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Massachusetts Appellate Court Applies Cross-Liability Exclusion in Finding that Insurer Had No Duty to Defend Additional Insured

The Appeals Court of Massachusetts found use of the phrase “any insured” in a cross-liability exclusion precluded coverage for a claim by the named insured’s employee against an additional insured and that the policy’s severability clause did not create an ambiguity.

The Case

Phoenix Baystate Construction, Co., Inc. (Phoenix) was the general contractor on a construction project. It retained Lanco Scaffolding as a subcontractor. While disassembling the scaffolding, a Lanco employee lost balance and sustained injury. He sued Phoenix.

The subcontract required Lanco to name Phoenix as an additional insured under its insurance policy on a primary and non-contributory basis for claims caused in whole or in part by Lanco’s negligent acts or omissions. Phoenix qualified as an additional insured under Lanco’s commercial general liability policy with First Financial Insurance Company.

First Financial declined to defend Phoenix based on the cross-liability exclusion. The cross-liability exclusion barred coverage for bodily injury to, among others, an "employee of any insured." There was no question that the claimant was an employee of Lanco, an insured under the policy.

Phoenix, however, argued that the separation of insureds clause created an ambiguity because it required that each insured be treated as having its own insurance policy. The separation of insureds clause provided:

> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.

Phoenix argued that if it were treated as having its own insurance policy, the reference in the cross-liability exclusion to "any insured" should be read to mean Phoenix only. According to Phoenix, because the claimant was not an employee of Phoenix, the cross-liability exclusion did not apply.

The Decision

Looking at cases across the nation, the court observed that the majority views the phrases "any insured" and "the insured" as distinct. For exclusions that pertain to "any insured," severability of interests clauses have no effect. The plain meaning of "any" applies. For exclusions that pertain to "the insured," severability of interests clauses clarify that "the insured" refers only to the insured who is actually seeking coverage. The court also pointed to a Massachusetts Supreme Judicial Court decision recognizing, although subtle, that the distinction in the use of the words "an insured" and "the insured" is not without difference.

The court next looked to general principles of contract interpretation. Specifically, that it must presume every word in the policy has been included for a purpose and that it must give every word meaning and effect whenever practicable. Applying this principle, the court noted that

if some exclusions refer to "any insured," while others refer to "the insured," there must be a difference between those two phrases. Reading the policy as a whole, it concluded that the policy's reference to "any insured" in the cross-liability exclusion unambiguously included Lanco in addition to Phoenix.

The purpose of the cross-liability exclusion, the court observed, is to bar coverage for the precise type of claim at issue – a claim brought by one insured against another insured. The court explained that there would be "no logical reason why [a severability of interests clause] would operate to limit application of an exclusion whose very purpose is to prevent one insured (or its employee) from suing another insured (or its employee)."

The appellate court reversed and remanded the case back to the trial court for entry of a new order declaring that First Financial has no duty to defend or indemnity Phoenix for claims asserted by the Lanco employee.

The case is *Phoenix Baystate Contr., Co., Inc. v. First Financial Ins. Co.,* No. 19-P-743 (Mass. Ct. App. May 18, 2020).

Eleventh Circuit Agrees That Spider Infestation Falls Within Exclusion for Insects and Vermin

The Eleventh Circuit upheld a trial court's ruling that the ordinary meaning of the terms "insects" and "vermin" include a claim for spider infestation for purposes of applying an exclusion in a homeowners policy.

The Case

After the Robinsons moved into their home, they discovered that it had been infested with the highly venomous brown recluse spider. The Robinsons tried to eradicate the problem, but with no success. They then filed a claim under their homeowners insurance policy.

Their insurer denied the claim based on the exclusion for loss "caused by … birds, vermin, rodents, or insects."

The Robinsons sued, alleging that the brown recluse spider infested every facet of their home, could not be eradicated, posed a deadly risk, and presented a dangerous and irreparable condition that rendered their home unsafe for occupancy.

The district court dismissed the complaint, finding that brown recluse spiders were both insects and vermin within the meaning of the exclusion. The Robinsons appealed.

The Decision

The Eleventh Circuit affirmed.

Applying Alabama rules of contract construction, the court recognized that the words used in the exclusion must be given their ordinary, everyday meanings, unless the context indicates that they bear a technical meaning. It looked to standard English dictionaries to determine the ordinary meaning of the terms "insects" and "vermin."

The court found that all the dictionaries it reviewed, both modern and old, listed spiders as an example of an "insect." The Robinsons, however, noted that spiders are not actually insects, but are arachnids. They pointed to dictionaries acknowledging this distinction. They argued that the scientific, or technical meaning should be given to the word "insect" when interpreting an exclusion.

The court disagreed, finding that the technical or scientific meaning does not control the interpretation of the policy. And dictionary definitions of "insect" establish that an ordinary person would understand the term "insect" to include spiders.

The court also found that brown recluse spiders were “vermin” under the ordinary meaning of that term. Dictionaries defined vermin to include "small common harmful or objectionable animals … that are difficult to control” and "noxious or objectionable" creatures such as "creeping or wingless insects (and other minute animals) of a loathsome or offensive appearance or character, esp. those which infest." The court found that the allegations of the Robinsons’ complaint alone established that brown recluse spiders are vermin, as the large colony of spiders were alleged to be pervasive, dangerous, and not easily eradicated. These allegations, the court emphasized, made clear that brown recluse spiders are small common harmful or objectionable animals that are difficult to control. The court stated that while the term “vermin” might be ambiguous with respect to other animals, the ordinary person would understand “vermin” in this context to include brown recluse spiders.

The court affirmed dismissal of the Robinsons’ complaint.

The case is *Robinson v. Liberty Mutual Ins. Co.*, No. 19-10940 (11th Cir. May 11, 2020).

Eighth Circuit Holds That Insurer Has No Duty to Defend Construction Defect Claim

The Eighth Circuit, applying Missouri law, held that an insurer had no duty to defend a construction defect claim involving foreseeable damages.

The Case

American Family issued a commercial general liability insurance policy to Mid-American. In February 2015, Mid-American entered into an oral contract with Lehenbauer, a Missouri resident.

Under this agreement, Mid-American was to design and construct a grain storage and distribution facility for Lehenbauer. Mid-American performed work under this agreement from February 2015 until March 2016, at which time Lehenbauer terminated Mid-American's services.

Four months later, Mid-American sued Lehenbauer in Missouri state court for breach of contract. Lehenbauer counterclaimed, alleging, among other things, breach of contract, breach of "implied dut[ies] of workmanlike performance and fitness for a particular purpose," and negligence.

Mid-American tendered these counterclaims to American Family, who in turn sought a declaratory judgment that no coverage existed under the CGL policy for Lehenbauer's counterclaims. American Family moved for summary judgment "limited solely to the dispositive issue of whether the counterclaims . . . allege an 'occurrence'" under the CGL policy. The district court awarded American Family summary judgment, concluding that the counterclaims did not allege an "occurrence." Lehenbauer and Mid-American appealed.

The Decision

The Eight Circuit affirmed. The court held that, under Missouri law, courts will "infer, as a matter of law," that the insured had the relevant state of mind precluding coverage when the damages resulting from the insured's acts are the "natural and probable consequences" of those acts. The court concluded that "normal, expected" damages of shoddy workmanship are foreseeable or expected as a matter of law in Missouri and are not the result of an "accident."

The court noted that, as pleaded, Lehenbauer's damages flowed directly from the "multitude of design and construction issues" with Mid-American's work.

The mere fact that Lehenbauer asserted a cause of action for "negligence" did not change the outcome. The court held that "[if] the damages are foreseeable, the act is not an 'accident' regardless of its ostensibly 'negligent' nature."

The court acknowledged that CGL policies are designed to protect the insured against losses to third parties arising out of the operation of the insured's business. But finding coverage under these circumstances would convert the CGL policy into a "guarantee of the quality" of Mid-American's work, which it was not meant to do.

The case is *Am. Family Mut. Ins. Co. v. Mid-American Grain Distribs., LLC*, No. 19-2050 (8th Cir. May 12, 2020).

Fifth Circuit Holds That Insurer Has No Duty to Defend Breach of Contract Claim

The Fifth Circuit, applying Louisiana law, held that an insurer had no duty to defend a breach of contract claim involving intentional conduct.

The Case

Gilchrist Construction Company, LLC contracted with two individuals to remove dirt from their property for use in a nearby road construction project and to store debris-laden dirt and other materials on their property. Under the contract, Gilchrist agreed to "leave a clean, nicely shaped dirt pile to the [property owners'] satisfaction when all activities are complete." After the project was completed, the property owners sued Gilchrist in Louisiana state court, alleging that Gilchrist "intentionally and maliciously buried rubble/debris in and around [their] property" and "underpaid [them] for the dirt it excavated." The property owners asserted claims for breach of contract and bad faith breach of contract.

A jury found in favor of the property owners in the underlying action and awarded them $5,559,000 in damages. Gilchrist sought recovery from its CGL insurers, but they denied coverage.

Gilchrist then sued its CGL insurers for breach of contract. Those policies covered claims for "property damage" arising from an "occurrence." The policies defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Neither policy defined the term "accident."

The district court found that the claim did not fall within the policies' coverage and granted summary judgment to the insurers. Gilchrist appealed.

The Decision

In a per curiam opinion, the Fifth Circuit held that the district court correctly concluded that neither insurer owed Gilchrist defense or indemnity with respect to the underlying action because none of the alleged intentional and malicious behavior was an accident.

The court noted that the acts alleged in the underlying action were intentional and not accidental. The court rejected Gilchrist's argument that the property owners did not expect or anticipate the property damage alleged in the underlying action because they expected the land to be left in a suitable condition, as the contract required. According to the court, the fact that the parties expressly bargained for Gilchrist to "leave a clean, nicely shaped dirt pile to the [property owners'] satisfaction when all activities are complete" did not mean a violation of that contractual provision was unforeseeable or unexpected.

The case is *Gilchrist Constr. Co., L.L.C. v. Travelers Indem. Co.*, No. 19-30863 (5th Cir. May 8, 2020).

West Virginia Federal Court Holds That Injuries from Bar Altercation Did Not Arise from an Accident

A federal court in West Virginia, siding with an insurer, held that injuries from a physical altercation in a bar did not constitute an accident under a commercial general liability policy.

The Case

On February 7, 2016, Jody Patrick Murray ("Murray") was injured during a physical altercation at the Frosted Mug, LLC ("the Frosted Mug"), a bar in Morgantown, West Virginia. During the altercation, Murray claimed he was shoved, punched, choked, kicked, knocked unconscious, and dragged from the Frosted Mug.

Murray sued the Frosted Mug, one of its employees, and a patron in West Virginia state court. Nautilus Insurance Company, the insurer of the Frosted Mug, filed a complaint in a West Virginia federal court seeking a declaratory judgment that it was not required to defend or indemnify the Frosted Mug or its employee under its commercial general liability insurance policy in effect at the time of the altercation. Nautilus moved for a default judgment and summary judgment.

The Decision

The court granted the motions and found that Nautilus had no duty to defend or indemnify the Frosted Mug or its employee on Murray's underlying claims.

The court noted that the policy limited coverage to injuries caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Applying West Virginia law, the court held that the physical altercation on February 7, 2016 "was no accident." The court noted that Murray claimed he was shoved, punched, choked,

kicked, knocked unconscious, and dragged from the Frosted Mug. Such acts, the court held, were intentional and therefore were not an "occurrence."

The court rejected Murray's contention that the claim implicated an "occurrence" because he pleaded a negligence cause of action. The court emphasized that Murray could not mischaracterize intentional acts as negligence in order to make out an "occurrence."

The court further noted that the assault-and-battery exclusion in the policy would also bar coverage.

The case is *Nautilus Ins. Co. v. Frosted Mug, LLC*, No. 1:19-CV-23 (N.D. W. Va. May 14, 2020).

Virginia Federal Court Finds No Duty to Defend Fraud Claim Involving Leaking Townhouses

A federal court in Virginia found that an insurer had no duty to defend a claim involving fraud in the construction and sale of townhouses because it did not arise from an "occurrence."

The Case

J.L. Albrittain, Inc. and Cathedral View, LLC (collectively "Cathedral") were business partners in the construction and sale of four townhouses on North Glebe Road in Arlington, Virginia. They sold townhouses to three groups of underlying plaintiffs.

After moving into their respective townhouses, the underlying plaintiffs discovered that the townhouses had significant water leaks and water damage and engaged various professionals to inspect the leaks and damage. The professionals found substantial water infiltration throughout the townhouses attributable to design and construction defects. The underlying plaintiffs asked Cathedral several times to remedy the leaks and damage, but Cathedral failed to

do so.

Each plaintiff sued Cathedral in Virginia state court. Each complaint alleged that Cathedral knew of the water leaks before they sold the townhouses, having attempted without success to repair the leaks throughout the construction process. Each complaint also alleged that Cathedral intentionally concealed or made misrepresentations regarding the leaks to induce the plaintiffs into purchasing the townhouses. Lastly, each complaint alleged that, as a result of Cathedral's concealment and misrepresentations, the townhouses suffered significant physical damage, including saturated walls, mold, and rusted heating and cooling systems, as well as a permanent diminution in value.

Based on this and other alleged conduct, plaintiffs asserted claims against Cathedral for breach of the implied statutory warranty, fraud, fraud in the inducement, and violation of the Virginia Consumer Protection Act.

Cathedral looked to its insurance policies for coverage.

Builders Mutual Insurance Company ("BMIC"), Cathedral's liability insurer, filed a lawsuit in Virginia federal court seeking a declaration that it owed no duty to defend Cathedral in the three state court actions. BMIC moved for summary judgment.

The Decision

The court granted BMIC's motion on the basis that the state court complaints were "replete with explicit allegations of intentional conduct." The court held that because such intentional conduct is neither an "occurrence" nor an "accident," the complaints did not trigger BMIC's duty to defend its insureds.

The court rejected Cathedral's reliance on a few allegations of negligence in the underlying complaints. Any allegations of negligence, the court explained, were inconsistent with the

complaints' overarching theory that Cathedral knew of the water leaks before selling the townhouses to the plaintiffs. By simply using the word "negligence" in the complaints, plaintiffs did not change the nature of the claim into an "occurrence." Although it was limited to a review of the policy and the complaint, the court stated that the Eight Corners Rule "does not require [courts] to abandon the rule of reason."

The court further held that even if the state court complaints had adequately alleged that Cathedral engaged in negligent conduct, that conduct still would not constitute an "occurrence." Under Virginia law, allegations of negligence are not synonymous with allegations of an "accident" or "occurrence." There is no "occurrence" where damage results from an insured's defective performance of a contract and is limited to the insured's work product. The court noted that contractors, when they agree to construct a building, expect that they will have to repair any defects in their work.

Alternatively, the court held that, even if Cathedral had met its burden to demonstrate coverage, the policy exclusion for property damage "expected or intended from the standpoint of the insured" barred coverage.

The case is *Builders Mut. Ins. Co. v. J.L. Albrittain, Inc.*, 19-cv-1315 (E.D. Va. May 7, 2020).

Fourth Circuit Finds Intentional Harm Exclusion Ambiguous and Requires Insurer to Defend Tortious Interference Claim

Finding that "physical harm" was a reasonable interpretation of the term "harm" in an intentional injury exclusion, the U.S. Court of Appeals for the Fourth Circuit held that an insurer was under a duty to defend economic-based torts, even though those torts required a showing of malice and intent to cause harm.

The Case

A woman sued her father and half-brothers over an employment dispute involving a family business. She asserted claims for tortious interference with economic relationships and tortious interference with contract. To prevail on her claims, she had to show intentional, malicious acts that were calculated to cause harm.

The policyholders – the father and half-brothers – tendered a claim to their insurer under a policy that covered wrongful employment practices. The insurer denied, asserting the intentional injury exclusion. The exclusion applied to:

> any act committed by or at the direction of the INSURED with intent to cause harm. This exclusion does not apply if INJURY arises solely from the intentional use of reasonable force for the purpose of protecting persons or property.

The insurer contended that "harm" meant any harm. The policyholders argued that "harm" could refer to "physical harm." The trial court sided with the insurer.

The Decision

The Fourth Circuit reversed. It agreed with the policyholder that the exclusion could reasonably suggest more than one meaning, and therefore, was ambiguous. The court reasoned that "when considered in conjunction with the exception for acts of force committed in defense of persons or property, 'harm' could reasonably be interpreted as referring only to harms of a physical nature." Giving the exclusion this narrow construction, the court ruled that the economic torts at issue did not assert a claim for physical harm, and thus, fell outside the reach of the exclusion.

The court held that the insurer was not justified in having refused to defend.

The case is *Miriam, Inc. v. Universal Underwriters Ins. Co.,* No. 19-1736 (4th Cir. May 15, 2020).

Washington Supreme Court Holds That Insurer Committed Bad Faith When Denying Coverage Where Law Was Uncertain

The Washington Supreme Court held that an insurer breached its duty to defend in bad faith by refusing to defend its insured based on its own interpretation of the policy and the law, which the court said was uncertain at best.

The Case

In 1854, the Washington Territory and nine Native American tribes, entered into a treaty under which the tribes relinquished their rights to the land but retained "the right of taking fish at all usual and accustomed grounds and stations … in common with all citizens of the Territory." Court decisions had found that this right included the right to harvest shellfish from private lands within the usual and accustomated places with naturally occurring shellfish beds, but not artificial shellfish beds.

In 1978, Leslie and Harlene Robbins (collectively "Robbins") purchased property in Mason County, Washington that included tidelands with manila clam beds. They obtained a title insurance policy from Mason County Title Insurance Company ("MCTI"). The policy provided that MCTI would insure Robbins "against loss or damage sustained by reason of: … [a]ny defect in, or lien or encumbrance on, said title existing at the date hereof." The policy further stated: "[MCTI] shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which

existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein."

Under "[g]eneral [e]xceptions," the policy excluded from coverage "public or private easements not disclosed by the public records." "[P]ublic records" was defined under the policy as "records which, under the recording laws, impart constructive notice with respect to said real estate."

For years, Robbins had contracted with commercial shellfish harvesters to enter Robbins's property to harvest shellfish from the tidelands. In 2015, after another contract expired, Robbins began negotiations with a different shellfish harvester. Although the harvester had reason to believe Robbins's clam beds were not natural, and thus, not part of the Treaty, he notified the tribe of his intent to harvest shellfish from Robbins's property. The tribe responded that it needed more information about the tidelands and that it disagreed with the harvester's assertion that Robbins's tidelands did not include natural clam beds.

Robbins ultimately tendered a claim to MCTI to defend against the tribe's demand to enter Robbins's property to harvest clams. On July 26, 2015, the tribe sent Robbins a formal letter to notify them of the tribe's plan to enter their property and harvest shellfish in accordance with the federal court's interpretation of the treaty.

MCTI denied Robbins's request for a defense because, in MCTI's view, the tribe's asserted right was an "easement[ ]" and "[a] treaty between the federal government and a Native American Indian tribe is not a record that imparts constructive notice pursuant to Washington law."

Robbins then sued MCTI in Washington state court, alleging in pertinent part, that MCTI breached its duty to defend. MCTI and Robbins filed cross-motions for summary judgment. The trial court granted MCTI's motion, denied Robbins's motion, and dismissed Robbins's claims with

prejudice. Robbins appealed. The Court of Appeals reversed the trial court's decision. Then MCTI appealed.

The Decision

The Washington Supreme Court affirmed the Court of Appeals' decision. The court held that MCTI had a duty to defend Robbins against the tribe's asserted right and that MCTI breached that duty in bad faith when it unreasonably failed to do so.

The court addressed the policy's requirements. The court first found that the tribe's letter to Robbins was a "demand" within the meaning of the policy. The term "demand" was undefined in the policy, so the court applied its plain and ordinary meaning. The court noted that dictionaries defined "demand" as "an assertion of a legal right" or "a request for something due." The court determined that the tribe's letter to Robbins seeking to harvest shellfish on Robbins's tidelands satisfied this definition, and thus, was a "demand" under the policy.

The court next rejected MCTI's argument that the duty to defend could only be triggered once legal proceedings had been initiated. The court distinguished decisions addressing policies that required an insurer to defend only a "suit" against the insured.

The court also rejected MCTI's reliance on the policy exclusion for "public or private easements not disclosed by the public records." The court held that the tribe's right constituted a "profit" and that Washington law was uncertain as to whether a profit is a type of easement. Any uncertainty in the law, the court observed, must be construed in favor of the insured. Because the policy exclusion for "easements" did not apply to the tribe's right, the court concluded that MCTI had a duty to defend, which it breached.

The court further found that MCTI acted in bad faith because it unreasonably failed to defend Robbins. The court emphasized that MCTI did not defend under a reservation of rights, but

instead, refused to defend outright based on its own interpretation of the policy and the law. Washington case law was uncertain, at best, as to whether the tribe's right is an easement or a profit and whether a profit is an easement. Therefore, the court concluded, MCTI wrongfully breached its duty and was estopped from denying coverage unless an affirmative defense applied.

The case is *Robbins v. Mason County Title Ins. Co*., No. 96726-1 (Wash. May 7, 2020).