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"Occupational Disease" Exclusion Is Not Limited to Insured's Employees, Connecticut Supreme Court Rules

The Supreme Court of Connecticut, resolving a question of first impression nationally, has ruled that the "occupational disease" exclusion in insurance policies issued to a company that mined and sold industrial talc allegedly containing asbestos applied not only to claims by the insured's employees but also to any individuals who contracted an occupational disease in the course of their work for other employers.

The Case

R.T. Vanderbilt Company, Inc., facing thousands of cases alleging injuries from exposure to industrial talc allegedly containing asbestos that Vanderbilt mined and sold, sued numerous insurance companies that issued primary and secondary comprehensive general liability insurance policies to Vanderbilt between 1948 and 2008.

In March 2017, as we previously discussed in Connecticut Appeals Court Broadly Interprets "Occupational Disease" Exclusion, a Connecticut appellate court ruled, among other things, that the occupational disease exclusion in two excess insurance policies applied not only to claims by the insured's employees but to any individuals who contracted occupational disease in the course of their work for other employers. One exclusion stated that, "[T]his policy shall not apply . . . to personal injury (fatal or nonfatal) by occupational disease," and the other stated that, "This policy does not apply to any liability arising out of: Occupational Disease."

The case reached the Connecticut Supreme Court, where Vanderbilt claimed that the appellate court had improperly failed to limit the application of the occupational disease exclusions to claims brought against Vanderbilt by its own employees. Vanderbilt contended that the appellate court's construction of the exclusions "dramatically reduce[s] general liability coverage for manufacturers, particularly in the context of claims of disease resulting from alleged exposure to asbestos and other industrial products."

The Connecticut Supreme Court's Decision

The court affirmed, concluding that the appellate court had properly interpreted the occupational disease exclusions to exclude occupational disease claims brought against Vanderbilt by both its employees and nonemployees.

In its decision, the court found nothing that limited the definition of occupational disease to the workers' compensation context and, therefore, to Vanderbilt's employees. The court also pointed out that the text of the exclusions did not contain language expressly limiting their application to

Vanderbilt's employees.

Although the occupational disease exclusions used the term "occupational disease" broadly and without qualification, the breadth of the exclusions did not render them any less clear, according to the court.

Finally, the court concluded, case law cited by the parties, none of which interpreted an occupational disease exclusion, supported the conclusion that an occupational disease may be compensable on a first-party basis by an affected employee's workers' compensation employer or on a third-party basis by another tortfeasor. Accordingly, the court found no reason to limit the exclusion to Vanderbilt's employees.

The case is *R.T. Vanderbilt Co. v. Hartford Accident and Indemnity Co.*, Nos. SC 20000, 20001, 20003 (Conn. Oct. 8, 2019).

Insurer Is Bound by Agent's Written Representations About Additional Insured Coverage, Washington Supreme Court Rules

The Supreme Court of Washington, departing from the customary rule about certificates of insurance, has decided that an insurance company is bound by its agent's written representations made in a certificate of insurance that a corporation is an additional insured under an insurance policy.

The Case

A contractor agreed to construct a cell phone tower on a rooftop in New York City for T-Mobile NE. The written agreement required the contractor to obtain an insurance policy, to provide T-Mobile NE "with certificates of insurance evidencing [that policy's] coverage," and to name T-Mobile NE as an additional insured under the policy.

The agent for the insurer that issued a policy to the contractor mistakenly issued a certificate of insurance to "T-Mobile USA Inc., its Subsidiaries and Affiliates" that stated that those entities were "included as an additional insured [under the policy] with respect to" certain areas of coverage. The agent signed the certificate as the insurer's "Authorized Representative." The certificate was issued on a standard form and included preprinted disclaimers that stated that the certificate "is issued as a matter of information only and confers no rights upon the certificate holder," "does not affirmatively or negatively amend, extend or alter the coverage afforded by the" insurance policy, and "does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder."

The owner of the New York City rooftop on which T-Mobile NE and the contractor had constructed the cell phone tower eventually sued the contractor and T-Mobile in federal district court in New York. The owner, however, sued T-Mobile USA, not T-Mobile NE.

T-Mobile USA tendered the building owner's claim to the insurer that had issued the policy to the contractor. The insurer rejected the tender.

T-Mobile USA, headquartered in Washington, sued the insurer.

The U.S. District Court for the Western District of Washington granted summary judgment in favor of the insurer, and T-Mobile USA appealed to the U.S. Court of Appeals for the Ninth Circuit.

The circuit court certified the following question to the Supreme Court of Washington:

> Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?

The Washington Supreme Court's Decision

The Supreme Court of Washington answered the certified question "yes," ruling that the insurer was "bound by the representations its agent made in the certificate of insurance."

The court rejected the insurer's argument that its agent's representations should not bind it because T-Mobile USA's alleged reliance on the agent's representations was unreasonable given that T-Mobile USA knew that it was not a party to a contract with the contractor and, therefore, that it was not an additional insured under the contractor's insurance policy. The court reasoned that the Ninth Circuit's ruling that the agent had acted with apparent authority necessarily decided that T-Mobile USA's belief that the agent was authorized to issue a certificate naming it as an additional insured was "objectively reasonable."

The court also decided that the certificate's "preprinted disclaimers" did not affect its conclusion. In the court's view, those disclaimers were ineffective because they were "general boilerplate" and "general in nature" whereas the additional insured statement had been specifically written into the certificate by the agent, specifically referred to "certain areas of policy coverage," and made a "discrete representation" that "T-Mobile USA Inc., its Subsidiaries[,] and Affiliates" were "included as an additional insured."

This specific written-in additional insured statement prevailed over the preprinted general disclaimers, the court said. Notwithstanding that the prevailing view of courts that have considered the issue is that certificates of insurance have no effect on coverage, the court concluded that an insurance company was bound when its agent made "an authoritative representation" even when that specific representation was transmitted via a certificate of insurance and was accompanied by general disclaimers.

The case is *T-Mobile USA, Inc. v. Selective Ins. Co.*, No. 96500-5 (Wash. Oct. 10, 2019).

Insured May Not Bring Bad Faith Claim Against Insurer's Adjuster, Washington Supreme Court Rule

The Supreme Court of Washington, in an underinsured motorist coverage case, has ruled that Washington law does not provide a basis for an insured's bad faith claims against a claims adjuster employed by an insurer.

The Case

While driving his truck, Moun Keodalah and an uninsured motorcyclist collided. The collision killed the motorcyclist and injured Keodalah.

The Seattle Police Department (SPD) investigated and determined that the motorcyclist had been traveling between 70 and 74 m.p.h. in a 30 m.p.h. zone. It reviewed Keodalah's cell phone records, which showed that he was not using his cell phone at the time of the collision.

Keodalah sued his insurer, seeking to recover underinsured motorist ("UIM") benefits. The insurer's designated claims adjuster asserted that Keodalah had run the stop sign and had been on his cell phone. She later admitted, however, that Keodalah had not run the stop sign and had not been on his cell phone.

The jury determined that the motorcyclist was 100 percent at fault and awarded Keodalah $108,868.20 for his injuries, lost wages, and medical expenses, and the trial court entered judgment against the insurer.

Keodalah then filed a second lawsuit against his insurer – and against the insurer's adjuster – alleging insurance bad faith.

The trial court dismissed Keodalah's bad faith claim against the adjuster.

The court of appeals reversed, holding that the statutory duty of good faith imposed by Washington law applied to individual insurance adjusters and that breach of that statutory duty could serve as a basis for Keodalah's bad faith claim against the adjuster. The Washington law on which the court of appeals relied provides that, "The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. . . ."

The dispute reached the Washington Supreme Court.

The Washington Supreme Court's Decision

The court reversed, finding that the statute did not create a private right of action against adjusters.

In its decision, the court first pointed out that the interest addressed in the statute was expressly stated to be the "public interest" and that the statute indicated that its purpose was to protect the "integrity of insurance." In the court's view, it could "not be said that the statute was enacted for the particular benefit of insureds."

The court next decided that the legislature did not intend to imply a cause of action based on violations of the statute, concluding that the statute might "properly be read as a broad statement of public policy supporting specific provisions of the insurance code, not as an additional and separate statutory cause of action."

Then, the court ruled that inferring a broad cause of action against "all persons" – subjecting even insureds to liability – "would not be consistent with the legislature's purpose in enacting the statute."

Accordingly, the court held that employee adjusters were not subject to personal liability for insurance bad faith.

The case is *Keodalah v. Allstate Ins. Co.*, No. 95867-0 (Wash. Oct. 3, 2019).

First-Party Bad Faith Claim Against Insurer Is Subject to 10-Year Limitations Period, Louisiana Supreme Court Rules

The Supreme Court of Louisiana has ruled that a first-party bad faith claim against an insurer is subject to a 10-year limitations period and not a one-year period, reasoning that the first-party bad faith claim arose from the insured's contractual relationship with the insurer.

The Case

Beverly Smith sued Darlene Shelmire and her insurer after an automobile accident on July 27, 2010. On February 26, 2015, following a trial on the merits, the trial court entered judgment in favor of Smith against Shelmire and the insurer in an amount in excess of the insurance policy limits.

The judgment was noticed and mailed to all counsel on March 5, 2015.

An appellate court affirmed the judgment on March 10, 2016.

Thereafter, Shelmire assigned her rights to pursue a first-party bad faith action against her insurer to Smith.

Through her assignment of rights, Smith sued the insurer for bad faith on March 10, 2017.

In response, the insurer argued that the action was untimely because it was governed by a one-year limitations period that had passed by the time Smith had filed her lawsuit.

The trial court disagreed with the insurer, and the dispute reached the Louisiana Supreme Court.

The Louisiana Supreme Court's Decision

The court affirmed.

In its decision, the court reasoned that an insurer's duty of good faith owed to its insured under Louisiana law did "not exist separate and apart from an insurer's contractual obligations." According to the court, the duty of good faith was an outgrowth of the "contractual and fiduciary relationship" between the insured and the insurer, and the duty of good faith and fair dealing emanated "from the contract between the parties."

Therefore, the court held, first-party bad faith claims against an insurer (including the claim assigned by Shelmire to Smith) were governed by the 10-year limitations period set forth in Louisiana law for contract claims.

Consequently, the court concluded, Smith's first-party bad faith claim against Shelmire's insurer, brought pursuant to an assignment of rights from Shelmire, was not untimely.

The case is *Smith v. Citadel Ins. Co.*, No. 2019-CC-00052 (La. Oct. 22, 2019).

Workers' Comp Exclusion Does Not Bar Coverage for Accident Allegedly Caused by Third Party, Fourth Circuit Decides

The U.S. Court of Appeals for the Fourth Circuit has ruled that a workers' compensation exclusion in a commercial automobile liability insurance policy did not preclude coverage for the liability of a third-party permissive user of an insured vehicle who allegedly caused personal injuries to the insured's employee.

The Case

While employees of Milton Hardware, LLC, including Milton Hardware's owner, were performing construction work on Rodney Perry's home in Milton, West Virginia, Milton Hardware's owner authorized Perry to move one of Milton Hardware's trucks, which was blocking the driveway. In doing so, however, Perry accidentally struck and injured a Milton Hardware employee, Greg Ball.

Ball requested indemnification from the insurer that had issued a commercial automobile liability insurance policy to Milton Hardware. The insurer denied coverage and asked the U.S. District Court for the Southern District of West Virginia to declare that the policy it had issued to Milton Hardware did not cover Perry's liability for Ball's injuries.

The district court ruled in favor of the insurer, concluding that Ball's negligence claim against Perry was not covered by the liability policy because of the policy's workers' compensation exclusion. The district court reasoned that because Ball was a Milton Hardware employee who was injured during the course of his employment, any coverage for his injuries, regardless of who caused them, had to be denied.

Ball appealed to the Fourth Circuit. He argued that the coverage he sought was not for or in regard to any workers' compensation claim or liability but, instead, was for the liability of Perry – a third party – to him for negligence. Because that claim was not for workers' compensation, he contended, the policy's workers' compensation exclusion was inapplicable.

The Fourth Circuit's Decision

The Fourth Circuit vacated the district court's judgment.

In its decision, the circuit court explained that the workers' compensation exclusion in the insurance policy issued to Milton Hardware provided that the policy's liability coverage did not extend to "[a]ny obligation for which an insured or an insurer of that insured, even if one does not

exist, may be held liable under workers' compensation . . . or any similar law."

The circuit court reasoned that because Ball's negligence claim against Perry was a claim against a third party, rather than a claim against his employer – Milton Hardware – for workers' compensation, the workers' compensation exclusion did not apply. The circuit court stated, "Perry was not Ball's employer; Ball was not Perry's employee; and Ball's claim against Perry therefore does not arise under workers' compensation law."

Accordingly, the Fourth Circuit concluded, the workers' compensation exclusion did not eliminate the insurer's duty to provide liability coverage to Perry with respect to Ball's negligence claim, and the district court had erred in holding that the workers' compensation exclusion applied.

The case is *United Financial Casualty Co. v. Ball*, No. 18-1657 (4th Cir. Oct. 30, 2019).

No "Occurrence" Where Insured Brandishes Weapon Outside of Workplace: Emotional Distress Was a Natural Consequence of Actions, Virginia Federal District Court Says

A federal court applying Virginia law sided with an insurer and found no "occurrence" under a homeowner's policy on that basis that a policyholder's brandishing a weapon at a third party would naturally cause emotional distress.

The Case

Travelers Home & Marine Insurance Company and Automobile Insurance Company of Hartford issued homeowners and umbrella policies to Christopher Lander. The policies provided coverage for suits brought against the insured "because of 'bodily injury' or 'property damage' caused by an 'occurrence.'" The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results . . . in bodily injury or property damage."

Dr. Rasheed Siddiqui and Sherri Johnson each sued Lander in state court. The suits alleged that that Dr. Siddiqui and Lander opened a pain management practice called Charlottesville Pain Management Center, PLLC ("CPMC") in 2002. According to the complaints, Siddiqui came to believe in 2014 that Lander was "impaired" while practicing at CPMC. Siddiqui filed a complaint against Lander with the Virginia Board of Medicine and staged an intervention. Lander was allegedly humiliated by the intervention and informed Siddiqui he could no longer work at CPMC. Siddiqui and Johnson allege that Lander exhibited a pattern of concerning behavior, including following Siddiqui after work, photographing the front and back of the CPMC office, driving past Siddiqui's home, and requesting a key to CPMC from the doctor who managed the building where CPMC is located.

According to the complaints, on November 21, 2016, Lander purchased a 9 mm Glock and 200 rounds of ammunition, consumed alcohol and prescription pills, drove to the CPMC office, and parked directly outside of Siddiqui's window. Lander then allegedly brandished the firearm such that people in the parking lot and CPMC office could see it, opened his car door, and fell to the

ground as he attempted to exit the vehicle. According to the complaints, the office was locked, patients were moved away from windows, and the police were called while two bystanders detained Lander in the parking lot. Lander is alleged to have later pled guilty to driving under the influence and brandishing a firearm within 1,000 feet of a school.

The suits asserted claims against Lander for: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; and (3) assault. Plaintiffs alleged that Lander "knew or should have known" that his actions would cause emotional distress, and that Lander's actions put Siddiqui and Johnson "in reasonable fear of imminent physical injury."

Lander tendered the underlying actions to Travelers for defense and indemnification pursuant to the homeowners and umbrella policies.

Travelers filed a declaratory judgment action and moved for summary judgment. Travelers argued that, although the underlying suits included negligent infliction of emotional distress claims, the underlying facts allege only intentional acts by Lander, not accidental ones.

In response, Lander argued that the underlying suits alleged conduct that constituted an "occurrence" under the policies because the underlying suits do not allege "purposeful conduct by Lander directed at Siddiqui or Johnson." Furthermore, Lander noted that he "did not shoot his gun while at CPMC," "advance" toward Siddiqui or Johnson, "say or do anything indicating an intent to injure them," or "display his gun for others to see." Lander contended that he simply "accidentally drove his car up onto the curb" and "accidentally stumbled to the ground."

The District Court's Decision

The district court granted Traveler's summary judgment motion.

The court noted that, under a Virginia Supreme Court decision – *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 725 S.E.2d 532, 535 (Va. 2012) – an intentional act is neither an occurrence nor an accident under similar policy language. The court noted that the Virginia Supreme Court had held that "[i]f a result is the natural or probable consequence of an insured's intentional act, it is not an accident."

Applying that standard, the court concluded that the distress Siddiqui and Johnson alleged "objectively" appeared to be the "natural or probable consequence" of Lander's alleged intentional acts of brandishing a firearm outside of their workplace.

The court emphasized that the relevant inquiry was whether Landers intended his actions, not whether he intended the results of those actions. The court noted that the underlying complaint alleged intentional actions. Therefore, the court ruled, there was no "occurrence" and Travelers had no duty to defend or indemnify Dr. Lander in the underlying actions.

The case is *Travelers Homes & Marine Ins. Co. v. Lander*, Case No. 3:18-cv-118 (W.D. Va. Oct. 26, 2019).

"Amusement Device" Exclusion Precludes Coverage of Beach Ball Injury Suit, District Court Says

A federal district court in Florida has ruled that an insurer did not have to defend a lawsuit arising out of injuries allegedly caused by a large inflatable beach ball.

The Case

Robert Hunt sued Hub City Enterprises, Inc., and Wall St. Enterprises of Orlando, Inc., seeking to recover for personal injuries he allegedly had sustained while attending the defendants' "Rum Fest 2017" festival.

Hunt alleged that, at the event, a crowd gathered to listen to music and dance, and that "an extra-large, heavy inflatable beach ball" provided by the defendants was "thrown into the crowd for people to push it around in the air." He further alleged that the ball was knocked toward him, and that he used his "outstretched arms and hands to push the extra-large beach ball away from him to prevent it from hitting him in the head," which resulted in "severe ligament and tendon injuries."

After the defendants sought coverage under their commercial general liability insurance policy, their insurer asked the U.S. District Court for the Middle District of Florida to declare that it did not have to defend or indemnify the defendants in Hunt's suit.

The insurer moved for judgment on the pleadings. It argued, among other things, that the extra-large inflatable beach ball fell within the amusement device exclusion in its policy and, therefore, that it had no duty to defend the Hunt suit or to indemnify the defendants.

The District Court's Decision

The court held that the insurer did not have to defend or indemnify the defendants.

In its decision, the court reasoned that the exclusion applied to Hunt's suit if the beach ball was an "amusement device."

The court noted that the policy stated that an amusement device "shall include, but not be limited to," a variety of items, including any mechanical or non-mechanical ride, rock climbing walls, and gymnastic equipment.

The court added that the list was "not exhaustive," as evidenced by the language "shall include, but not be limited to." Therefore, the court continued, just because an extra-large inflatable beach ball was not on the list of amusement devices did not mean that it did not qualify as an amusement device.

The court observed that the exclusion also stated that an amusement device was "[a]ny device that requires the user to strike, punch, or kick." It then concluded that the allegations in Hunt's complaint that "[p]eople in the crowd knocked the extra large beach ball in the air toward [Hunt] who used his outstretched arms and hands to push the extra-large beach ball away from him to

prevent it from hitting him in the head" were sufficient for it to rule that the insurer had no duty to defend or indemnify the defendants in connection with Hunt's suit.

The case is *Princeton Excess and Surplus Lines Ins. Co. v. Hub City Enterprises, Inc.*, No: 6:18-cv-1608-Orl-41GJK (M.D. Fla. Oct. 3, 2019).