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Unintentionally Faulty Subcontractor Work That Damages Insured's Work Product Can Constitute An "Accident," Michigan Supreme Court Holds

The Michigan Supreme Court, siding with a policyholder, found that unintentionally faulty subcontractor work that damages an insured's work product can constitute an "accident" under a commercial general liability policy.

The Case

Skanska USA Building, Inc., served as the construction manager on a renovation project for Mid-Michigan Medical Center—Midland. Skanska subcontracted the heating and cooling portion of the project to defendant M.A.P. Mechanical Contractors, Inc. (MAP).

MAP obtained a commercial general liability insurance policy from Amerisure Insurance Company. Skanska and the Medical Center were additional named insureds on the CGL policy.

In 2009, MAP installed a steam boiler and related piping for the Medical Center's heating system. MAP's installation included several expansion joints. Between December 2011 and February 2012, the plaintiff determined that MAP had installed some of the expansion joints backward. Significant damage to concrete, steel, and the heating system occurred as a result. The Medical Center demanded that Skanska pay for all costs of repair and replacement.

The next day, Skanska sent a demand letter to MAP, asserting that MAP was responsible for all costs of repair and replacement. Skanska ultimately spent $1.4 million repairing and replacing the damaged property and submitted a claim to Amerisure, seeking coverage as an

insured. Amerisure denied the claim on the basis that defective workmanship was not a covered "occurrence." Skanska then sued MAP and Amerisure, seeking payment for the cost of the repair and replacement work.

The trial court denied summary disposition to both parties. Both sides appealed. The Court of Appeals reversed the trial court and granted summary disposition to Amerisure. The appeals court found that there was no "occurrence" because the only damage was to the insured's own work product. Skanska moved for leave to appeal to the Michigan Supreme Court, who accepted review.

The Decision

The Michigan Supreme Court reversed the Court of Appeals. The court found that unintentionally faulty subcontractor work that damages an insured's work product could constitute an "accident" under a CGL policy.

The court cited its precedents defining an "accident" as an "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." The court found that faulty work by a subcontractor could fall within the plain meaning of most of these terms.

The court also determined that the terms of the policy supported this conclusion. The court noted that the policy contained an exclusion precluding coverage for an insured's own work product, but contained an exception for work performed by a subcontractor on the insured's behalf. The court reasoned that if, as the Amerisure argued, faulty workmanship by a subcontractor could never constitute an "accident" and therefore never be an "occurrence" triggering coverage in the first place, the subcontractor exception would be nugatory.

The court rejected Amerisure's argument that an "accident" must involve a "fortuity," or something over which the insured had no control. The court held that although fortuity is one way to establish an accident, it is not the only way. The court said that the term "accident" is broader than "fortuity" and an insured need not act unintentionally for an act to constitute an "accident." The court pointed to cases holding that a deliberate act performed negligently can be an accident if the effect is not the intended or expected result.

In reaching the conclusion that an "accident" may include damage to an insured's own work product, the court rejected the distinction between damage to property of a third party and the insured's own work product as based on "an outdated rationale grounded in the language of the 1973 [CGL] policy." The court observed that the earlier policy featured the "business risk" doctrine under which many risks inherent in doing business were excluded. The court noted that in 1986, the Insurance Services Organization adopted certain changes to the policy language at issue. These changes expanded coverage for some business risks, including damage caused by a subcontractor's faulty workmanship, with no carveout based on whose property was damaged. According to the court, "the 1986 reformation of the scope of coverage under the CGL policies underscored a plain reading of 'accident'—that faulty subcontractor work may fall within the policy's coverage."

The case is *Skanska USA Bldg., Inc. v. M.A.P. Mech. Contractors, Inc.* Nos. 159510-159511 (Mich. June 29, 2020).

Criminal Acts Exclusion Barred Coverage for Injuries from Aggravated Assault Despite Insured's Statement That She Feared for Her Own Safety, Georgia Appellate Court Finds

A Georgia appellate court, siding with an insurer, held that a criminal acts exclusion barred

coverage for an aggravated assault claim, despite contradictory statements by the insured regarding her culpability in her *Alford* plea, because the acts that caused the injuries were criminal in nature.

The Case

For a period leading up to January 2017, the insured, Elisabeth Cannon, observed what she believed was "suspicious activity," loitering, and vandalism by young people on the sidewalk in front of her house.

During one altercation, Cannon fired several shots, striking V.M., a juvenile returning home from a store with his friend who had not been involved in any prior interactions with Cannon. V. M. was struck in the head by a bullet and suffered permanent disabilities.

Cannon told the police that she did not intend to hit anyone, but only wanted to scare the youths, who were allegedly throwing rocks at Cannon and her daughter.

Cannon was charged with two counts of aggravated assault and one count of aggravated battery. She entered a not guilty plea. But on the morning of trial, she pleaded guilty to one count of aggravated assault under *North Carolina v. Alford,* 400 U.S. 25, 37 (1970). Under an *Alford* plea, a defendant in a criminal case proclaims innocence but concedes that the prosecution has enough evidence to prove the defendant guilty.

Cannon did not assert self-defense or justification and was sentenced to prison.

In May 2017, V. M.'s parents, the Marcuses, made a claim under Cannon's home insurance policy issued by Country Mutual. Country Mutual reserved its rights under the criminal acts exclusion and sought a declaration as to whether it owed coverage for the shooting. Country Mutual successfully moved for summary judgment and the Marcuses appealed.

The Decision

The appellate court affirmed the trial court's ruling. The court reasoned that the policy did not cover criminal acts of the insured and Cannon's acts were criminal.

The Marcuses argued that the trial court improperly awarded Country Mutual summary judgment because there were disputed factual issues in the record. Specifically, they pointed to an affidavit by Cannon and statements she made during her guilty plea that she was justified in shooting V.M. because she reasonably feared for her own safety. They argued that this evidence renders Cannon's conduct not criminally culpable, and therefore, not subject to the policy's exclusion for criminal acts.

The court rejected the Marcuses' argument. The court found that, under Georgia law, this evidence amounted to self-serving testimony in contradiction of Cannon's earlier admissions during her guilty plea and did not create a genuine issue of fact for summary judgment.

The court noted that a guilty plea was *prima facie* evidence of the facts supporting the plea, even for an *Alford* plea in which a defendant enters a guilty plea under a claim of innocence. The court noted that Georgia courts have held that when a party-witness in Cannon's position gives contradictory testimony as to her culpability, the law will construe the contradictions against her, absent reasonable explanation. The court further noted that Cannon did not assert a justification defense in the criminal proceeding and faced the same collateral consequences from her *Alford* plea as an ordinary plea of guilty. The court found that the record did not reveal any infirmity on the part of Cannon or any flaw in the guilty-plea proceedings.

For these reasons, the court found that the trial court did not err by granting summary judgment to the insurer on the basis that the policy's criminal acts exclusion applied.

The case is *Marcus v. Country Mut. Ins. Co.*, A20A0391 (Ga. App. Ct. June 24, 2020).

Seventh Circuit Rules That Known Claim and Intentional Injury Exclusions Barred Coverage for Fugitive Dust Claim

The Seventh Circuit, in a garnishment action brought by the insured recycling company and neighbors of the insured, held that a district court properly granted summary judgment to an insurer based on the "known claim" and "intentional injury" exclusions.

The Case

A group of homeowners alleged that the waste disposal practices of the insured, VIM Recycling, exposed them to dust and odors in violation of federal environmental law. They also brought state tort law claims for the resulting loss of use and enjoyment of their property and adverse health effects. The neighbors eventually obtained a $50.56 million default judgment against VIM.

After securing the default judgment but realizing they were unable to recover much from VIM, the neighbors moved to institute garnishment proceedings in federal court in Indiana against VIM's insurer, Westfield. The Westfield policies applied to damages VIM was legally obligated to pay because of "bodily injury" or "property damage" that took place within the coverage period. The policies also contained two relevant exclusions.

One exclusion was for known claims. It stated that the policy does not apply if "a listed insured or authorized employee knew prior to the policy period, that the bodily injury or property damage occurred" and that "any continuation, change or resumption" of the property damage or bodily injuries "during or after the policy period will be deemed to have been known prior to the policy period." As the court explained, "[t]his type of exclusion gives effect to the common law principle 'that one may not obtain coverage for a loss that has already taken place.'"

The second exclusion was for intentional injuries. Under this exclusion, there is no coverage for any bodily injury or property damage expected or intended from the standpoint of the insured.

The district court granted summary judgment to Westfield because the policy excluded damages for expected or intended injuries, the neighbors' damages were claims known to VIM at the time it purchased the policies, and VIM breached the policies' notice requirement. The neighbors and VIM appealed.

The Decision

The Seventh Circuit affirmed. The court noted that the complaint – which was deemed as true by the trial court as part of entering a default judgment – established that VIM (in particular, its owner) knew about the fugitive dust and resulting injuries before the first Westfield policy went into effect. The court also said that the neighbors could not reverse course from their own allegations in the complaint now that it wanted VIM's insurer to pay the judgment.

The court also rejected the neighbors' and VIM's argument that Westfield was estopped from invoking any policy exclusions because it allegedly breached its duty to defend. The court found that VIM violated its obligation to provide written notice of the suit in a timely manner. The court also found that the record did not support a conclusion that Westfield acted in bad faith by flatly refusing VIM coverage in the federal case. The court ruled, as a matter of equity, that Westfield did not shirk its duties such that it should be estopped from invoking policy exclusions.

The case is *Greene v. Westfield Ins. Co.*, No. 19-2260 (7th Cir. 2020).

Ninth Circuit Affirms Ruling That Trademark Infringement Claim Against Retailer Did Not Fall Within Advertising Injury Coverage

In an unpublished decision, the Ninth Circuit upheld a California federal district court's ruling that an insurer had no duty to defend Walmart against a vendor's claim that its trademark was displayed too close to competing merchandise, as the claim did not satisfy the requirements of the policy's advertising injury coverage.

The Case

Hybrid Promotions LLC supplied Walmart with private label apparel. It also supplied display racks and graphic signage for those products.

Ultimate Brand Management (UBM) owns the MMA Elite trademark. UBM sued Walmart for trademark infringement. It alleged that Walmart displayed the MMA Elite trademark next to and above displays that included Hybrid's private label merchandise, which UBM claimed was visually similar to UBM's trademarked merchandise.

Under the supplier agreement between Hybrid and Walmart, Hybrid owed Walmart indemnification and requested that its insurer defend Walmart under the advertising injury coverage of the policy. The insurer refused and a declaratory judgment action ensued.

The policy defined "advertising injury" as:

> injury . . . sustained by a person or organization and caused by an offense of infringing, in that particular part of [Hybrid's] advertisement about [Hybrid's] goods, products or services, [ ] upon their copyrighted advertisement; or registered collective mark, registered service mark or other trademarked name, slogan, symbol or title.

"Advertisement" was defined as:

> an electronic, oral, written or other notice, about goods, products or services, designed for the specific purpose of attracting the general public or a specific market segment to use such goods, products or services.

Hybrid pointed to evidence suggesting that Walmart displayed Hybrid's products and signage near the MMA signage and that Hybrid paid for and designed part of the signage for Hybrid's products and some of the physical displays.

Hybrid argued that a consumer would view the entire retail display as one advertisement.

Thus, Hybrid argued that for purposes of coverage, the advertisement is the combination of signage and displays of products.

The Decision

Even assuming this is true, the court found that there was no "advertising injury" because Hybrid did not design, pay for, possess, or set up the combination. Thus, the advertisement was not Hybrid's advertisement.

The court reasoned that while "close proximity" of Hybrid's products to the MMA Elite signage arguably may be enough to show an "advertisement about [Hybrid's] goods," it is not enough to establish that the retail display was Hybrid's advertisement about Hybrid's goods. Similarly, with respect to the non-MMA-Elite signage and display materials that Hybrid paid for and designed, the contribution of materials that are used to make a different advertisement does not make that resulting advertisement Hybrid's.

The Ninth Circuit held that the district court was correct in awarding summary judgment to the insurer.

The case is *Hybrid Promotions, LLC v. Federal Ins. Co.,* No. 18-56658 (9th Cir. June 22, 2020).

Ninth Circuit Reverses and Finds Insurer Had No Duty to Defend Claim Arising from Agency's Environmental Abatement Orders

In an unpublished decision, the Ninth Circuit reversed a district court's ruling that an insurer owed defense and indemnity for environmental losses stemming from non-litigated disputes. The Ninth Circuit found that policy applied only to "suits" seeking "damages."

The Case

A governmental agency required San Diego Port District to remediate and abate environmental contamination and pollution. The port tendered the claim to its insurer, who issued primary and umbrella policies. The insurer defended under a primary policy, but denied it had any defense obligation under the umbrella policy. After the primary policy exhausted, the insurer withdrew its defense. The Port then filed a declaratory judgment action.

The insuring agreement in the umbrella policy applied to sums the insured is obligated to pay "as damages." The insurer argued that the umbrella policy therefore applied only to "suits," not non-litigated "claims." As the agency's abatement order was not the result of a lawsuit, the policy did not apply.

The Port relied on the California Supreme Court's decision in *Powerine II* (*Powerine Oil Co., Inc. v. Super. Ct.,* 37 Cal. 4th 377 (2005)), in which the court distinguished the scope of coverage afforded by an umbrella policy from a standard CGL policy based on its use of the terms "expenses," "compromise," and "claims."

The district court found the umbrella policy to be ambiguous and interpreted it to apply to the defense of claims.

The Ninth Circuit's Decision

The Ninth Circuit reversed the district court's ambiguity finding. The Ninth Circuit said the language of the umbrella policy was clear and explicit. Its central insuring provision provided coverage only for "damages."

Also, the umbrella policy's defense obligation extended only to suits. The court noted that the insurer retained the right, but not the duty, to investigate, negotiate, or settle "any claim or suit." Nothing in the umbrella policy, the court observed, required the insurer to defend or indemnify expenses or claims unrelated to "suits" and "damages."

Thus, the court held that coverage under the umbrella policy was limited to "damages" – liabilities assessed against the Port within the context of a lawsuit.

The case is *San Diego Unified Port Dist. v. Landmark Ins. Co.,* No. 19-55409 (9th Cir. June 15, 2020).

Tenth Circuit Holds That Bodily Injury Claim Based on Pesticide Spraying Was Barred by Pollution Exclusion

The Tenth Circuit affirmed an Oklahoma federal court's decision that an insurer had no duty to defend a claim for injury resulting from the policyholder's spraying of pesticides, finding that the policy's pollution exclusion barred coverage for such claim and that the insurer did not act in bad faith by denying coverage.

The Case

Two individuals sued MJH Properties, LLC for spraying pesticides that allegedly caused them substantial bodily injuries. The individuals alleged that the pesticides contained Essentria IC3, piperonyl butoxide, and permethrins. MJH tendered the suit its liability insurer.

The insurer denied coverage based on the Total Pollution Exclusion. The exclusion barred coverage for "[b]odily injury" or "property damage" that "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The term "pollutants" was defined as including "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The insurer argued that the chemicals contained in the pesticide spray were "pollutants." MJH argued that it did not use "pollutants" as defined by the policy because the pest control pesticides contained only Essentria, which consists of 40% mineral oil, 37% wintergreen oil, 10% rosemary oil and 13% other ingredients.

MJH sued for breach of contract and bad faith. The district court granted the insurer's motion to dismiss.

The Tenth Circuit's Decision

The Tenth Circuit affirmed.

It found that the district correctly dismissed the breach of contract claim because MJH failed to show that the insurer had a duty to defend. The court explained that the underlying petition alleged that MJH used Essentria IC3, piperonyl butoxide, and permethrins. MJH did not dispute on appeal that piperonyl butoxide and permethrins are "pollutants" as defined in the Policy.

The court acknowledged that the Oklahoma Supreme Court did not address these specific substances when interpreting a nearly identical total pollution exclusion provision broadly to include non-environmental pollutants. But the court found no ambiguity and concluded the

district court did not err in determining that at least one of the underlying petition's three alleged substances is a "pollutant" within the defined term's plain and ordinary meaning.

The court also dismissed the bad faith claim because MJH failed to show the claim was covered.

The case is *MJH Properties, LLC v. Westchester Surplus Lines Ins. Co.,* No. 20-6002 (10th Cir. June 10, 2020).

North Carolina Federal Judge Finds Lawyers and a Chiropractor Accused of Violating the Driver's Privacy Protection Act Were Not Owed a Defense by Their Insurers

In a trilogy of decisions, a judge from the Middle District of North Carolina ruled that insurers had no duty to defend lawyers and a chiropractor who used names and addresses contained in automobile accident reports for marketing purposes. The court found that these claims, based on alleged violations of the Driver's Privacy Protection Act, were barred by two privacy exclusions contained in the lawyers' and chiropractor's liability policies.

The Cases

Two law firms and a chiropractor were among those named in a putative class-action suit alleging that these professionals violated the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 ("DPPA") by using automobile accident reports to solicit clients. Each professional submitted a claim with their respective insurers, each of whom defended under a reservation of rights. Declaratory judgment actions followed.

The putative class-action suit alleged that defendants obtained and used protected personal information. All three policyholders sought coverage under the "personal and

advertising injury" provisions, and specifically, the offense for "oral, written or electronic publication of material that violates a person's right of privacy." (One policyholder also sought coverage under the "bodily injury" and "property damage" coverages as well).

The policies contained an "Unsolicited Communications" or similarly worded exclusion that barred coverage for injury "arising out of any actual or alleged violation of any law that restricts or prohibits the sending, transmitting or distributing of 'unsolicited communication,'" defined as "any communication, in any form, that the recipient of such communication did not specifically request to receive."

The District Court's Decisions

The court observed that the DPPA was meant to address at least two concerns: (1) protect against stalkers and criminals who could acquire personal information from state DMV's and (2) curtail states from selling personal information to businesses engaged in direct marketing and solicitation. The DPPA makes it generally unlawful for any person to knowingly disclose personal information from a motor vehicle record.

The court found that the DPPA, by its plain terms, restricts or prohibits the sending or transmitting of certain unwanted communications. Because the allegations in the putative class action complaint all arose out of alleged violations of the DPPA, the court found that the exclusion barred coverage. The court ruled that the Unsolicited Communications exclusion precluded coverage for all claims arising out of statutes like the DPPA, regardless of whether the particular violations constituted improper communication or distribution of information.

Two of the policies also contained an exclusion for injury "arising out of the violation of a person's right of privacy created by any state or federal act." The court found that this exclusion plainly applied because the only claim against the insureds was for alleged DPPA violations. The

court considered an exception for "liability for damages that the insured would have in the absence of such state or federal act," *i.e.*, those remedies available at common law. But the court emphasized that "the Fourth Circuit has twice held that that exception is inapplicable because 'the right of privacy that the defendants [in the underlying actions] are alleged to have invaded is the right created and protected by [the DPPA], not by the common law of North Carolina.'"

Thus, the court found in each case that the insurer had no duty to defend or indemnify.

The cases are: *Van Laningham v. Allied Ins.*, No. 1:16CV948 (M.D.N.C. June 25, 2020); *Sentinel Ins. Co. v. Farrin,* No. 1:17CV211 (M.D.N.C. June 25, 2020); and *Sentinel Ins. Co. v. Salama,* No. 1:17CV328 (M.D.N.C. June 25, 2020).