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Multiple Collisions Were One Accident, Fifth Circuit Decides

The U.S. Court of Appeals for the Fifth Circuit, reversing a district court's decision, has ruled that there was one accident for purposes of a commercial auto insurance policy where a Mack truck struck a toll plaza and two vehicles at the plaza without the truck driver hitting his brakes.

The Case

A Mack truck on North Beltway 8 in Houston hit a Dodge Ram and, three minutes later, struck a Ford F150. Two minutes after that, the truck approached a toll plaza and struck a Honda Accord that was waiting in line, pushing it forward more than 100 feet. The truck continued to travel through the automatic toll lane for approximately 65 feet before striking a Dodge Charger. While travelling through the lane, the truck struck the tollbooth, causing significant damage. The truck came to rest when it crashed into a retaining wall.

The truck driver did not apply the brakes from the time he struck the Accord until his truck crashed into the retaining wall.

All the resulting claims settled. The insurance carrier that had issued an excess insurance policy to the truck's owner, Global Waste Services, LLC, sued the insurer that had issued a commercial auto insurance policy to Global, seeking reimbursement for a portion of the payments it had made on behalf of Global and seeking to recover its defense costs. The excess insurer argued that the commercial auto insurer had incorrectly construed all the collisions beginning when the Mack truck struck the Accord to be a single accident, defined in the commercial auto policy to include "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" According to the excess carrier, each separate impact between the Mack truck and another vehicle or object beginning when it struck the Accord constituted a separate accident under the commercial auto insurance policy subject to separate liability limits.

The U.S. District Court for the Southern District of Texas entered judgment in favor of the excess carrier, and the dispute reached the Fifth Circuit.

The Fifth Circuit's Decision

The Fifth Circuit reversed.

In its decision, the circuit court explained that there was a single occurrence under the commercial auto policy if there was "one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."

However, the circuit court added, if the "chain of proximate causation" was broken by a pause in the negligent conduct or by some intervening cause, then there were multiple occurrences, even if

the insured's negligent conduct that caused each of the injuries was the same kind of negligent conduct.

Applying these principles, the Fifth Circuit found that the "chain of causation" remained unbroken in this case. The ongoing negligence of the runaway truck, the circuit court stated, was the single "proximate, uninterrupted, and continuing cause" of all the collisions at issue.

The Fifth Circuit observed that the parties agreed that the truck driver did not apply the brakes at any time from when his truck first struck the Accord until all the vehicles came to rest. The Fifth Circuit then noted that the policy language provided that all injuries – no matter the number of vehicles involved or the number of claims made – arising from continuous or repeated exposure to substantially the same conditions were a single accident. According to the circuit court, the "broad language of the policy must be given effect."

It concluded that, without any indication that the truck driver had regained control of the truck or that his negligence had otherwise been interrupted between collisions, all of the collisions at issue resulted from the same continuous condition: the unbroken negligence of the truck driver. Therefore, there was one "accident" under the policy.

The case is *Evanston Ins. Co. v. Mid-Continent Casualty Co.*, No. 17-20812 (5th Cir. Nov. 19, 2018).

Multi-Vehicle Collisions Were Two Accidents, Oklahoma District Court Rules

The U.S. District Court for the Western District of Oklahoma has ruled that a pileup involving multiple vehicles involved two accidents for purposes of an insurance policy issued to the owner of a truck.

The Case

While driving through fog on the westbound lanes of Interstate 40 near the border of Oklahoma and Texas, a truck owned by Western Express, Inc., hit a BMW. The two vehicles pulled off into the center median, although the truck may not have been completely cleared from the inside westbound lane. Another vehicle then hit the truck, which left it positioned across at least the inside westbound lane. Other impacts followed over the course of minutes, not all of which involved the truck.

The commercial auto insurer for Western Express asked the Oklahoma district court to rule that the initial impact between the Western Express truck and the BMW as well as all of the other impacts constituted a single accident under its insurance policy, which defined "accident" to include "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'"

In response, individuals injured in the pileup contended that the term accident in the Western Express insurance policy was ambiguous and that there were separate accidents when viewed from the standpoint of anyone injured or killed.

The District Court's Decision

The district court ruled that there were two accidents for purposes of the Western Express

insurance policy.

In its decision, the district court reasoned that the initial impact between the truck and the BMW was the first accident. The truck's impact with the BMW was "independent of the subsequent impacts," the district court found.

It then ruled that the subsequent impacts, which had been "caused or affected by one another and were the result of each driver being subjected to the same general condition, the obstructed westbound highway," were a second accident for purposes of the Western Express insurance policy.

The district court said that its conclusions would be the same even if it considered "control" and "timing" as the dispositive factors.

The district court pointed out that, according to the parties, the Western Express driver was in control at the time he struck the BMW, and at best maintained control until he was hit from behind. After that impact, the district court observed, the truck driver "never gained control of the situation." Therefore, the subsequent impacts amounted to a second accident.

The outcome was the same, according to the district court, if it considered timing. It cited testimony that the first 911 call regarding the incident was received at 8:27:52 a.m. on March 31, 2012, indicating an accident between a truck and a car, and that the impacts between the vehicles had ended by 8:30:18 a.m. There was "no significant passage of time" between the truck being hit from behind and the last vehicle being struck, so those incidents together amounted to a second accident, the district court concluded.

The case is *National Casualty Co. v. Western Express*, No. CIV-15-1222-R (W.D. Okla. Nov. 19, 2018).

Claims Stemming from Collapse of Two Bridges Were Related, Fourth Circuit Affirms

The U.S. Court of Appeals for the Fourth Circuit, affirming a district court's decision, has ruled that claims arising from the collapse of two pedestrian bridges were "related" within the meaning of a professional liability insurance policy, and therefore, were subject to the policy's $3 million single claim limit.

The Case

On November 13, 2014, a pedestrian bridge on the campus of Wake Technical Community College collapsed. Less than a day later, a second bridge collapsed.

The professional liability insurer for the company that furnished structural engineering designs for the bridges indemnified the company up to the $3 million single claim limit. The insured company contended, however, that the insurer also had to indemnify it for claims arising out of the collapse of the second bridge up to the $5 million policy term limit.

The insurer argued that the claims from the collapse of the two bridges were "related," and therefore, that they were subject to the $3 million single claim limit.

The U.S. District Court for the Eastern District of North Carolina granted summary judgment in favor of the insurer, holding that it had no further obligation to defend or indemnify the insured.

The insured appealed to the Fourth Circuit.

The Fourth Circuit's Decision

The Fourth circuit affirmed, ruling that the claims arising out of the collapse of the second bridge were related to the claims arising out of the collapse of the first bridge "under the plain and unambiguous language of the policy."

In its decision, the circuit court explained that claims were related under the language of the policy if they arose out of wrongful acts that were "logically or casually connected by *any* common fact." The circuit court added that the alleged wrongful acts out of which the claims arose were logically connected by multiple common facts:

- The insured executed a single contract for the design of both bridges;
- The same project manager and project engineer worked on the design of both bridges; and
- The same alleged design flaw caused the collapse of both bridges.

Moreover, the circuit court continued, a miscommunication between the project manager and the project engineer responsible for both bridges allegedly led to the insured's failure to detect and correct the common design flaw.

Because the claims stemming from the collapse of the second bridge were related to the claims stemming from the collapse of the first bridge, and because the insurer had already indemnified the insured up to the $3 million limit on related claims, the district court had correctly decided that the insurer had no further obligation to defend or indemnify the insured against the claims stemming from the collapse of the second bridge, the court of appeals concluded.

The case is *Stewart Engineering, Inc. v. Continental Casualty Co.*, No. 18-1386 (4th Cir. Nov. 7, 2018).

Insured's "Reasonable Expectations" Did Not Trump Unambiguous Policy Language, Third Circuit Says

The U.S. Court of Appeals for the Third Circuit, reversing a district court's decision, has ruled that an insured could "not complain that its reasonable expectations" had been frustrated where policy language was "unambiguous."

The Case

A principal in a company that provided stone masonry work for residential properties contended that he asked an insurance agency to obtain an insurance policy for his company that provided "maximum," "soup to nuts" coverage. The insurance agency obtained a liability policy for the company.

The insured subsequently was sued in state court for breach of warranty, negligence, and related statutory claims by two customers.

While defending the insured in the customers' state court action, the insurer asked the U.S. District Court for the Eastern District of Pennsylvania to declare that it did not have a duty under its policy to defend and indemnify the insured for its defective workmanship.

The insurer moved for summary judgment, but the district court denied the motion. At the ensuing bench trial, the district court found that the insurance policy unambiguously excluded faulty workmanship coverage. The district court also found, however, that the insured's principal believed that the policy provided coverage "if something was done inadvertently" or if the business "did something and someone made a claim against his business that he might be liable for." The district court also found that the insurer had never provided the principal with a copy of the policy to contradict his beliefs.

Ultimately, the district court found that the insured had a reasonable expectation of workmanship coverage, and accordingly, it entered judgment in its favor.

The insurer appealed to the Third Circuit.

The Third Circuit's Decision

The Third Circuit reversed.

In its decision, the circuit court explained that after the district court found that the insurance policy unambiguously excluded coverage for the faulty workmanship claims the customers made in the state court action against the insured, that "should have been the end of" the district court's inquiry.

Because the policy language was unambiguous, the insured could "not complain that its reasonable expectations" had been frustrated, the Third Circuit added.

The circuit court also pointed out that the insured's principal did not apply for the specific type of insurance coverage he claimed that he expected when he asked "in general terms" for "soup to nuts" coverage. According to the Third Circuit, the insurer could regard the application for insurance "as seeking a general liability insurance policy" – which "does not provide a guarantee of the policyholder's workmanship."

The circuit court concluded that if it were to allow an insured to override the plain language of a policy limitation anytime he or she was dissatisfied with the limitation "by simply invoking the reasonable expectations doctrine," the language of insurance policies "would cease to have meaning, and as a consequence, insurers would be unable to project risk."

The case is *Frederick Mutual Ins. Co. v. Hall*, No. 17-3477 (3d Cir. Nov. 8, 2018).

Pollutant Exclusion Barred Coverage of Suit Alleging Carbon Monoxide Poisoning, Pennsylvania Court Holds

The U.S. District Court for the Eastern District of Pennsylvania has ruled that a pollutant exclusion in a landlord's insurance policy precluded coverage of a lawsuit against the landlord filed by tenants alleging that they had suffered carbon monoxide poisoning at their residence.

The Case

Tenants sued their landlord, alleging that they suffered carbon monoxide poisoning as a result of a problem with the home's heating system.

The landlord sought a defense and indemnification from its insurer.

Thereafter, the insurer asked the district court to declare that it had no duty to defend or indemnify the landlord based on the policy's pollutant exclusion.

The landlord answered, asserting that although the facts pled in the tenants' lawsuit fell under the exclusion, it contested the facts and that "some kind of a fire would make more logical sense." The tenants also answered, asserting that the exclusion did not apply because the carbon monoxide had been released by an accidental fire, which was an exception to the exclusion. In particular, they contended that because they did not know that the heating system had been converted to gas, they were unaware they were using gas when they turned on the furnace.

The insurer moved for summary judgment, arguing that the exclusion barred coverage, that there were no allegations in the tenants' lawsuit of any fire, and that, regardless, there was no "accidental fire" as that term was used in the policy.

The District Court's Decision

The district court granted the insurer's motion for summary judgment.

In its decision, the district court first ruled that the exclusion was "clear and unambiguous" and barred coverage. The district court reasoned that the exclusion applied because the tenants allegedly suffered bodily injury (carbon monoxide poisoning) at the insured property; the exclusion provided that the insurer would not pay for bodily injury "[a]rising out of the actual, alleged or threatened discharge, dispersal, release, escape of, or the ingestion, inhalation or absorption of pollutants"; and carbon monoxide was a pollutant.

Next, the district court ruled that the exception for irritants and contaminants released by an "accidental fire" did not apply because the only fire at the tenants' home was not accidental. The tenants had knowingly and intentionally started the fire by turning on the furnace. There was no suggestion that any flames from, or any part of, the controlled fire extended outside the sealed unit where it was designed to burn. The fire, the district court ruled, had not occurred by chance or unexpectedly, and therefore, had not been "accidental."

The district court decided that the term "accidental fire" was not ambiguous, but said that even assuming it was ambiguous, the reasonable expectations doctrine barred coverage. The tenants argued that the exclusion did not apply because, when they turned on the furnace, they were unaware that the heating system had been converted to gas. According to the tenants, they started an accidental fire. The district court said that based on this logic, the tenants essentially were conceding that if the heating system had not been improperly converted and the oil burning furnace emitted a dangerous amount of carbon monoxide, the pollutant exclusion would bar coverage for any resulting loss. The district court found that it was "unlikely that the parties" to the policy would have intended "such contradictory results."

Therefore, the district court ruled, the tenants failed to show either that the exclusion did not apply or that the accidental fire exception to the definition of pollutant did apply. Consequently, it

concluded, the pollutant exclusion barred coverage and the insurer had no duty to defend or indemnify the landlord in the tenants' action.

The case is *Foremost Ins. Co. v. Nosam, LLC*, No. 5:17-cv-02843 (E.D. Pa. Nov. 5, 2018).

Another Connecticut Court Rejects Coverage in Concrete Cracking Case

The U.S. District Court for the District of Connecticut has dismissed a breach of contract claim against an insurance company that denied coverage to homeowners for damage to the basement walls of their home.

The Case

The owners of a home in South Windsor, Connecticut, asserted that a professional engineer who inspected the basement walls of their home in 2017 discovered that it had been constructed with defective concrete and that the basement walls had "pattern cracking" caused by a chemical compound. The owners alleged that the concrete basement walls of the home were in a state of collapse, and they requested coverage from their homeowners' insurance carrier for the damage caused by the condition of the basement walls.

Their insurer denied coverage and the homeowners sued. The insurer moved to dismiss the homeowners' breach of contract claim.

The District Court's Decision

The district court granted the insurer's motion.

In its decision, the district court explained that the policy's collapse provisions defined a collapse as "an abrupt falling down or caving in of a building" and that a building "in danger of falling down or caving in" or still "standing" but showing "evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion" was not in a state of collapse.

Accordingly, the district court ruled, it would be unreasonable to construe the policy language as ambiguous relevant to coverage of the insureds' home, which was still standing and which they still occupied. Therefore, the district court granted the insurer's motion to dismiss the insureds' breach of contract cause of action.

The case is *Houlihan v. Safeco Ins. Co. of America*, No. 3:18cv184 (WWE) (D. Conn. Nov. 9, 2018).

Connecticut Court Rejects "Chemical Reaction" Coverage in Concrete Cracking Case

The U.S. District Court for the District of Connecticut has dismissed a lawsuit filed by homeowners against their insurance company seeking damages for its failure to provide coverage for damage to the basement walls of their home caused by a "chemical reaction."

The Case

The owners of a home in Union, Connecticut, asserted that a professional engineer who inspected the basement walls of their home in 2016 "indicated that there was a chemical reaction in the

concrete and that the concrete would have to be replaced." The owners made a claim for coverage under their homeowners' insurance policy.

Their insurer denied coverage, and the homeowners sued. They claimed that they were entitled to coverage under the collapse provision of their insurance policy. They also asserted that the chemical reaction substantially impaired "the structural integrity" of their home and that losses due to chemical reaction were not excluded from coverage.

The insurer moved to dismiss.

The District Court's Decision

The district court granted the insurer's motion.

In its decision, the district court first ruled that the homeowners were not entitled to coverage under the collapse provision of their insurance policy. The district court pointed out that the policy defined collapse as the "abrupt falling down or caving in" of a structure "with the result that it cannot be occupied for its intended purpose." It further stated that a structure was not in a state of collapse if it was still standing, even if it was "in danger of falling down or caving in," or showed "signs of . . . cracking." Moreover, the policy required a collapse to be "sudden and accidental."

The district court found that the policy language was "unambiguous" and that the homeowners had not alleged an "abrupt" or "sudden" collapse. According to the district court, they alleged only a "gradual deterioration" rather than a "sudden" or "abrupt" collapse as required by the policy.

Next, the district court rejected the homeowners' contention that losses due to "chemical reaction" were not excluded from coverage under their policy, and therefore, that replacing the concrete to prevent the chemical reaction from further damaging the structure was covered.

The district court reasoned that although loss from "chemical reaction" was not specifically listed among the policy's exclusions, many of the exclusions were "broad enough to include chemical reactions."

For example, the district court said, the exclusions for "wear and tear," "deterioration," "inherent vice," "latent defect," "rust," and "cracking" all were terms that may encompass the "chemical reaction" described in the homeowners' complaint.

The district court also pointed out that the only observed manifestation of the chemical reaction that the homeowners identified in their complaint was "cracking in the basement walls." Loss from cracking, however, was excluded under the policy's collapse provisions, the district court concluded.

The case is *Cockill v. Nationwide Property & Casualty Ins. Co.*, No. 3:18cv254 (MPS) (D. Conn. Nov. 27, 2018).

Insured's Failure to Show It "Owned" Funds Transferred After Impostor Sent Email Doomed Its Bid for Insurance Coverage

The U.S. District Court for the District of New Jersey has ruled that a crime insurance policy did not cover a loss allegedly suffered by its insured after an impostor sent an email directing the insured's customer to make wire payments to the impostor's bank accounts.

The Case

According to Posco Daewoo America Corp., in early 2016, an impostor posing as an employee of its accounts receivable department sent emails to an employee of Allnex USA, Inc., requesting wire payments to four separate bank accounts to satisfy outstanding receivables owed by Allnex to Daewoo.

Allnex, seemingly without confirming the authenticity of the impostor's email or of the four bank accounts, wired three separate payments to the accounts, totaling $630,058.

After the fraud was discovered, Allnex recovered $262,444 of the $630,058. The impostor apparently transferred the rest of the money to accounts in Shanghai, China.

Daewoo contended that the insurer from which it had purchased a crime insurance policy should indemnify it for the losses caused by the impostor. It alleged that there was "no legitimate question that 'computer fraud,' as defined by the [p]olicy, set into operation a chain of causation that resulted in a loss to Daewoo." It asserted that the impostor "used a computer to cause the fraudulent transfer of hundreds of thousands of dollars belonging to Daewoo to other parties."

The insurer denied coverage and Daewoo sued.

The district court granted the insurer's motion to dismiss, concluding that the policy's "Ownership of Property; Interests Covered" provision was dispositive and that Daewoo failed to plausibly plead that it owned the wired payments.

Daewoo filed an amended complaint. The insurer again moved to dismiss, arguing that Daewoo still did not satisfy the policy's ownership requirement.

The District Court's Decision

The district court again granted the insurer's motion to dismiss, this time with prejudice.

In its decision, the district court rejected Daewoo's contention that it owned the stolen funds. Daewoo's argument was based on Allnex's position that it had no further obligation to Daewoo because Daewoo owned the stolen funds. According to the district court, Allnex's characterization of which party owned the funds had "no impact" on whether the insurance policy actually covered the alleged loss. Allnex was "not a party to the insurance contract" between Daewoo and the insurer, the district court noted, adding that Allnex had every reason to advocate that the losses in the case were covered by Daewoo's insurance policy.

The district court also was not persuaded by Daewoo's contention that it owned an account receivable, which was "tangible property" of Daewoo within the meaning of the policy because it was considered a tangible asset for accounting purposes. The dispute, the district court observed, concerned insurance coverage under the policy and was "not an accounting matter."

The district court also observed that even if it were to conclude that Daewoo's account receivable was tangible property, the policy still would not cover the alleged loss because Daewoo did not allege that its account receivable had been stolen or improperly taken.

Finally, the district court rejected Daewoo's argument that once Allnex placed the funds into the funds transfer system, Daewoo "had the right and ability to impose a constructive trust over the funds," which supported its claim to ownership over the funds. The district court concluded that a constructive trust was an equitable remedy that courts might compel following adjudication, but that the remedy did "not mean that Daewoo owned the funds in the first instance."

The case is *Posco Daewoo America Corp. v. Allnex USA, Inc.*, No. 17-483 (D.N.J. Nov. 19, 2018).