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Illinois Supreme Court Says Triggering Event for Malicious Prosecution Coverage Is the Wrongful Prosecution, Not the Exoneration

The Illinois Supreme Court, reversing an intermediate appellate court decision, has ruled that the triggering event for a malicious prosecution claim in an occurrence-based policy is the underlying wrongful prosecution, not the exoneration.

The Case

Rodell Sanders was convicted of murder, attempted murder, and armed robbery arising out of a December 1993 shooting. His conviction was overturned in 2011. He was then retried and acquitted in 2014. Sanders sued the City of Chicago Heights and some of its employees for malicious prosecution. He alleged that the city's police department had manipulated evidence and coerced false witness identifications. The city settled the suit for $15 million.

The city had purchased primary liability insurance from Illinois Union Insurance Company from November 2011 to November 2014. It also had purchased excess liability policies from Starr Indemnity & Liability Company during this same period.

The city assigned its rights to pursue recovery from the insurers to Mr. Sanders. The insurers denied coverage on the basis that the malicious prosecution did not take place during their policy periods. The matter was litigated and the trial court ruled in favor of the insurers. It held that the policy required an act and injury during the policy period, not the accrual of a completed cause of action. The wrongful acts and injury occurred long before the Illinois Union and Starr policies were in effect.

On appeal, a split panel reversed. The appellate court ruled that coverage was not triggered by the initiation of the alleged malicious prosecution, but rather, by the exoneration. Malicious prosecution was one of the offenses enumerated in the policies' definition of "Personal Injury." The appellate court reasoned that the policy described the "tort" of malicious prosecution, instead of the misconduct giving rise to the tort. It found that the plain and ordinary meaning of the word "offense" referred to a legal cause of action that arises from wrongful conduct. In the court's view, the policies' reference to the offenses by their proper legal names, instead of the underlying wrongful conduct, made clear that coverage was triggered by the completed cause of action (i.e., Sander's exoneration), not by his earlier wrongful prosecution.

Illinois Union and Starr were granted leave to appeal to the Illinois Supreme Court.

The Illinois Supreme Court's Decision

The Illinois Supreme Court reversed the intermediate appellate court, holding that insurance coverage was triggered when Sanders was maliciously prosecuted in 1994, not when he was acquitted.

The policy required that the offense take place during the policy period. The court found that the word "offense" in the insurance policy referred to the wrongful conduct underlying the malicious prosecution. In the court's view, malicious prosecution does not take place upon exoneration.

The court stated that the fact that the policy was an occurrence-based policy "weigh[ed] heavily" on its decision. Occurrence-based policies, the court noted, are designed to cover only an insured's acts or omissions that happen during the policy period. Treating exoneration as the trigger would violate the intent of the parties because liability could be shifted to a policy period in which none of the acts or omissions giving rise to the claim occurred.

The court rejected Sanders' argument that the policy must have intended for all elements of the tort of malicious prosecution to be satisfied before finding that the offense has occurred. Based on a plain reading of the policy language, the court observed that the policy had no such requirement.

As the triggering event occurred more than a decade before the Illinois Union and Starr policies were issued, the court ruled that the insurers were not required to indemnify the city for damages related to Sanders' claim.

The case is *Sanders v. Illinois Union Ins. Co*., Docket No. 124565, 2019 IL 124565 (Ill. Nov. 21, 2019).

"Collapse" Coverage Requires Proof That Home Is in "Imminent Danger of Falling Down," Connecticut Supreme Court Rules

The Supreme Court of Connecticut, after reaffirming its 1987 holding that the term "collapse" in a homeowners' insurance policy, when otherwise undefined, included coverage for "substantial impairment of the structural integrity" of the insureds' home, has ruled that the "substantial impairment of structural integrity" standard required proof that the home was in imminent danger of falling down. The court also held that the term "foundation" unambiguously encompassed a home's basement walls.

The Case

The owners of a home in Vernon, Connecticut, sought coverage under their homeowners' insurance policy for the cracking and crumbling of their concrete basement walls. The insurer denied the claim, and the homeowners sued.

The homeowners asserted that the insurer had breached the collapse provisions of the policy by declining to compensate them for the purported collapse of their basement walls. They argued that they were entitled to payment under their policy because the deterioration of the concrete within their basement walls constituted hidden decay that so substantially impaired the walls'

structural integrity that they were in a state of collapse as the Supreme Court of Connecticut defined that term in its 1987 decision in *Beach v. Middlesex Mutual Assurance Co.*

The U.S. District Court for the District of Connecticut certified a question to the Supreme Court of Connecticut, which reformulated the certified question as follows:

1. Is "substantial impairment of structural integrity" the applicable standard for "collapse" under the [homeowners' insurance policy] provision at issue?
2. If the answer to question one is yes, then what constitutes "substantial impairment of structural integrity" for purposes of applying the "collapse" provision of [the homeowners'] insurance policy?
3. Under Connecticut law, [does] the [term] "foundation" . . . in a [homeowners'] insurance policy unambiguously include basement walls?

The Connecticut Supreme Court's Decision

The court first ruled that *Beach's* substantial impairment standard applied to the collapse provision of the homeowners' insurance policy in this case.

The court explained that the policy stated that, "We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following. . . . Collapse does not include settling, cracking, shrinking, bulging or expansion." The court noted that the term "collapse" was not further defined in the policy. It concluded that because the policy did not limit collapse coverage in words that "unmistakably" connoted an actual collapse, whereby a building was "reduced to a flattened form or rubble," the substantial impairment standard applied.

Next, the court ruled that, to meet the substantial impairment standard, an insured whose home had not actually collapsed had to present evidence demonstrating that the home nevertheless was in "imminent danger of such a collapse."

Finally, the court ruled that the coverage exclusion in the policy for the collapse of the home's "foundation" unambiguously included the home's basement walls. In common parlance, the court said, a "basement wall" and a "foundation wall" were one and the same.

In summary, the court said that the answer to the first certified question was "yes" and that the "substantial impairment of structural integrity" standard applied to the "collapse" provision of the homeowners' insurance policy.

It also said that the answer to the second certified question was that the "substantial impairment of structural integrity" standard required a showing that the building was in imminent danger of falling down or caving in; in other words, that it was in imminent danger of an actual collapse.

The court concluded that the answer to the third certified question was "yes," and that the term "foundation" in the homeowners' insurance policy unambiguously included the basement walls of the insureds' home.

The case is *Karas v. Liberty Ins. Corp*., No. SC 20149 (Conn. Nov. 12, 2019).

Rivkin Radler Comment

The Connecticut Supreme Court reached the same result in a second "crumbling concrete" case that it decided on the same day. In *Jemiola v. Hartford Casualty Ins. Co*., No. SC 19978 (Conn. Nov. 12, 2019), the court concluded that the homeowner's claim was barred by the "unambiguous" definition of "collapse" contained in the homeowner's insurance policy because the home had not suffered "an abrupt falling down or caving in of a building or any part of a building" such that it could "not be occupied for its current intended purpose." The court pointed out that the insured's home was "still standing," the insured "continued to reside there," and, according to her own expert, she could "continue to do so safely for the foreseeable future."

The court added that even if it agreed with the insured that the definition of collapse contained in her insurance policy was ambiguous and that Beach's substantial impairment standard applied to her claim, there was no coverage for the insured's claim because her home was not in "imminent danger of falling down" and therefore unsafe to occupy.

Auto Policy Provision Requiring Insured to Submit to IMEs Violates Public Policy and Is Void, Pennsylvania Supreme Court Decides

The Supreme Court of Pennsylvania, in response to a certified question from the U.S. Court of Appeals for the Third Circuit, has ruled that an automobile insurance policy provision that requires an insured seeking first-party medical benefits to submit to an independent medical exam by an insurer-selected doctor whenever the insurer required, conflicted with the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") and was void as against public policy.

The Case

An insured injured in an automobile accident sought to recover his medical expenses from his auto insurer, which requested that he submit to an independent medical exam ("IME") that it scheduled as it was permitted to do by the policy. The insured did not attend the scheduled IME.

Instead, the insured sued, asserting that the policy's IME requirement conflicted with a section of the MVFRL.

The U.S. District Court for the Middle District of Pennsylvania ruled that the policy's IME clause violated the MVFRL and, therefore, was void as against public policy.

The insurer appealed to the Third Circuit, which consolidated the case with another case and certified the following question to the Supreme Court of Pennsylvania:

> Whether, under Pennsylvania law, a contractual provision in a motor vehicle insurance policy that requires an insured to submit to an independent medical examination by a

> physician selected by the insurer, when and as often as the insurer may reasonably require, as a condition precedent to the payment of first-party medical benefits under that policy, conflicts with the Motor Vehicle Financial Responsibility Law . . . and is therefore void as against public policy.

The Pennsylvania Supreme Court's Decision

The court ruled that the policy's IME clause was in "irreconcilable conflict" with the MVFRL's requirements and, as a result, that it was void as against public policy.

In its decision, the court explained that the MVFRL requires an insurer that wants to compel a claimant seeking first-party medical benefits to undergo an IME to file a petition with a court of competent jurisdiction and to show good cause for the IME. Moreover, the court continued, any court order for an IME must give the insured "adequate notice of the time and date of the examination," as well as "state the manner, conditions and scope of the examination."

By contrast, the court said, the policy's IME provision did not require an insurer to file a petition or to establish good cause; rather, the policies allowed the insurer to unilaterally and, at any time, require that the insured make himself or herself available for an IME at a time and place of the insurer's choosing. Therefore, the court continued, under the policy's IME provision, the insured did not necessarily have to receive suitable advance notice of the request for an IME, the reasons for which the IME was being requested, or information about how the examination would be conducted, and the insured did not have the opportunity to challenge the request before a neutral judicial decision maker on the ground that it lacked good cause.

The court also noted that, under the MVFRL, if a judge granted an insurer's request for an IME, the judge selected the physician to perform the IME and set the manner, conditions, and scope of the examination. By contrast, the IME policy provision allowed the insurer "to unilaterally select the physicians who will perform the IME" and set no limits on the scope or conduct of the IME.

The court concluded that these IME policy provision conflicted with the MVFRL's requirements and, consequently, that the IME policy provision was void as against Pennsylvania public policy.

The case is Sayles v. Allstate Ins. Co., Nos. 58 MAP 2018, 59 MAP 2018 (Penn. Nov. 20, 2019).

Outside Business Exclusion Bars Coverage, Third Circuit Holds

The U.S. Court of Appeals for the Third Circuit, affirming a district court's decision, has ruled that an insurer had no obligation to defend a law firm and its partner in a lawsuit asserting claims stemming from the partner's alleged outside business activities.

The Case

Gregory Morris and Morris Management, Inc. (together, "Morris") sued Hippo Fleming & Pertile, a law firm, and its partner Charles Wayne Hippo Jr. in a Pennsylvania state court. The lawsuit

arose from Hippo's prior legal representation of Morris, which included counseling on a variety of real estate deals that Morris wished to pursue.

Morris alleged that Hippo had been disloyal and that he had prioritized the interests of companies in which he owned substantial interests. Specifically, Morris alleged that Hippo had conspired with a Morris executive to divert opportunities away from Morris for Hippo's companies' benefit, including by engaging in disloyal actions concerning an aborted shopping center project. Morris also alleged that Hippo and his companies had poached several employees from Morris.

The liability insurer for Hippo and his law firm asked the U.S. District Court for the Western District of Pennsylvania to declare that it was not obligated to defend against the Morris lawsuit based on the policy's outside business exclusion.

The district court granted summary judgment in favor of the insurer, finding that each count in the Morris suit alleged that Hippo had acted to benefit his own business interests to Morris' detriment. That led the district court to the conclusion that the outside business exclusion applied to all counts in the Morris suit as a matter of law, therefore excluding coverage.

The dispute reached the Third Circuit.

There, Hippo and the law firm argued that Westport was obligated to defend against the Morris action because two counts in Morris' complaint – alleging legal malpractice and breach of the contract to provide legal services – were unrelated to Hippo's alleged outside business activities.

The Third Circuit's Decision

The Third Circuit affirmed.

In its decision, the Third Circuit explained that the outside business exclusion was "broad" and excluded coverage for "any claim based upon, arising out of, attributable to or directly or indirectly resulting from [] any Insured's activities" arising from Hippo's work with a company "other than [the law firm]." Therefore, the circuit court continued, if Morris' claims were related to Hippo's business activities, "directly or *indirectly*," there was no coverage under the policy.

The Third Circuit then ruled that it was clear from the allegations in Morris' complaint that Hippo's business-related activities were at the center of Morris' claims for legal malpractice and breach of the contract to provide legal services.

Simply put, the Third Circuit found that the complaint's factual allegations were "inextricably intertwined" with Hippo's business activities. Because Morris' claims for legal malpractice and breach of the contract to provide legal services were "based upon, arising out of, attributable to or directly or indirectly resulting from" Hippo's involvement with his outside business activities, the insurer had "no duty to defend," the Third Circuit concluded.

The case is *Westport Ins. Corp. v. Hippo Fleming & Pertile Law Offices*, No. 18-3551 (3d Cir. Nov. 8, 2019).

Fifth Circuit Concludes That Settlement Ended Insurer's Duty to Defend

The U.S. Court of Appeals for the Fifth Circuit, affirming a decision by the U.S. District Court for the Eastern District of Texas, has ruled that a commercial general liability insurer's payments on behalf of additional insureds under its policy amounted to a settlement that ended its duty to continue to provide a defense to an underlying lawsuit.

The Case

An employee of Guichard Operating Company, L.L.C. was electrocuted while working on a generator housing cabinet the company had leased from Aggreko, L.L.C. The employee's parents sued Aggreko and Rutherford Oil Corporation, the owner of the rig on which the incident had occurred.

Guichard's commercial general liability insurer agreed to pay the parents $50,000 in exchange for a release of their claims against Rutherford and $950,000 in exchange for their covenant not to execute against Aggreko for any judgment they obtained against Aggreko except as to available insurance.

Asserting that it had exhausted its policy limit "in settlement" of the parents' lawsuit, Guichard's insurer notified Aggreko that it intended to withdraw its defense in the parents' lawsuit.

Thereafter, Aggreko's insurer asked the district court to declare that Guichard's insurer maintained a duty to defend Aggreko.

The district court ruled that Guichard's insurer's payment of the policy limits, the parents' execution of a covenant not to execute against Aggreko, and the parents' release in favor of Rutherford had terminated Guichard's insurer's duty to defend and indemnify Aggreko and Rutherford as additional insureds.

The dispute reached the Fifth Circuit.

The Fifth Circuit's Decision

The Fifth Circuit affirmed.

In its decision, the circuit court explained that the policy issued to Guichard required the insurer to defend Aggreko, as an additional insured, with respect to the lawsuit filed by the employee's parents until such time as the insurer "used up the applicable limit of insurance in payment of judgments or settlements under Coverage[] A." The circuit court pointed out that Guichard's insurer had paid its limit of insurance to the employee's parents with respect to their claims against Rutherford and Aggreko.

The Fifth Circuit then ruled that Guichard's insurer's payment of $950,000 to the employees' parents on behalf of Aggreko in exchange for their covenant not to execute any judgment against Aggreko, except as to available insurance, constituted a "settlement" under its insurance

policy sufficient to relieve the insurer of its duty to defend Aggreko – and that the lack of a "release" in favor of Aggreko was not required.

Incidentally, the Fifth Circuit concluded that it did not have to determine whether the dispute was governed by Texas or Louisiana law, finding that a "settlement" had occurred under the terms of the policy issued by Guichard's insurer under the law of both states.

The case is *Aggreko, L.L.C. v. Chartis Specialty Ins. Co.,* No. 18-40325 (5th Cir. Nov. 11, 2019).

Pollution Exclusion Plainly Barred Coverage for Gasoline Spill, Language in Fluids Endorsement Did Not Create an Ambiguity

The U.S. District Court for the District of Massachusetts has ruled that an exception to an exclusion in a liability policy cannot affirmatively create coverage and that the total pollution exclusion expressly barred coverage for claims stemming from a spill of gasoline and other fuel.

The Case

On February 19, 2019, an employee of Performance Trans, Inc. ("PTI"), was driving a tanker-truck on Route 116 in North Salem, New York, when it drove off the road and overturned, discharging approximately 4,300 gallons of gasoline, diesel fuel, and dyed diesel fuel onto the roadway and adjacent reservoir. At the direction of the New York State Department of Environmental Conservation, PTI undertook emergency response action to clean up the spill.

On March 13, 2019, PTI filed an insurance claim with its insurer. The insurer disclaimed coverage under the policy's total pollution exclusion.

After the insurer was sued for breach of contract and unfair business practices, it moved for summary judgment.

The District Court's Decision

The district court granted the insurer's motion, finding that the total pollution exclusion expressly barred coverage.

In its decision, the district court explained that the exclusion barred coverage for "any damages for which the insured is legally liable, or loss, costs or expenses, arising out of, resulting from, caused by or contributed to by the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time" or "loss, costs or expenses, arising out of any request, demand, or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants." The court concluded that gasoline, diesel fuel, and dyed diesel fuel "indisputably" qualified as pollutants.

The policyholder pointed to another exclusion in the policy, and particularly, an exception to that exclusion, in an effort to show that the policy was ambiguous. The policy's Special Hazards and Fluids Limitation Endorsement excluded "the unloading of drilling fluids from any auto,

mobile equipment, machinery or equipment, whether unloading is the result of movement of property by a mechanical device, an accident, a spill or otherwise" from coverage. But it excepted unloading caused by the upset or overturn of an auto from the scope of the exclusion. The policyholder argued that by adding this exception to the exclusion, the insurer agreed to provide insurance for unloading caused by the upset or overturn of an auto.

The court rejected this argument, reaffirming the rule that an exception to an exclusion cannot affirmatively create coverage. The Total Pollution Exclusion expressly barred coverage. The exception in the Special Hazards and Fluids Limitation Endorsement did not create an ambiguity.

The court granted summary judgment in the insurer's favor on all claims.

The case is *Performance Trans, Inc. v. General Star Indemnity Co.,* No. 4:19-40086-TSH (D. Mass. Nov. 25, 2019).

Iowa Appeals Court Affirms "No Coverage" Decision in Dirt Moving Case

An appellate court in Iowa has affirmed a trial court's decision that a commercial general liability insurance company did not have to defend or indemnify its insured in connection with litigation asserting that it had improperly moved dirt from private property rather than from authorized sites.

The Case

Green Bay Levee Drainage District contracted with MEP Co. to reshape the levee. As part of the bid process before the contract was awarded, board members took MEP's owner to the "various locations" from which dirt could be moved to complete the project.

After MEP's bid was accepted, the company allegedly moved dirt from individual landowners' private property rather than from the authorized sites, and federal litigation ensued.

MEP's commercial general liability insurer asked an Iowa court to declare that its policy did not provide coverage for MEP's expenses in the federal litigation.

The trial court ruled in favor of the insurer, holding that MEP's actions in intentionally removing dirt from unauthorized sites did not qualify as an occurrence.

MEP appealed. It contended that although its owner had intentionally removed dirt from the individual property owners' sites, he had not expected or intended resulting property damage because he had believed it was permissible to remove dirt within the 150-foot easement the district had over the levee. In other words, MEP asserted that because it had not intended to harm property owned by private landholders, the removal of the dirt was an accident and, therefore, an occurrence.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that the trial court found that MEP's owner "knew exactly what he was doing" and that the removal of the dirt from sites other than those explicitly authorized "was wrongful." The appellate court added that the trial court also found that MEP's owner "intended and expected the resulting harm, although [the owner] intended not to be caught," and that the trial court had decided that MEP's "intentional acts" of removing dirt from unauthorized sites did not constitute an accident and did not qualify as an occurrence covered by the insurance policy.

Finding no error in the trial court's conclusions, the appellate court decided that MEP's insurer did not have a duty to defend MEP against any claims asserted against it by the district or third parties, and that it did not have to indemnify MEP for any losses it sustained based on its dispute with the district.

The case is *Addison Ins. Co. v. MEP Co.*, No. 17-2091 (Iowa Ct. App. Nov. 6, 2019).