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Idaho Supreme Court Affirms Decision Barring Coverage for Damaged USTs

The Supreme Court of Idaho has affirmed a trial court's decision that exclusions in an insurance policy precluded coverage for water damage to an insured's underground storage tanks ("USTs").

The Case

ABK, LLC, alleged that USTs at a gas station it owned and operated in Post Falls, Idaho, were damaged due to water infiltration into the gas stored in the USTs.

ABK's insurer denied the claim and ABK sued.

The trial court granted summary judgment in favor of the insurer, finding coverage barred under the policy's water and weather conditions exclusions.

ABK appealed to the Supreme Court of Idaho.

The Idaho Supreme Court's Decision

The court affirmed.

In its decision, the court first decided that the trial court had not erred in concluding that ABK's damages were barred from coverage under the policy's water exclusion, reasoning that it was "undisputed" that water had caused the damage. The court found that ABK failed to sufficiently dispute that a cause of its damage was water that accumulated from melted snow above the USTs.

The court rejected ABK's contention that the trial court had erred in finding that the damages were barred from coverage under the water exclusion because the trial court had not considered evidence that the source of the water infiltration was groundwater, not surface water. The court pointed out that the policy's language provided that if the damage was excluded under the water exclusion, it was irrelevant whether any other cause (such as groundwater) contributed to the damage.

Next, the court decided that the trial court had not erred in finding that ABK's damages also were barred from coverage under the weather conditions exclusion because heavy snowfall led to heavy snowmelt, which caused surface water to accumulate above the USTs and eventually led to the water infiltration.

The court explained that the trial court had not applied the weather conditions exclusion in isolation but, instead, had applied the exclusion along with the water exclusion. Because it was

"undisputed" that the cause of the alleged loss was water, an excluded peril, the trial court did not err in finding that ABK's damages were barred from coverage under the weather conditions exclusion, the court ruled.

Finally, the court rejected ABK's contention that the trial court should have performed an efficient proximate cause analysis because there may have been more than one cause of the water infiltration. The court concluded that because ABK's damages had been caused by water and weather conditions and were excluded from coverage, and because of the policy's anticoncurrent causation language, the trial court did not have to perform an efficient proximate cause analysis.

The case is *ABK, LLC v. Mid-Century Ins. Co.*, No. 46430 (Idaho Dec. 23, 2019).

Massachusetts Supreme Judicial Court Upholds Validity of Consent-to-Settle Provisions

The Supreme Judicial Court of Massachusetts has ruled that a consent-to-settle provision in a professional liability insurance policy was valid under Massachusetts law and that an insurer's duty to effectuate a prompt, fair, and equitable settlement under Massachusetts law did not require the insurer to violate a consent-to-settle provision, even when liability had been clearly established.

The Case

Massachusetts homeowners sued a registered professional engineer for what they claimed to be engineering design errors he made in connection with the design of their new home.

The engineer's professional liability insurance policy contained a consent-to-settle clause that provided that the insurer would "not settle any claim without the informed consent" of the engineer. The engineer's carrier recommended that the engineer settle the homeowners' lawsuit, but he refused.

The homeowners sued the insurer, asserting that the insurer had violated Massachusetts law by failing to effectuate a prompt, fair, and equitable settlement once liability had become reasonably clear.

The trial court granted summary judgment to the insurer, and the dispute reached the Supreme Judicial Court of Massachusetts.

The Supreme Judicial Court's Decision

The court affirmed.

In its decision, the court ruled that consent-to-settle clauses in professional liability insurance policies did not as a matter of law violate an insurer's obligations under Massachusetts law.

The court added, however, that a consent-to-settle clause was "not a carte blanche for an insurer to engage in unfair or deceptive conduct with a third-party claimant" merely because the insured declined to reach a settlement, and that an insurer in this situation still owed residual duties to a third-party claimant, even when the insured refused to settle.

In this case, the court found, the engineer's insurer had made good faith efforts to investigate the homeowners' claims and effectuate a settlement consistent with its duty to the insured (the

engineer) and the third-party claimants (the homeowners). The court added that the insurer's alleged shortcomings as cited by the homeowners (for example, that the insurer failed to conduct a reasonable investigation), did not proximately cause them harm. The proximate cause of the homeowners' harm "was the insured's refusal to settle," the court concluded, and not any conduct attributable to the insurer.

The case is *Rawan v. Continental Casualty Co.*, No. SJC-12691 (Mass. Dec. 16, 2019).

Montana Supreme Court Says Insurer May Pay Policy Limits Without Obtaining Insured's Release in Specified Circumstances

The Supreme Court of Montana, in response to a question certified by the U.S. District Court for the District of Montana, has ruled that an insurer did not breach its duty to its insured when it paid policy limits to an injured third party, without a release for the insured, after a motor vehicle accident when both liability for the accident was reasonably clear and where claimed special damages were below policy limits but it was reasonably clear that total damages (including general damages) exceeded policy limits.

The Case

An employee of High Country Paving, Inc., an asphalt paving company in Bozeman, Montana, was involved in an accident while operating a High Country vehicle. The driver of the other vehicle was killed and a passenger was seriously injured. High Country notified its insurer of the accident, which hired an attorney to represent High Country.

The parties injured in the accident demanded payment of High Country's $3 million policy limits without offering a release for High Country. High Country's insurer accepted the demand.

High Country subsequently settled remaining claims for $1.275 million, in exchange for a release. It then sued its insurer, and the district court certified the following question to the Supreme Court of Montana:

> Where liability is reasonabl[y] clear, is it a breach of an insurer's duty to its insured to pay policy limits to a third party in a motor vehicle accident without a release of its insured where claimed special damages are below policy limits but total damages (including general damages) exceed policy limits?

The Montana Supreme Court's Decision

The Supreme Court of Montana answered the certified question "no."

In its decision, the court explained that its answer to the certified question was qualified by several factors:

- First, liability for the underlying accident must be reasonably clear.
- Second, total damages caused by the accident must be reasonably proven to exceed policy limits.

- Third, the insurer may be required to continue to provide a defense of its insured, even after paying policy limits without a release, depending on the language of its contract with its insured.

According to the court, when these factors were met, it was not a breach of an insurer's duty to its insured to pay policy limits to an injured third party without first obtaining a release for the insured.

The court concluded that when it was "reasonably clear" that the amount required for a final settlement of all claims – including general damages reasonably shown to have been caused by the insured's conduct – exceeded policy limits, an insurer had "a duty to pay policy limits to an injured third party, without conditioning such a payment on obtaining a release for its insured."

The case is *High Country Paving, Inc. v. United Fire & Casualty Co.*, No. OP 19-0283 (Montana Dec. 31, 2019).

Professional Services Exclusion Precluded Coverage of Suit Against Security Company, Ninth Circuit Rules

The U.S. Court of Appeals for the Ninth Circuit, affirming a district court's decision, has decided that the professional services exclusion in a commercial general liability ("CGL") insurance policy precluded coverage of a lawsuit for breach of contract and negligence against the insured, a security company.

The Case

German Motors Corporation hired Bay One Security to provide security for its BMW dealership in San Francisco. German Motors subsequently sued Bay One for breach of contract and negligence, alleging that while a Bay One security guard was on duty, a man broke into the dealership and caused significant damage.

Bay One tendered the claim to its CGL insurance carrier. The insurer denied coverage, citing the policy's professional services exclusion, which provided: "This insurance does not apply to 'any injury or damage' arising out of the rendering of or failure to render any professional services by or for you."

Bay One contested the insurer's position. The U.S. District Court for the Northern District of California ruled that the insurer did not have a duty to defend or indemnify Bay One, and the dispute reached the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit affirmed.

In its decision, the circuit court found that the policy's professional services exclusion applied. The circuit court reasoned that Bay One's security services fell within the "commonly understood

meaning" of "professional services" in that they arose out of employment, involved specialized knowledge, and were predominantly mental.

The Ninth Circuit added that the CGL policy under which Bay One sought coverage typically did "not cover" professional negligence, such as a security guard's negligent failure to watch a video monitor.

Finally, the circuit court said, the "nature of the security enterprise" suggested that it was a professional service given that German Motors' agreement with Bay One involved an exchange for value – Bay One provided security and German Motors paid an hourly rate of $45.00 for the service.

Overall, the Ninth Circuit concluded, the nature of Bay One's security services placed them "squarely within" the professional services exclusion.

The case is *Burlington Ins. Co. v. German Motors Corp.*, No. 18-15835 (9th Cir. Dec. 17, 2019).

Eleventh Circuit Finds Coverage for Phishing Scheme Under Commercial Crime Insurance Policy

The Eleventh Circuit determined that a commercial crime insurance policy covered a $1.7 million loss related to a phishing scheme.

The Case

The loss stemmed from a sophisticated phishing scheme in which a scammer posing as an executive of Principle Solutions Group, LLC, persuaded an employee to wire money to a foreign bank account.

On the morning of July 8, 2015, Loann Lien, the controller for Principle, received an email purporting to be from Josh Nazarian, a managing director of Principle. The email informed Lien that Principle had been secretly working on a "key acquisition" and asked her to wire money "in line with the terms agreed . . . as soon as possible." The email told Lien to give her "full attention" to "attorney Mark Leach," who would provide further information. Because the purported deal was not public, Lien was to "treat [the] matter with the upmost discretion and deal solely with" Leach.

Lien received an email five minutes later from someone purporting to be Leach, a partner at the London-based law firm, Bird & Bird. After Lien confirmed that Principle could wire the money, Leach sent Lien remittance details for a bank in China. Leach later reiterated to Lien over the phone that Nazarian approved the wire transfer.

Lien worked with another Principle employee to create and approve the transfer, but a fraud prevention service, Wells Fargo, asked for verification that the wire transfer was legitimate. Lien then confirmed with the person purporting to be Leach that Nazarian had approved the transaction. Lien relayed this information to Wells Fargo, which released the hold. At 11:21 a.m.,

about two hours after Lien received the first email, Principle wired more than $1.7 million to the scammers.

After Principle discovered the fraud and determined that it could not recover the funds, it sought coverage under the "fraudulent instruction" provision of its policy with Ironshore Indemnity, Inc.

The policy covered "[l]oss resulting directly from a fraudulent instruction directing a financial institution to debit [Principle's] transfer account and transfer, pay or deliver money or securities from that account." The policy defined a "fraudulent instruction" as an "electronic or written instruction initially received by [Principle], which instruction purports to have been issued by an employee, but which in fact was fraudulently issued by someone else without [Principle's] or the employee's knowledge or consent."

Ironshore denied Principle's claim. Ironshore asserted that the scammer's communications with the employee did not meet the conditions for a fraudulent instruction under the policy and that the loss did not result directly from the alleged fraudulent instruction.

Principle sued Ironshore. Applying Georgia law, the district court concluded that the policy covered the loss and granted summary judgment to Principle. Ironshore appealed.

The Decision

The Eleventh Circuit affirmed the district court order.

The court rejected Ironshore's argument that neither email had the required elements for a fraudulent instruction. Ironshore had argued that the emails instructed Lien only to work with Leach to wire funds later in the day, not to wire a specific amount of money to a specific recipient. Ironshore had also argued that the email purporting to be from Leach, while fraudulent and specific, was not a "fraudulent instruction" under the statute because it was not sent by someone purporting to be a Principle employee, but rather by an outside attorney.

First, the court said it was hard-pressed to construe the initial email telling Lien to "make the initial wire as soon as possible" as anything but "directing a financial institution to debit [Principle's] transfer account and transfer . . . money . . . from that account." The court also noted that a later email from Leach identified the amount of the wire transfer, the recipient bank, and the purported beneficiary of the transfer.

Second, the court rejected what it called Ironshore's "divide-and-conquer approach." The court held that nothing in the policy warranted the assumption that the two emails could not be part of the same fraudulent instruction. The court noted that the two emails should be read together because the first email cloaked Leach with authority to give additional details.

The court also concluded that the loss "resulted directly from" the emails telling Lien to wire money. The court concluded that the phrase "resulted directly from" equated to a "proximate cause" measure of causation. The court found that the loss was a natural and probable consequence of the email scam. The court concluded that neither of the two alternative causes proffered by Ironshore – Lien's communication with the person purporting to be Leach and Wells

Fargo's involvement –constituted a sufficient intervening event breaking the causal link between Nazarian's purported email and Principle's loss.

The case is *Principle Sols. Grp., LLC v. Ironshore Indem., Inc.*, No. 17-11703 (11th Cir. Dec. 9, 2019).

Missouri Appeals Court Rules That Malicious Prosecution Claim Under Injury-Based Liability Policy Was Triggered on Exoneration, Not Prosecution

A Missouri appeals court ruled that a malicious prosecution claim under an injury-based policy was triggered on exoneration, not prosecution.

The Case

On March 10, 2004, Ryan Ferguson was arrested and charged with robbery and homicide in Boone County, Missouri, and was convicted on October 21, 2005. He was incarcerated from the date of his arrest until his conviction was vacated on November 12, 2013. The State elected not to retry Ferguson on the charges, and he was discharged from custody.

On March 10, 2014, Ferguson sued the City of Columbia ("Columbia") and five of its police officers in federal court, alleging that the officers violated Ferguson's constitutional rights and engaged in malicious prosecution.

Columbia and its officers were insured by Law Enforcement Liability ("LEL") insurance policies through St. Paul from October 1, 2006 through October 1, 2010, and insured by a similar LEL policy through Travelers from October 1, 2010 through October 1, 2011. The relevant policy provision "covered injury or damage that . . . happens while this agreement is in effect."

Columbia tendered the defense of the action to its insurers under its insurance policies. The insurers denied coverage. First, the insurers asserted that the underlying "wrongful acts" committed by the officers occurred two years before the first policy was in effect. Second, the insurers asserted that the injuries for malicious prosecution and related civil rights violations were manifest at the time of indictment or arraignment and because Ferguson was arraigned two years before the policies were in effect, neither insurer owed a duty to defend the suit or indemnify the officers for the judgment.

Columbia and its officers entered into a partial settlement agreement with Ferguson. As a judgment creditor, Ferguson petitioned the circuit court for an equitable garnishment against the insurers on January 5, 2018. Ferguson and the insurers filed cross-motions for summary judgment. On July 25, 2018, the circuit court awarded Ferguson partial summary judgment and ordered equitable garnishment against the insurers for $5,354,000.

The insurers appealed. The insurers argued that the policies were not triggered because Ferguson's injury "happened" before the policy period began.

The Decision

The Missouri Court of Appeals affirmed the circuit court order. The court found that Ferguson's malicious prosecution claim did not accrue until November 12, 2013, when his conviction was vacated and the state elected not to retry him.

The court emphasized that the policy was an injury-based policy, as opposed to an "act-based" or "occurrence-based" policy. The court noted that, under Missouri law, injury-based policies are triggered at the "happening of an enumerated injury during the policy period," whereas "act-based" or "occurrence-based" policies are triggered when an allegation or existence of one of the policy's enumerated acts arises during the policy period.

The court found that in a malicious prosecution case involving incarceration, the tort is not completed, and the injury does not cease, until the criminal proceeding terminates in the victim's favor.

The court also concluded that a layperson purchasing an insurance policy would understand that incarceration is a continuing injury.

Therefore, the court ruled, Ferguson met his burden to demonstrate that the insurers had a duty to indemnify Columbia for Ferguson's personal injuries.

The case is *Ferguson v. St. Paul Fire & Marine Ins. Co.,* WD82197 (Mo. App. Dec. 10, 2019).

Comment: Last month, we reported on the Illinois Supreme Court's decision in *Sanders v. Illinois Insurance Company*, 2019 IL 124565 (Ill. 2019), which held that malicious prosecution occurred at the time of prosecution, not exoneration. Although not bound by that decision, the Missouri Court of Appeals in *Ferguson* harmonized its holding with *Sanders* by noting that the policy at issue in *Sanders* was an "occurrence-based" policy, not an "injury-based" policy.

Insurer Had No Duty to Defend Where Underlying Suit Did Not Assert Claims Occurring During Policy Periods. And It Can Recoup Defense Costs Paid, Says Illinois Appellate Court

An appellate court in Illinois, affirming a trial court's decision, has ruled that an insurer did not owe a duty to defend and indemnify as the underlying lawsuit did not allege violations or injuries occurring during the policy periods. The appellate court also upheld the trial court's decision that the insurer was entitled to reimbursement of defense costs it had paid under a reservation of rights.

The Case

In the fall of 2001 or in early 2012, Ferrara Pan Candy Company, Inc., a manufacturer of candies and confections, engaged in merger talks with Farley's & Sathers Candy Company, Inc. On June 18, 2012, the companies publicly announced their merger, which became effective on January 1, 2013. Ferrara Candy Corporation, successor-in-interest to Ferrara Pan and a subsidiary of Ferrara Candy Company Holdings, Inc., was formed as a result of the merger.

On November 14, 2012, after the merger announcement, Ferrara Pan, Ferrara Candy, and Promotion in Motion, Inc. ("PIM") entered into a confidentiality agreement governing the use of PIM's trade secrets relating to the manufacturing of two products, Sour Jacks and Welch's Fruit Snacks.

PIM subsequently sued Ferrara Candy and Ferrara Candy Company Holdings (together, the "defendants"), asserting claims of misappropriation of trade secrets, breach of contract, trade dress infringement, violation of Delaware's Deceptive Trade Practices Act, and common law unfair competition. Among other things, PIM alleged that in violation of the confidentiality agreement, Ferrara Candy used PIM's trade secrets to manufacture competing products marketed as "Sour Buddies" and "Market Pantry Fruit Flavored Snacks." Additionally, PIM alleged that Ferrara Candy's "Black Forest Juicy Burst" products also misappropriated and misused Welch's Fruit Snacks' trade secrets. PIM also contended that Sour Buddies infringed on PIM's Sour Jacks trade dress.

The defendants sought coverage under commercial general liability insurance and umbrella insurance policies.

The insurer initially funded Ferrara Candy's defense but subsequently determined that there was no coverage for PIM's claims. It filed a declaratory judgment action in an Illinois state court, seeking a declaration that it had no duty to defend or indemnify the defendants against the PIM action as well as recoupment of the defense costs it had paid on behalf of Ferrara Candy.

The trial court granted judgment on the pleadings in favor of the insurer, finding that the PIM suit did not allege a covered injury during the policy periods. It also ordered Ferrara Candy to repay the insurer for the defense costs.

The defendants appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that PIM's complaint did "not leave open the possibility" that the injuries it claimed stemmed from the conduct of Ferrara Pan, the entity that existed during the time the policies were in effect. According to the appellate court, PIM made a "clear distinction" between Ferrara Candy and Ferrara Pan throughout its complaint and it was not referring to the acts of Ferrara Pan. The appellate court said that, read in its entirety, PIM's complaint made "clear" that it was alleging infringement by Ferrara Candy.

Because none of the allegations in PIM's complaint occurred during the policy periods, the appellate court found no coverage under the policies and ruled that the insurer did not have to defend or indemnify the defendants.

The appellate court also determined the insurer was entitled to reimbursement of its defense costs, reasoning that the insurer had defended under a reservation of rights (which notified the defendants that the insurer was reserving its rights to terminate the defense and to seek reimbursement for defense costs) and the insurance policies provided the right to reimbursement of defense costs if it was determined that the claims were not covered.

The case is *Liberty Mutual Fire Ins. Co. v. Ferrara Candy Co.*, No. 1-18-1385 (Ill. Ct. App. Dec. 11, 2019).

Pollutants Exclusion Bars Coverage for Remediation Claim

A magistrate judge in Pennsylvania has decided that an insurance policy's pollutants exclusion precluded coverage for the costs the insured claimed were necessary to remove black powder from its warehouse, where the powder contained a level of chromium that exceeded federal regulatory limits.

The Case

Vale Vista Associates, L.P., asserted that its tenant left the interior of leased space in Vale Vista's warehouse covered in black powder. Vale Vista made a claim under its insurance policy for costs associated with removing the powder and cleaning the damaged area.

The insurer denied coverage based on two grounds: that the loss was not "accidental" and that the black powder constituted a "pollutant" because high levels of chromium, a toxic substance, were detected in a sample taken from the warehouse.

Vale Vista sued, and the parties moved for summary judgment.

The Court's Decision

In a decision by a magistrate judge, the court recommended that the insurer's motion for summary judgment be granted.

The court first found that, under applicable Pennsylvania law and construing the policy language in favor of the insured, the insured's claim was for "accidental physical loss." The court reasoned that, from the insured's perspective, the tenant engaged in an unexpected act by leaving black powder throughout the warehouse upon its departure. Vale Vista did not know about this condition, did not expect that its tenant would leave the premises in this condition, played no role in causing the property damage, and had no control over the operations of the tenant that created the black powder, the court said.

The court then decided that coverage was barred by the policy's "clear and unambiguous" pollutants exclusion.

The court pointed out that at least one of the samples taken by the insurer's expert contained a level of chromium in excess of the value listed as toxic in federal regulations. The court concluded that the insurer had not acted unreasonably in relying on its expert and the sample he took in determining that the damage to the warehouse involved a "pollutant" as defined in the policy.

The court rejected Vale Vista's contention that the pollutants exclusion did not apply because it was not claiming damages based on a "toxic" property of the black powder but merely was seeking to be reimbursed for the cost of cleaning the black powder from its warehouse. This was contradicted by an estimate Vale Vista secured that included "decontaminating" the building and testing for hazardous substances. But that aside, the court observed that Pennsylvania law does not limit pollution exclusions to traditional pollution situations and predicted that the Supreme Court of Pennsylvania would similarly not limit a pollution exclusion to the situation in which the harm was caused solely by the "toxic" element of the pollutant.

The case is *Vale Vista Associates, L.P. v. Cincinnati Casualty Co.*, No. 18-1064 (W.D. Pa. Dec. 31, 2019).

North Carolina Trial Court Rules That Policyholder's Disagreement with Insurer's Coverage Denial Based on Pollution Exclusion Did Not Rise to an Unfair and Deceptive Trade Practice

A North Carolina trial court, siding with an insurer, held that a policyholder's mere disagreement with an insurer's coverage denial did not amount to a violation of North Carolina's Unfair and Deceptive Trade Practice statute.

The Case

The policyholder, Murphy-Brown LLC ("Murphy-Brown") was in the business of producing and growing hogs on company-owned farms and contracting with farms owned by third parties. Murphy-Brown was sued in federal court by individuals who lived near Murphy-Brown farms. The residents alleged that they suffered property damage and bodily injury caused by Murphy-Brown's hogs and related farm activities.

Murphy-Brown sought insurance coverage under excess policies issued by the various defendant insurers. The insurers either refused to indemnify Murphy-Brown for costs related to the federal litigation or reserved their rights under the policies. The insurers asserted that the operative pollution exclusion provision in their respective policies barred coverage for Murphy-Brown's claims.

Murphy-Brown sued the insurers in North Carolina State court under the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). Murphy-Brown argued that the insurers understood the nature of its business to be hog farming and knew these activities produced certain hazards, including odors, flies, insects, buzzards, vultures, noise, and dust. Murphy-Brown argued that it purchased insurance to protect from precisely these types of liabilities and that this denial constituted a violation of the UDTPA.

Specifically, Murphy-Brown argued that the insurers reliance on the pollution exclusions were:

1. misrepresentations regarding the coverage provided by policies;
2. unreasonable explanations for refusing to provide coverage; and
3. intended to induce Murphy-Brown to forfeit or surrender the policies, or to let the policies lapse.

The insurers moved for judgment on the pleadings.

The Decision

The North Carolina Superior Court granted the insurers' motion. The court held that the insurers were entitled to judgment on the pleadings under the UDTPA claims.

The court observed that Murphy-Brown's claims amounted to an argument that the insurers' reliance on the pollution exclusion was in and of itself an unreasonable explanation for denial of coverage, and therefore, a violation of the UDTPA. The court, however, held that absent an actual, specific misrepresentation or precedent supporting the proposition that a mere disagreement over a policy exclusion equated to a misrepresentation, there could be no violation of the UDTPA.

In particular, the court held that the insurers' denial of coverage based on their interpretations of policy exclusions was not unethical or unscrupulous, did not have a tendency to deceive, and was not an unreasonable explanation for denial of coverage.

Accordingly, the court granted the insurers' motions and dismissed the UDTPA claims.

The case is *Murphy-Brown LLC v. Ace Am. Ins. Co.,* 19-CVS-2793 (N.C. Bus. Ct., Super. Ct., Wake Cty. Dec. 16, 2019).

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