached the New Jersey Supreme Court.

There, the insurers argued that Bendix's decision to continue to manufacture and sell products containing asbestos, after insurance was no longer available, should result in Honeywell being required to contribute to the losses from its past and future sale of those products.

Honeywell emphasized that it was seeking coverage only for claims alleging first exposure to a Bendix product before 1987 – when Bendix and its successors had active occurrence-policy coverage for asbestos-based risks – even if manifestation had occurred after that point in time. Honeywell stressed that, under existing New Jersey law, post-1987 conduct was not relevant because it did not affect the prior exposure for which insurance had been purchased.

The New Jersey Supreme Court's Decision

A divided court (5-1, with one justice not participating) affirmed.

In its decision, the majority explained that, in *Owens-Illinois, Inc. v. United Ins. Co.,* 650 A.2d 974 (N.J. 1994), an asbestos coverage case, it had adopted the "continuous-trigger" method of allocation of insurance liability. The court added that the continuous-trigger method assumed the availability of insurance and recognized an "unavailability" exception under which a policyholder was not responsible for the pro rata portion of liability that reflected a period of insurance unavailability. The unavailability exception, the court observed, had been applied to require an insured to share in an allocation of liability under the continuous-trigger doctrine only when it failed to purchase available insurance.

The court then rejected the insurers' argument in the Honeywell case that it should create an equitable exception to the unavailability rule under which corporations that continue to manufacture products after insurance has become unavailable for those products would have to contribute to the losses.

According to the court, the insurers' appeal did "not present a proper factual basis to revisit the unavailability rule" because none of the initial asbestos exposures for which Honeywell was seeking insurance coverage had occurred after insurance had become unavailable.

The court concluded by rejecting the insurers' argument that its holding would dis-incentivize manufacturers from responsible behavior regarding products for which insurance had become unavailable, noting that "[t]his manufacturer" had "ceased its production."

The case is *Continental Ins. Co. v. Honeywell Int'l, Inc.*, No. 078152 (N.J. June 27, 2018).

Rivkin Radler Comment

It is worth noting that one justice dissented from the court's opinion on the unavailability exception. The dissent reasoned that the exception gave a corporation a "free pass" if it continued to "expose workers to extremely dangerous products after insurance coverage becomes unavailable." In the dissent's opinion, the unavailability exception compelled

insurance carriers that previously insured the corporation – but later refused to do so – to "remain the guarantors" for claims arising during the years the corporation continued to manufacture its dangerous products – which did "not further notions of fairness or a rational public policy."

The dissent stated:

> Given the apparent health hazards and number of pending and expected personal-injury lawsuits relating to Bendix's brake and clutch pads, the primary insurance carriers in 1986 and then the excess insurers in 1987 declined to underwrite coverage for those products. Despite the known medical dangers of asbestos, more than a decade of lawsuits, and an insurance marketplace that refused to provide coverage for its asbestos products, Bendix opted to continue to manufacture its asbestos-containing brake and clutch pads for fourteen more years without liability coverage. Bendix's decision put at risk the health and safety of countless workers exposed to the dangerous asbestos fibers in its products over those fourteen years.

The dissent said that a majority of the court held that Bendix, although it had paid no premiums for coverage, was "insured for the injuries caused to mechanics and others who worked with the products it continued to manufacture – so long as the first asbestos exposure predated the period when the company went bare of insurance." The dissent added that, according to the majority, the insurance carriers that previously issued liability policies to Bendix "must pick up this grisly tab." The dissent concluded that, in the future, "companies similarly situated to Bendix will have less incentive to stop producing dangerous products under such a scheme."