RIVKIN RADLER
ATTORNEYS AT LAW

May 2019 | Insurance Update | WWW.RIVKINRADLER.COM

South Dakota Supreme Court: No "Occurrence" Where Insured Sold Land for Hog Confinement Facility

The Supreme Court of South Dakota has ruled that an insurer had no duty to defend an insured against a claim by nearby property owners who alleged that the insured sold his property to a company he knew would use it to build a hog confinement facility.

The Case

When Delray Geidel sold a portion of real property he owned in South Dakota to Cedar Creek Feeders, LLC, he knew that Cedar Creek would build a hog confinement facility within one-quarter of a mile of property owned by Herman and Jeanette Fink and other property owned by Karl and Alene Fink (collectively, the "Finks").

The Finks claimed that once operations began at the facility, they experienced a "very noticeable and disagreeable" hog smell upon their property. More specifically, they alleged that, "[a]s the pigs [grew] larger, the smell emanating from the facility [became] even more disagreeable, offensive, and nauseating, as the odors that emanate[d] from there [were], at times, intolerable to plaintiffs and cause[d] them a great deal of discomfort." The Finks sued Geidel, asserting claims for nuisance, trespass, and negligence.

Geidel sought a defense to the Finks' lawsuit under his farm liability insurance policy. The insurer declined to defend. The insurer argued that the Finks' complaint did not allege an occurrence, the placement of the facility was not an accident, and Geidel had been aware that the Finks objected to the location and operation of the hog confinement facility before it was constructed. Geidel retained his own counsel and a jury returned a verdict in his favor on all claims. Thereafter, Geidel sued his insurer, alleging breach of contract.

The trial court granted summary judgment in favor of the insurer, and Geidel appealed to the Supreme Court of South Dakota. He argued that there was coverage under his insurance policy because he did not intend the Finks to be injured by the hog confinement facility. He also asserted that he did not expect the Finks' claimed injuries because he "could not and did not expect that his neighbors would sue him for use of property he sold to Cedar Creek" and he "could not expect to be dragged into the lawsuit by the Finks, much less expect to be blamed for injuries resulting from the hog barn in which he does not own, run, or work."

The South Dakota Supreme Court's Decision

The court affirmed.

In its decision, the court observed that, to invoke the insurer's duty to defend, the Finks' complaint had to allege an arguably qualifying "occurrence."

The court found that the Finks' complaint did not allege an occurrence. The court noted that although Geidel may not have expected to be sued by the Finks because of Cedar Creek's operation of the hog confinement facility, the allegations and record established that Geidel knew his neighbors would see, hear, and smell the facility on the property sold by Geidel. Moreover, the court continued, even if Geidel did not expect the Finks to object to the hog confinement facility because they had previously raised hogs and two of the Finks lived in Minnesota, away from their South Dakota property, the Finks' complaint alleged that they had informed Geidel and Cedar Creek of their concerns before selling the property.

The court also held that the Finks' negligence claim did not allege an "occurrence" under the insurance policy. The court reasoned that although the Finks' complaint asserted that Geidel owed the Finks a duty to construct the facility in a location that would not disrupt or cause harm to the Finks, Geidel had not constructed the facility. The court was not persuaded by the argument that Geidel had acted negligently because he "had ample alternative locations upon which to locate a commercial hog confinement building, which would have resulted in no harm to [the Finks] or other third persons."

The court concluded that Geidel's sale of real property to Cedar Creek was not an "occurrence" because under no set of facts alleged in the complaint would the mere selling of property to an allegedly objectionable purchaser invoke coverage.

The case is *Geidel v. De Smet Farm Mutual Ins. Co.*, No. 28627 (S.D. April 10, 2019).

11th Circuit: No "Accident" Where Faxes Intentionally Sent Under Mistaken Belief Recipients Had Consented

The U.S. Court of Appeals for the Eleventh Circuit has ruled that an "accident" within the meaning of commercial general liability insurance policies did not occur when an insured intentionally sent faxes that caused recipients' fax machines to suffer property damage (such as depletion of the machines' ink and paper) even where the insured mistakenly thought that the recipients had consented to receive the faxes.

The Case

Between September 18, 2005, and November 15, 2008, MFG.com sent approximately 494,212 fax advertisements to people included on lists it purchased, believing that it was complying with all applicable laws.

Thereafter, G.M. Sign, Inc., brought a putative class action against MFG alleging, among other things, violations of the federal Telephone Consumer Protection Act ("TCPA"). G.M. Sign asserted that, on several occasions, MFG sent fax advertisements to G.M. Sign and the other members of the putative class without the recipients' permission, in violation of the TCPA.

MFG notified its commercial general liability insurer of the lawsuit, and demanded defense and indemnification. The insurer disclaimed and MFG and G.M. Sign eventually settled, agreeing that MFG was liable to the class for $22,536,500. As part of the settlement agreement, MFG agreed to pay $460,000 of this amount. The parties further stipulated that the remaining amount MFG owed the class could only be satisfied from MFG's insurance policies.

G.M. Sign, on behalf of itself and the other class members, went to court, seeking a declaratory judgment that MFG's insurance policies covered the settled claims.

The U.S. District Court for the Northern District of Georgia granted summary judgment in favor of MFG's insurer.

G.M. Sign appealed to the Eleventh Circuit, arguing that MFG's insurer had to indemnify MFG for its TCPA liability because the term "accident" under Georgia law covered injuries resulting from negligence. G.M. Sign contended that MFG sent the faxes negligently because it never intended to send any faxes without the recipients' consent. Thus, according to G.M. Sign, MFG had no intent to injure the recipients.

MFG's insurer responded that no accident had occurred when MFG sent the faxes because, by sending the faxes, MFG had intended to cause the relevant property damage: the use of the recipients' fax machines and the depletion of their ink and paper. According to the insurer, MFG's mistaken belief that the recipients had agreed to receive the faxes was immaterial.

The Eleventh Circuit's Decision

The circuit court affirmed, reasoning that, under applicable Georgia law, an "accident" did not include damage to persons or property when that damage was intentionally inflicted, even where that intentional conduct was caused by erroneous information.

In its decision, the circuit court found that MFG intended to send the faxes and thus intended to cause the resulting property damage. The Eleventh Circuit noted that the fact that MFG mistakenly thought the recipients had consented to receive the faxes was "insufficient" to render the property damage an accident under Georgia law.

Therefore, the circuit court concluded, the policies' property damage provisions provided no coverage for the TCPA liability arising from MFG's conduct, and the district court had correctly granted summary judgment in favor of MFG's insurance carrier.

The case is *G.M. Sign, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 17-14247 (11th Cir. April 11, 2019).

Missouri District Court: No "Occurrence" Where Suit Against Insured Alleged Breach of Contract

The U.S. District Court for the Eastern District of Missouri has ruled that claims against an insured stemming from its alleged breach of contract did not involve an "occurrence" and, therefore, its insurer did not have a duty to defend the insured against the claims.

The Case

After Lehenbauer Farms, Inc., asserted claims for breach of contract, negligence, and unjust enrichment against Mid-American Grain Distributors, LLC, in a dispute over the construction of a grain storage and distribution facility, the insurance company that had issued a commercial general liability insurance policy to Mid-American asked the Missouri district court to declare that it had no duty to defend Mid-American. The insurer contended that none of the claims alleged an "occurrence" under its insurance policy and applicable law.

Mid-American asserted, however, that the design and construction defects allegedly caused by its services were covered as an "occurrence."

The insurer moved for summary judgment.

The District Court's Decision

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

In its decision, the court held that the purported cause of Lehenbauer's alleged loss was Mid-American's negligent designing and building of the grain handling system. The court noted that Mid-American's performance was within its control and management, and that its alleged failure to perform – that is, the alleged design and construction defects – did not constitute an undesigned or unforeseen event.

Accordingly, the court found, there was no "occurrence" because Mid-American had control over the property during its construction of the grain facility, including the ability to resolve any construction or design deficiencies.

The court concluded that because the ability to resolve any deficiencies was within Mid-American's control, Mid-American's alleged failure to address them was not an "accident," and because there was no "accident," there was no "occurrence" under its insurance policy.

The case is *American Family Mutual Ins. Co. S.I. v. Mid-American Grain Distributors, LLC*, No. 2:18-cv-00051-HEA (E.D. Mo. April 17, 2019).

Illinois Appellate Court: "Occurrence" Definition Requires That Claims Arising Out of Substantially the Same Exposures Be Bundled by Location

In an asbestos exposure case, an Illinois Appellate Court has ruled that the "occurrence" definition of the policies required the bundling of claims that arise from the same exposures, such that each location constituted a separate occurrence.

The Case

Between the 1950s and mid-1980s, Ammco Tools, Inc. manufactured automobile brake equipment, including brake shoe grinders, brake lathes, and brake assembly washers. The

equipment didn't contain asbestos, but when used with brake shoes that did contain asbestos, the equipment was alleged to have caused the release of asbestos.

Ammco's successor-in-interest, Hennessy Industries, Inc., was named in thousands of lawsuits. The underlying lawsuits alleged that the claimants suffered personal injuries from the asbestos exposure caused by their use of Ammco's products.

Ammco had various umbrella liability policies in effect during the relevant time period. The "occurrence" definition in some of the policies stated that exposures to the same general conditions "existing at or emanating from each premises location shall be deemed one occurrence."

The insurers filed a declaratory judgment action to resolve the coverage issues.

The trial court ruled that the underlying claims constituted a single occurrence under the policies. Hennesy appealed. Hennesy argued that the trial court should have concluded that the claims must be grouped by location, such that all claims arising at a single location, *i.e.*, "emanating from one premises location," constituted a separate occurrence.

The Appellate Court's Decision

The appellate court reversed. The court held that policies required the bundling of claims that arise from the same exposures, such that each location would be a separate occurrence.

The court noted that the policies provided that where multiple exposures to substantially the same conditions occur at the same premises location, those multiple exposures should be considered a single occurrence. The court reasoned that "[i]f all exposures to the same conditions at one location are grouped into a single occurrence, it necessarily follows that exposures to the same conditions at a different location should be grouped into a separate, single occurrence, such that where exposures occur at multiple locations, multiple occurrences will result."

The court rejected the insurers' argument that it should rely on the "cause test" to determine number of occurrences. The court reasoned that the "cause test" was adopted by Illinois Courts only when the policy did not otherwise clarify the issue. In this case, the court reasoned, there was no need to employ the cause test because the policies required the bundling of claims that arise from substantially the same conditions at the same location.

The court also disagreed with the insurers that its ruling resulted in the application of the "effects test." The court noted that, if it were applying the effect tests, the claims would not have been grouped by location; instead, under the "effects test," each claim would have been a separate occurrence.

The court also disagreed that its rulings automatically equated the number of occurrences with the number of locations at which injuries or claims took place. The court observed that the number of occurrences under the policies was based on the number of premises locations only when multiple claims arise from substantially the same conditions existing at a single location. The court noted

that, if multiple claims arise at a single location but are based on exposure to different conditions, they would not constitute a single occurrence.

The case is *Cont'l Cas. Co. v. Hennessy Indus.,* NO-1-18-0183 (Ill. App. Ct., 1st Dist., 2nd Div. April 23, 2019).

Ohio Appellate Court: Insurer May Withdraw Defense in Asbestos Lawsuits Where Extrinsic Evidence Showed Injury Occurred Outside Policy Periods

An appellate court in Ohio, affirming a trial court's decision, has ruled that an insurance company could withdraw its defense of its insured in asbestos lawsuits after it discovered "indisputable, reliable evidence" that the date of the asbestos plaintiffs' injuries clearly occurred outside of its policy periods.

The Case

Hyster-Yale Group, Inc., and its parent company, Hyster-Yale Materials Handling Corporation, manufactured forklifts with component parts allegedly containing asbestos. Hyster-Yale was sued in various asbestos-injury actions.

Hyster-Yale sought defense and indemnity from an insurer under general liability insurance policies with policy periods from February 1, 1957 through February 1, 1969.

In 2005, Hyster-Yale and the insurer entered into a claims handling agreement under which the insurer agreed to pay a portion of the cost to defend against each Hyster-Yale-related asbestos claim so long as the complaint potentially alleged exposure to asbestos before or during its policy periods.

The insurer subsequently notified Hyster-Yale that it was withdrawing from the defense of certain claims. The insurer maintained that it had learned through discovery that these claimants' asbestos exposure with regard to Hyster-Yale products had occurred after the expiration of its last policy.

The insurer then went to court, seeking a declaration that it had no duty to defend Hyster-Yale in asbestos lawsuits when there was "compelling evidence" that the plaintiff in such a lawsuit had not been exposed to Hyster-Yale's products during the period when the insurer's policies were in effect.

In response, Hyster-Yale maintained that the insurer's obligation to provide a defense applied even if the allegations in the asbestos lawsuits were "groundless, false, or fraudulent."

An Ohio trial court granted the insurer's motion for partial summary judgment on the duty to defend. Hyster-Yale appealed, asserting that the trial court had erred in permitting the insurer to terminate its duty to defend based on information extrinsic to the asbestos complaints developed during the course of the underlying asbestos lawsuits. Rather, Hyster-Yale contended, the duty to

defend had to be determined solely with reference to the policy language and the allegations of the injury set forth in the asbestos plaintiffs' complaints.

For its part, the insurer argued that the trial court had correctly determined that an insurer's duty to defend may be terminated, following a declaratory judgment action, where extrinsic facts established that a claim was not within policy coverage.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court ruled that the insurer – which had agreed to defend Hyster-Yale against even groundless, false, or fraudulent claims, and which had accepted the defense of Hyster-Yale on the basis of the allegations in the asbestos complaints – could use discovery "to attempt to clarify" the nature of the claims against Hyster-Yale under the laws of Ohio (the present location of Hyster-Yale's headquarters) as well as under the laws of Oregon (the location of Hyster-Yale's headquarters during the policy periods and where the insurance contracts had been negotiated and obtained).

Therefore, the appellate court continued, it was "proper to look at extrinsic evidence" after the duty to defend attached to determine whether that duty may be terminated when "indisputable, reliable evidence" established that insurance coverage had not been contractually triggered under the policy's effective time period.

Accordingly, the appellate court concluded, the trial court had properly determined that the insurer could withdraw its defense of Hyster-Yale in asbestos lawsuits in cases in which there was indisputable, reliable evidence that the date of the alleged asbestos injury "clearly occurred" outside of the effective policy period.

The case is *Fireman's Fund Ins. Co. v. Hyster-Yale Group, Inc.*, No. 106937 (Ohio Ct. App. April 25, 2019).

2d Circuit: No "Collapse" Coverage for Cracked Connecticut Walls That Still Stand

The U.S. Court of Appeals for the Second Circuit, affirming a decision by the U.S. District Court for the District of Connecticut, has ruled that the "collapse" provision in a homeowner's insurance policy did not afford coverage for basement walls that exhibited significant cracking but remained standing.

The Case

In October 2015, the owners of a home in Coventry, Connecticut, noticed several horizontal and vertical cracks in their basement walls. They sought coverage for the damage under the "collapse" provision of their homeowner's insurance company. The policy also included a provision that collapse did "not include settling, cracking, shrinking, bulging or expansion."

The insurer denied coverage, and the homeowners sued.

The district court dismissed the homeowners' complaint, and they appealed to the Second Circuit.

The Second Circuit's Decision

The circuit court, applying Connecticut law, affirmed.

In its decision, the Second Circuit held that the policy's terms were "clear and unambiguous" that a covered collapse had to be "entire," sudden," and "accidental."

It then ruled that the gradual deterioration of the homeowners' still-standing basement walls did not constitute a covered collapse under their insurance policy. In the circuit court's opinion, the words "sudden and accidental" in the insurance policy's collapse provision was sufficient to bar coverage under the policy for the damage sustained to the homeowners' basement walls.

The Second Circuit held that even if the damage to the homeowners' walls could be said to have occurred suddenly and accidentally, their claim was still barred because the damage could not be deemed an "*entire* collapse." The circuit court concluded that whatever the term "entire collapse" encompassed, it entailed more than mere "cracking," since cracking was expressly excluded under the policy's provision that collapse did "not include settling, cracking, shrinking, bulging or expansion."

The case is *Valls v. Allstate Ins. Co.*, No. 17-3495-cv (2d Cir. April 2, 2019).

8th Circuit: Pollution Exclusion Applies to Defective Shipments of Recycled Fat

The U.S. Court of Appeals for the Eighth Circuit has affirmed a district court's decision granting judgment on the pleadings in favor of an insurer, concluding that the insurance policy's pollution exclusion precluded coverage of a claim seeking damages allegedly caused by use of a contaminated food product.

The Case

New Fashion Pork, LLP, sued Restaurant Recycling, LLC, alleging that it had delivered recycled fat contaminated with a chemical agent known as lasalocid and an industrial waste product known as lascadoil and that New Fashion Pork had used the fat product as an ingredient in its swine feed. New Fashion Pork sought reimbursement of its payment for the fat and damages for the harm to its swine caused by the contaminated feed.

Restaurant Recycling, in turn, sued its commercial general liability insurer, seeking a declaratory judgment that the insurer had a duty to defend and indemnify Restaurant Recycling.

The insurer moved for judgment on the pleadings, citing a pollution exclusion in its policy that limited coverage in the case of property damage arising from dispersal of pollutants.

The U.S. District Court for the District of Minnesota granted the insurer's motion, and Restaurant Recycling appealed to the Eighth Circuit.

The Eighth Circuit's Decision

The circuit court, applying Minnesota law, affirmed.

In its decision, the Eighth Circuit held that New Fashion Pork alleged that both lascadoil and lasalocid were "not generally recognized as safe," that lascadoil contained lasalocid, that the fat product delivered by Restaurant Recycling was contaminated with both lasalocid and lascadoil, and that consumption of the contaminated fat caused damage to New Fashion Pork's swine.

The Eighth Circuit noted that the insurance policy excluded property damage that "would not have occurred in whole or part but for" dispersal of a pollutant. The court then concluded that the allegations that lascadoil caused some measure of damage sufficed to place New Fashion Pork's claims within the pollution exclusion if the damage was caused by "dispersal" of the pollutant.

The circuit court concluded that New Fashion Pork's allegations that Restaurant Recycling collected waste cooking oil and processed that waste oil into fat products for use in animal feed, and that New Fashion Pork "blended" the contaminated fat into its feed and transported the feed to its swine facilities in Indiana and Illinois, qualified as "dispersing" the lascadoil, for they involved the breaking up and distributing of the lascadoil throughout the processed fat product and New Fashion Pork's swine feed.

The case is *Restaurant Recycling, LLC v. Employer Mutual Casualty Co.*, No. 17-2792 (8th Cir. April 29, 2019).

Nebraska Federal District Court: Pollution Exclusion Applies to Ammonia Exposure

The U.S. District Court for the District of Nebraska has granted an insurer's motion to dismiss a coverage case, concluding that the insurance policy's pollution exclusion precluded coverage of a claim seeking damages allegedly caused by release of a cloud of ammonia gas.

The Case

Topp's Mechanical, Inc. ("TMI") deconstructed an existing carbon-dioxide plant in Beatrice, Nebraska, and reassembled it in Boyceville, Wisconsin, for Air Products & Chemicals, Inc. Thereafter, an Air Products employee reportedly was standing near the reassembled plant when he was immersed in a hot cloud of ammonia gas that was released from the pressure valve of an anhydrous-ammonia tank at the plant.

TMI notified its commercial general liability insurer, which denied coverage based on its policy's pollution exclusion.

TMI sued the insurer, which moved to dismiss. It argued that the cloud of ammonia gas that allegedly enveloped the Air Products employee and caused his injuries was a "pollutant" within the meaning of its insurance policy.

The District Court's Decision

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

In its decision, the district court held that there was strong support for the insurer's position in recent decisions from the Nebraska Supreme Court that "broadly construed" pollution exclusions and "readily upheld the insurers' coverage denials as a matter of law because the plain and ordinary meaning of the policy language unambiguously excluded coverage."

The court then rejected TMI's contention that the insurer had to defend TMI against the employee's claims because some of his alleged injuries – such as injuries to his knees and shoulder following his descent from a ladder – were not the result of any "pollutant." The court reasoned that the language of the pollution exclusion was "unambiguous" and did not specifically limit excluded claims to those based solely on injuries directly caused by the physical exposure to a pollutant. The court concluded that the phrase "arising out of" in the exclusion did not require more than a "causal connection between the accident and injury."

The case is *Topp's Mechanical, Inc. v. Kinsale Ins. Co.*, No. 8:19CV20 (D. Neb. April 15, 2019).

©2019 Rivkin Radler LLP. All Rights Reserved.