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September 2018 | Insurance Update | WWW.RIVKINRADLER.COM

Mining Company's Unauthorized Removal of Coal Was Not an "Occurrence," Kentucky Supreme Court Rules

The Supreme Court of Kentucky, reversing an appellate court's decision, has ruled that a mining company's intentional but unauthorized removal of coal from another's property was not an "occurrence" within the meaning of the mining company's commercial general liability insurance policy.

The Case

Ikerd Mining, LLC, removed over 20,000 tons of coal from land belonging to Peters Farms, LLC. Of that amount, about 19,000 tons were wrongfully mined under Ikerd's allegedly mistaken belief as to the correct location of Peters' boundary lines. Ikerd mined the other 1,000 or so tons from land it knew belonged to Peters but believing that an oral lease permitted it to mine there.

Peters sued Ikerd and Ikerd's insurer for "willful and wanton trespass" onto Peters' property and for conversion of coal.

In response, the insurer argued that the losses claimed by Peters from Ikerd's mining activities were not an "occurrence" and, therefore, were not covered by the insurance policy it had issued to Ikerd.

The parties reached a partial settlement under which Ikerd admitted that it had mined the coal without Peters' consent. The settlement, however, left open whether Ikerd's mining had been "intentional." The parties agreed that the trial court should decide whether Ikerd's CGL insurance policy covered the damage caused by its actions.

During a bench trial, an Ikerd employee testified that Ikerd only intended to mine coal from adjacent land but mistakenly mined 19,000 tons from Peters' land. Also, the remaining coal was knowingly removed from Peters' property because Ikerd employees mistakenly believed that Ikerd had permission from Peters to mine it. In fact, Peters had never entered into a lease with Ikerd.

The trial court ruled that both of Ikerd's mistakes in mining Peters' property – that is, its mistake as to the location of the boundary line and its mistake as to whether it had permission to remove coal from Peters' land – were accidents, and therefore, "occurrences" under Ikerd's insurance policy.

An appellate court affirmed, finding that an "occurrence" had taken place because the property damage – the trespassory removal and the conversion of Peters' coal – had not been intended by Ikerd.

The case reached the Kentucky Supreme Court.

The Kentucky Supreme Court's Decision

The Kentucky Supreme Court reversed, holding that Ikerd's mining from Peters' property was not an accident, and therefore, not an "occurrence" under its insurance policy.

In its decision, the court explained that inherent in the meaning of accident was the doctrine of fortuity. Under the fortuity doctrine, the court added, coverage under Ikerd's insurance policy depended on Ikerd's intent and control regarding its mining of Peters' coal.

The court then found that Ikerd had intended to mine and sell the coal it extracted, even if it had not intended to specifically mine Peters' coal. "Regardless of whether its trespass was willful or innocent, Ikerd intended to act," the court reasoned.

Next, the court pointed out that Ikerd had complete control over the workers who had extracted the coal from Peters' property and that Ikerd had "directed" them to excavate coal from Peters' property for several months.

Accordingly, the court concluded, Ikerd's intentional removal and conversion of Peters' coal was not an accident constituting an "occurrence," regardless of whether the trespass was willful or innocent.

The case is *American Mining Ins. Co. v. Peters Farms, LLC*, No. 2017-SC-000066-DG (Ky. Aug. 16, 2018).

Allegedly Supplying Non-Compliant Lumber Was Not an "Occurrence," Illinois District Court Rules

The U.S. District Court for the Northern District of Illinois has ruled that a lumber retailer was not entitled to a defense from its insurer against lawsuits alleging that it had supplied customers with non-compliant lumber, concluding that the allegations did not amount to an "occurrence."

The Case

Chicago Flameproof and Wood Specialties Corporation, an Illinois-based lumber retailer, was sued by two framing contractors for allegedly providing lumber to them that did not comply with International Building Code ("IBC") requirements for use on exterior walls, although Chicago Flameproof had agreed that it would ship IBC-compliant lumber to the contractors.

In addition to negligent misrepresentation and fraudulent misrepresentation, the contractors charged Chicago Flameproof with deceptive business practices, false advertising, consumer fraud, breach of warranties, and breach of contract.

Chicago Flameproof tendered its defense of the contractors' lawsuit to its commercial general liability insurance carrier.

The insurer filed a declaratory judgment action, contending, among other things, that its duties to defend and indemnify had not been triggered because the claims against Chicago Flameproof were not an occurrence.

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 contractors alleged "knowing and intentional conduct" on the part of Chicago Flameproof. In particular, the contractors alleged that Chicago Flameproof had made a "unilateral decision" to ship non-IBC compliant lumber to the contractors in place of the lumber that had been ordered, that Chicago Flameproof had "concealed" that the lumber it shipped had not been tested or listed pursuant to IBC requirements, and that Chicago Flameproof had "falsely represented on the bills of lading" that the lumber delivered to the contractors was the appropriate lumber.

The district court acknowledged that one claim against Chicago Flameproof was couched in negligence terminology, but said that "merely casting a claim in terms of negligence" was not enough to establish an occurrence. Rather, the district court continued, it was "the actual alleged conduct" and "not the labels given to a particular cause of action" that determined whether the duty to defend had been triggered.

In the district court's opinion, the "thrust" of the contractors' allegations was that Chicago Flameproof had engaged in deliberate conduct – the shipping of the wrong lumber and the concealment of that fact – that had caused property damage.

Moreover, the district court added, even if Chicago Flameproof had not intended the damage allegedly caused by the lumber it shipped, it "could have and should have reasonably anticipated" that such injuries could result from the lumber it supplied to the contractors.

The district court ruled that, if Chicago Flameproof had knowingly supplied non-IBC-compliant lumber and had concealed that it had done so, as the contractors' alleged, then the property damages that allegedly resulted could not be said to have been caused by any accident but were the "natural and ordinary consequence" of knowingly supplying a non-compliant product. They did not potentially fall within the insurance policy's coverage, the district court concluded.

The case is *Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp.*, No. 17-cv-3513 (N.D. Ill. Aug. 10, 2018).

Insured's Assault of Pub Patron Was Not an "Occurrence," Pennsylvania District Court Rules

The U.S. District Court for the Eastern District of Pennsylvania has ruled that a homeowner's insurance company had no duty to defend the homeowner against claims that he had assaulted a patron at a pub, finding that the complaint against the homeowner did not allege any "occurrence."

The Case

The insured was sued for assault and battery for attacking a patron at a pub. The insurer that had issued a homeowners' insurance policy to the insured – who was convicted of simple assault in connection with his attack on the patron – asked a federal district court in Pennsylvania to declare that it had no duty to defend the insured in the underlying lawsuit, asserting that no "occurrence" had triggered its duty under the policy.

The insurer moved for summary judgment.

The District Court's Decision

The district court granted the insurer's motion, ruling that it had no duty to defend or indemnify the defendant in connection with the underlying lawsuit.

In its decision, the district court explained that the underlying complaint alleged only an assault and battery claim against the insured and contained "no allegations of negligence" against him.

Because the "four corners" of the underlying complaint did not describe any type of accident involving the insured, the district court ruled, there was no "occurrence."

The district court rejected the insured's contention that it should consider extrinsic evidence – such as the deposition he had given in the underlying lawsuit in which he testified that he had acted in self-defense – to find a genuine issue of material fact as to whether he "harbored the malicious intent" to injure the patron or whether he had been acting in self-defense.

The district court found that the insured's argument was "mistakenly" premised on the assumption that his insurer's refusal to defend was based on an exclusion from coverage for personal liability for bodily injury resulting from the insured's willful and malicious acts, which might permit the district court to go beyond the four corners of the underlying complaint. The district court pointed out, however, that the insurer was not relying on an exclusion within the policy but, rather, on the fact that the allegations of the underlying complaint did not set forth any "occurrence" that triggered its duty to defend.

The district court concluded that the policy did not provide any coverage for intentional acts, even if done in self-defense, and it ruled that the insurer was entitled to a declaration that it did not have a duty to defend or indemnify the insured in connection with the underlying action.

The case is *State Farm Fire and Casualty Co. v. Jackson*, No. 18-102 (E.D. Pa. Aug. 22, 2018).

District Court Properly Considered Complaint's Facts and Legal Theories to Find No "Occurrence," Eleventh Circuit Rules

The U.S. Court of Appeals for the Eleventh Circuit has affirmed a district court's decision that the facts and legal theories alleged in a complaint against an insured did not "fairly and potentially bring the suit within policy coverage" because the complaint did not allege an "occurrence."

The Case

A customer sued a Florida boat yard for breach of contract, conversion, fraud, and fraud in the inducement. The boat yard's insurer denied coverage and refused to defend the boat yard.

Following a jury trial, the customer obtained a judgment against the boat yard, which the boat yard forwarded to its insurer.

The insurer again denied the claim, and the boat yard sued.

The U.S. District Court for the Southern District of Florida concluded that the customer's suit was not based on an "occurrence" because the customer had not asserted any cause of action through which the boat yard could potentially be found liable for acts "that were not intentional." Accordingly, the district court granted summary judgment in favor of the insurer.

The boat yard appealed to the Eleventh Circuit, arguing that the district court should not have considered the claims and legal theories asserted in the customer's complaint, in addition to the customer's factual allegations, when deciding whether the insurer had a duty to defend. The boat yard contended that the customer's claims and legal theories were irrelevant. According to the boat yard, coverage depended solely on the factual allegations in the customer's complaint. If those allegations arguably could support a claim that would be covered under the policy, the insurer owed a duty to defend.

The insurer disagreed, arguing that the customer's factual allegations had to be viewed in the context of the customer's claims and legal theories. Because the customer alleged claims based on intentional conduct, the factual allegations could not fairly be construed as supporting a claim for damages caused by an accident, the insurer asserted, and as a result, were not based on an "occurrence."

The Eleventh Circuit's Decision

The circuit court affirmed.

In its decision, the circuit court disagreed with the boat yard's argument that the duty to defend depended solely on the factual allegations of the customer's complaint, to the exclusion of any causes of action or legal theories that the customer also alleged.

The Eleventh Circuit explained that, in a "long line of cases," it had stated that the duty to defend depended on "the facts *and legal theories* alleged in the pleadings and claims against the insured." Therefore, the circuit court continued, if a complaint's factual allegations could support liability under one of the legal theories alleged in the complaint, the duty to defend was triggered.

Accordingly, the circuit court ruled that the district court had not erred by considering whether the customer's complaint alleged both facts and legal theories under which the boat yard could be found liable. It concluded that the district court also had not erred by deciding that the facts and legal theories alleged in the customer's complaint did not "fairly and potentially bring the suit within policy coverage."

The case is *Jones Boat Yard, Inc. v. St. Paul Fire and Marine Ins. Co.*, No. 17-14500 (11th Cir. Aug. 8, 2018).

"Expected or Intended" Exclusion Precluded Coverage for Assault by Insured's Son, Maine's Top Court Rules

The Supreme Judicial Court of Maine has ruled that an "expected or intended" exclusion in a homeowner's insurance policy precluded coverage for injuries caused when the insured's son attacked another student.

The Case

After a high school student assaulted another student, breaking his jaw, the injured student sued him. The defendant agreed to a consent judgment in favor of the injured student for $150,000.

The homeowners' insurance company that had issued an insurance policy to the defendant's father went to court for a declaratory judgment that the injured student's damages were not covered by the policy. It asserted that coverage was precluded by the policy's exclusion for "expected or intended" bodily injury.

The trial court found coverage, declaring that although the insured's son had the "subjective intent" to strike the injured student on multiple occasions in the face, it could not conclude that he subjectively had intended to inflict the level of damage that ultimately had been inflicted on the injured student.

The insurer appealed to the Supreme Judicial Court of Maine.

The Decision by Maine's Supreme Judicial Court

The court reversed.

In its decision, the court explained that the exclusion was ambiguous because it reasonably could be interpreted in different ways, including by leaving open the question of whether the infliction of bodily injury had to be "expected or intended" based on an objective assessment or based on the tortfeasor's own subjective perceptions. It then said that it would interpret the exclusion to mean bodily injury that the insured in fact subjectively wanted ("intended") to be a result of his conduct or in fact subjectively foresaw as practically certain ("expected") to be a result of his conduct.

Next, the court said that it was "undisputed" that the insured's son had subjectively intended to hit the injured student in the face with a closed fist. It added that the trial court's findings that the insured's son had not considered "the consequences of his action" and had not "subjectively" considered or intended the extent of the damage he could and did cause could not stand, and that the insured's son "must have subjectively foreseen as practically certain (i.e., expected) that his deliberately violent conduct would result in bodily injury" to the injured student.

The court declined the insurer's request to categorically hold that an assault such as occurred in this case fell within the exclusion irrespective of the assailant's subjective intent or expectation of harm, but it concluded that the insured's son's conduct established that the damages he had inflicted on the injured student were excluded from coverage.

The case is *Vermont Mutual Ins. Co. v. Ben-Ami*, No. Yor-17-416 (Me. Aug. 21, 2018).

"Intentional Acts" Exclusion Precluded Coverage for Damage Caused by Fire Set by Insureds' Son, Kentucky Appeals Court Rules

An appellate court in Kentucky has reversed a trial court's decision that the "intentional acts" exclusion in a homeowners' insurance policy did not preclude coverage for damage to the insureds' home caused by a fire set by their son, notwithstanding that he might have set the fire intending to commit suicide rather than to damage the home.

The Case

The insureds' home was damaged by fire and their 16-year-old son was charged with arson.

The insureds then submitted a claim to their homeowners' insurance company for the damage caused by the fire. The insurer denied the claim, citing the results of the arson investigation and an intentional acts exclusion within their policy.

The insureds sued the insurer, which filed a third-party claim against the insureds' son. He responded that he had been of "unsound mind" as to render him "incapable of forming an intent to cause a loss" at the time he set the fire.

The trial court granted summary judgment in favor of the insureds, concluding that because the insureds' son (also an insured) had committed a volitional act ("start[ing] a fire in the basement of the residence") with the ultimate intention of ending his own life rather than damaging his home, coverage was not precluded by the intentional acts exclusion.

The insurer appealed.

The Appellate Court's Decision

The appellate court reversed.

In its decision, the appellate court explained that the intentional acts exclusion eliminated coverage for an action by or at the direction of an insured person (a) committed with the intent to cause a loss, or (b) that could reasonably be expected to cause a loss. The appellate court added that the first provision – (a) – involved the insured's subjective intent, while the latter provision – (b) – created an objective standard measured by what an objective, reasonable person would expect to result from an intentional act.

The appellate court then pointed out that some evidence reflected that the insureds' son was "*aware* that he *set* a *fire*." Moreover, the appellate court continued, he was aware of "*how* he set the fire, and *where* he *wanted* to set it."

From those circumstances, the appellate court concluded, a jury could reasonably infer that the insureds' son's subjective intent was to end his own life by starting a fire in the house that he anticipated would spread from the basement to his second-floor bedroom, where he went after starting the fire. Alternatively, the appellate court said, a jury could reasonably infer that, at the very least, from an objective point of view, the property damage was a reasonably foreseeable consequence of the fire that the insureds' son started and that when he started the fire, he had enough presence of mind to understand that throwing fire on gasoline would make more fire.

Accordingly, the appellate court reversed the trial court's decision that the intentional acts exclusion did not preclude coverage for the fire damage to the insureds' home.

The case is *Auto Club Property-Casualty Ins. Co. v. Foreman*, No. 2016-CA-001949-MR (Ky. Ct. App. Aug. 10, 2018).