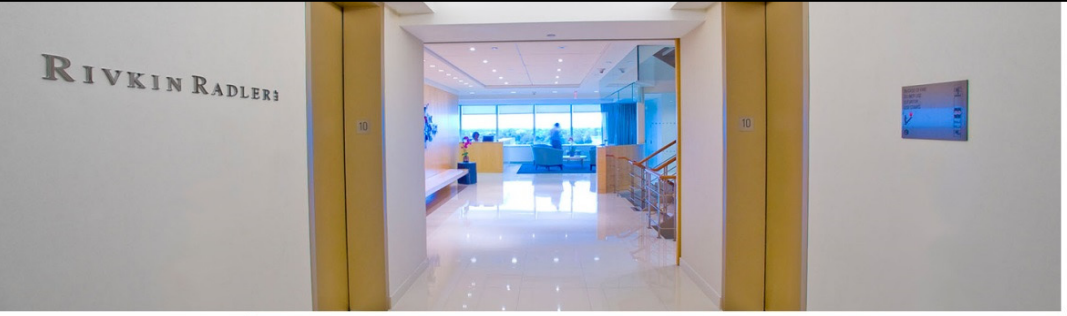

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Delaware Supreme Court Holds That Insurers Have No Duty to Defend Drugstore Chain in Opioid Litigation

Reversing the lower court, the Delaware Supreme Court held that governmental entities' claims to recover their own increased economic costs due to negligent opioid distribution to the public did not trigger an insurer's duty to defend.

Interpreting the phrase "damages because of bodily injury," the court advises on an important causation issue. The court instructs that to trigger coverage, there must be more than "some linkage" between the injury and damages; there must be bodily injury to the plaintiff and damages sought because of that specific bodily injury.

The Case

Thousands of suits have been filed against companies in the pharmaceutical supply chain for their roles in the national opioid crisis. These suits have been coordinated in a multi-district litigation before the U.S. District Court for the Northern District of Ohio. Rite Aid is a defendant in many of those suits.

Rite Aid sought a defense from its liability insurer, Chubb. After Chubb denied coverage, Rite Aid sued Chubb seeking a ruling that Chubb must pay Rite Aid's defense costs. The trial court ruled for Rite Aid. Chubb appealed.

The Delaware Supreme Court's Decision

The coverage dispute before the Delaware Supreme Court concerned bellwether complaints by two Ohio counties. The counties' complaints were directed at two primary causes of the opioid crisis: (1) a marketing scheme; and (2) a supply chain scheme where various entities failed to maintain proper controls over prescription opioids that led to oversupply and the development of an illegal secondary market.

The Chubb policy pays "those sums the insured becomes legally obligated to pay as damages because of 'personal injury' or 'property damage' to which this insurance applies." Chubb had the right and duty to defend the insured against any suit seeking those damages. But the policy also stated that Chubb had "no duty to defend the insured against any 'suit' seeking damages for 'personal injury' or 'property damage' to which this insurance does not apply." The term "personal injury" was defined to include "bodily injury."

It was undisputed that the counties' suits did not seek damages for physical or emotional injury to a person, but instead sought purely economic injuries in the form of increased social spending.

Rite Aid contended that non-derivative economic damages related to bodily injury was not excluded and that if the damages sought are causally related to a covered "occurrence," Chubb's duty to defend was triggered.

Chubb conceded that the policy covers suits seeking damages "for" or "because of" personal injury. But Chubb argued that coverage depends on whether the bodily injury was suffered by the plaintiff or someone asserting bodily injury derivatively for the harmed plaintiff. Chubb argued that the counties themselves did not suffer personal injury and sought compensation only for their non-derivative economic harms.

The Delaware Supreme Court acknowledged that the counties' economic losses, which included medical care, might have been linked to care for Ohio residents affected by the opioid epidemic. But it found that the policy covered damages for bodily injury only when asserted by 1) the person injured, 2) a person recovering on behalf of the person injured, or 3) people or organizations that treated the person injured or deceased, who show the existence of and cause of the injuries. The counties, however, expressly disclaimed all personal injury damages and said their claims were "not based on" the injuries of others.

The counties alleged that their citizens were injured by opioids. But the court said that "the existence of injury—untethered to the claims—does not transform the allegations into claims for damages 'because of' personal injury." The complaint must do more than relate to a personal injury, the court explained. It must seek to recover for the personal injury or seek damages derivative of the personal injury. The counties did not seek damages for personal injury; they sought to recover only for non-derivative economic loss.

Thus, the court held that Chubb had no duty to defend the counties' suits.

In reaching its conclusion, the Delaware Supreme Court disagreed with the reasoning of an intermediate Ohio appellate court in *Acuity v. Masters Pharmaceutical, Inc.* The *Acuity* court found that similar opioid lawsuits triggered a duty to defend because there arguably was a causal connection between the opioid distributor's alleged conduct and the bodily injury suffered by individuals who became addicted to opioids, and the damages suffered by the governmental entities through money spent on emergency services, medical care, and substance abuse treatment.

The *Acuity* court interpreted "because of bodily injury" to mean any injuries "causally related" to personal injury and held "the policies expressly provide for a defense where

organizations claim economic damages, as long as the damages occurred because of bodily injury." The Delaware Supreme Court interpreted this language differently. There must be more than "some linkage" between the personal injury and damages to recover "because of" personal injury, the court explained. There must be bodily injury to the plaintiff, and damages sought because of that specific bodily injury. The court said the Chubb policy does not provide for coverage unless it is connected to the personal injury, independently proven, and shown to be caused by the insured.

The Delaware high court also rejected Rite Aid's argument that the counties' suits sought damages claimed by an organization for care and death resulting from bodily injury. The court emphasized that the Chubb policy covers "damages claimed by any person or organization for care, loss of services or death resulting at any time from *the* 'personal injury.'" "The" personal injury means one that the person or organization claims is covered by the policy. The counties expressly disclaimed injuries suffered by others and instead claimed their own increased economic costs. The counties' claims were directed at Rite Aid's negligent distribution of opioids to the public. That claim was directed not to an individual injury but to a public health crisis.

In explaining the distinction, the court said if the counties ran public hospitals and sued Rite Aid on behalf of these hospitals to recover their demonstrated costs of treating bodily injuries caused by opioid over prescription, then the Chubb policy probably would be triggered. But the counties' claim for damages did not depend on proof of bodily injury. Thus, the counties' complaints were not covered and did not trigger a duty to defend.

The case is *Ace Am. Ins. Co. v. Rite Aid Corp.,* No. 339, 2020 (Del. Jan. 10, 2022).

Suit over Sale of Knock-Off Trailer Did Not Allege Advertising Injury, 7th Circuit Holds

Affirming the district court's ruling, the U.S. Court of Appeals for the Seventh Circuit found that a suit against a manufacturer for breach of contract and tortious interference with contract did not plausibly allege trade dress infringement in an advertisement as required by the manufacturer's insurance policy. Thus, the insurer had no duty to defend. The ruling reaffirms the principle that for this type of coverage to apply, there must be a causal connection between the injurious offense and advertising. Also, the duty to defend is to be measured by the facts pleaded, not what could be pleaded.

The Case

BizBox sued Aluminum Trailer Company (ATC), alleging that ATC sold a knock-off trailer using BizBox's design. The knock-off trailer was nearly identical to a BizBox trailer, except that ATC had replaced BizBox's name and logo with its own name and logo. BizBox's suit asserted claims for breach of contract and tortious interference.

ATC tendered the suit to its commercial general liability insurer and sought coverage under the policy's personal and advertising injury provisions.

"Personal and advertising injury" was defined in relevant part as, "injury arising out of ... [i]nfringing upon another's ... trade dress ... in your 'advertisement.'" "Advertisement" meant "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

ATC argued that it was owed a defense because BizBox's suit could be construed as alleging trade dress infringement. The insurer disagreed and denied coverage. ATC then sued for a declaratory judgment.

The insurer moved to dismiss the declaratory judgment complaint because BizBox never alleged an infringement of its trade dress in an "advertisement." An Indiana federal district court judge agreed and dismissed the action. ATC appealed.

The Seventh Circuit's Decision

The Seventh Circuit affirmed.

ATC conceded that BizBox's complaint did not expressly allege trade dress infringement. But ATC argued that it *could be* construed as alleging such a claim and that its logo affixed to the trailer was an advertisement.

The Seventh Circuit wasn't buying it. It found that BizBox did not allege any facts that plausibly showed that ATC infringed on BizBox's trade dress in an advertisement. The logo affixed to the knock-off trailer did not provide the requisite connection to advertising. The court found that no facts from BizBox's complaint could be construed to support the assertion that the injury stemmed from the alleged advertisement.

As the insurer's duty to defend was never triggered, the court upheld the district court's dismissal of ATC's declaratory judgment complaint.

The case is *Aluminum Trailer Co. v. Westchester Fire Ins. Co.,* No. 21-1538 (7th Cir. Jan. 31, 2022).

Fourth Circuit Applies "True Excess" Rule in "Other Insurance" Dispute

In a dispute between insurers over priority of coverage, the Fourth Circuit held that one insurer's policy was a "true excess" policy because it required underlying insurance. In comparison, the other insurer's policy was a "coincidental excess" policy because it contemplated

serving as primary insurance. As this case illustrates, this distinction is key when applying "other insurance" clauses.

The Case

J. Randolph Hooper was operating his parents' boat when he was involved in an accident that killed a passenger. The deceased passenger's estate brought a wrongful death lawsuit against Rand and his parents, Gary and Lucy Hooper. The Hoopers had three separate insurance policies: a GEICO marine liability policy with limits of $500,000; a Mutual Assurance Society of Virginia (the "Society") homeowners' policy with limits of $500,000; and a Federal Insurance Company "group personal excess liability policy" with limits of $5,000,000.

The Society policy provided excess coverage for boating accidents and purported to be "excess over other valid and collectible insurance that applies to the loss or claim." The Society policy further stated, "[i]f the other insurance is also excess, 'we' pay only 'our' share of the loss or claim." By contrast, the Federal policy covered permissive use of a boat "with liability coverage in excess of your underlying insurance."

The deceased's estate settled for $4,000,000. GEICO and the Society agreed to contribute their policy limits of $500,000 toward the settlement and Federal agreed to contribute $3,000,000. Society reserved the right to pursue contribution for each insurer's proportionate share of the settlement.

The Society sued GEICO and Society in Virginia state court, contending that it paid more than its *pro rata* share. Federal removed the case to federal court. Society voluntarily dismissed its claims against GEICO. The Society argued that its policy and Federal's policy both afforded identical excess coverage for liability arising from Rand's permissive use of his parent's boat and contained mutually repugnant "other insurance" clauses. The Society thus claimed it should have

shared liability with Federal on a *pro rata* basis and sought $181,818.18 as reimbursement. The parties cross-moved for summary judgment.

The district court granted Federal's motion for summary judgment and denied the Society's motion. The district court predicted that Virginia would adopt the "true excess rule," which directs courts to evaluate the effects of each policy on coverage before comparing the language of the "other insurance" provisions. Applying this rule, the district court found that Federal's policy was a true excess policy because it held itself out as excess insurance and required underlying insurance. By contrast, the court noted, the Society policy was a coincidental excess policy because it presented itself simply as homeowners' insurance and it contemplated serving as primary insurance, even if in most situations it would operate as excess coverage because of its "other insurance" clause.

In siding with Federal, the district court found that Federal's "substantially higher ceiling" of $5,000,000 suggested "that it served as excess, catastrophic, or umbrella coverage," while the Society's limits of $500,000 "insured ground floor risk." The district court also rejected Society's argument that Federal's duty to defend rendered it a primary policy. Society appealed.

The Decision

The Fourth Circuit affirmed, agreeing that the contrast between the two policies is "unmistakable." The Society's policy was a primary policy with an "other insurance" clause. Federal's policy was an excess policy requiring underlying primary insurance. Just because the Society's policy was not primary under the facts of this particular case did not change its basic nature and function. The Federal policy was thus excess to the Society policy and did not share pro rata with the Society policy.

The case is *Mut. Assur. Soc'y of Va. v. Fed. Ins. Co*., No. 20-1149 (4th Cir. Jan. 22, 2022).

Ninth Circuit Reinstates Insured's Claim under Crime Policy for Loss Arising from Fraudulent Email Instructions

The Ninth Circuit held that the district court incorrectly interpreted the Computer Fraud and Funds Transfer Fraud provisions in a commercial crime policy, where the insured's employee was tricked into transferring funds to an imposter. The case addresses the thorny issue of what "directly from" means in these types of policies.

The Case

The insured is a property management company. An employee in the accounting department received an email that she thought was from her superior. The email included an invoice for $50,000 and directed the employee to pay a third-party by wire transfer. Believing the email instruction was legitimate, she processed the payment by wire transfer.

The employee received two more fraudulent email instructions for payments of $150,000 and $470,000. The employee wired the $150,000 payment but then became suspicious. She emailed her superior for confirmation and learned that he had not requested the prior transfers. The company could not recover the two wire transfers totaling $200,000.

The company submitted a claim under its commercial crime policy. The insurer denied the claim, asserting that the funds transfer fraud coverage did not apply because an employee had initiated the wire transfer.

The company sued. The district court ruled for the insurer. It found that the property management company's loss did not result directly from fraudulent email instructions as required by the computer fraud and funds transfer fraud provisions of the policy.

The company appealed.

The Ninth Circuit's Decision

The Ninth Circuit reversed for three reasons.

Computer Fraud

The court first found that the district court misinterpreted the computer fraud provisions. Its initial error stemmed from relying on the *Pestmaster* decision, a case with distinguishable facts. In that case, a payroll tax contractor was authorized to transfer money from the insured's accounts to pay taxes. The contractor began embezzling money entrusted to it. The *Pestmaster* court held that the computer fraud provisions did not cover the stolen funds because the funds were transferred by the contractor under authorization from the insured, and then stolen.

But here, the property management company never authorized the third-party to pay its bills. Instead, an imposter sent an email fraudulently authorizing the employee to pay the third-party based on a fraudulent invoice. Initiating a wire transfer, the Ninth Circuit stated, is not the same as authorizing payment. If the company had authorized the employee to pay a third-party and the employee then stole some of that money, then *Pestmaster* might have controlled. As this case involved an email fraud scheme, the district court erred when relying on *Pestmaster*.

The commercial crime policy at issue covered loss "resulting directly from the use of any computer to fraudulently cause a transfer of that property from" the insured to a person or location outside the insured. The Ninth Circuit said that the district court was wrong to interpret this language to mean only a loss resulting directly from unauthorized use of the insured's computers or hacking. Such interpretation, the court suggested, eliminates the possibility of coverage whenever an employee is defrauded into taking action.

The circuit court determined that the district court's reliance on *Pestmaster* led it to a circular premise: that the employee "authorized" a transfer of $200,000, curing any prior fraud, when she initiated a transfer of $200,000 based on fraud.

Because the Ninth Circuit could not conclude that the company's loss of funds due to the fraudulent email was not "direct," it reversed the district court's ruling.

Funds Transfer Fraud

The court next considered the funds transfer fraud coverage, which covers "loss of Money and Securities resulting from a Fraudulent Instruction directing a financial institution to transfer, pay or deliver Money and Securities from Your Transfer Account."

The court held that the district court overlooked the express language of the policy, which states that funds transfer fraud includes not only fraudulent instructions sent directly to a bank, but also fraudulent instructions first received by an employee. Either type of fraudulent instruction that results in "directing" a financial institution to transfer funds is covered by the policy, the court added.

The court considered the definition of "fraudulent instruction," which included "an electronic . . . instruction initially received by You which purports to have been transmitted by an Employee but which was in fact fraudulently transmitted by someone else without Your or the Employee's knowledge or consent." The parties offered different interpretations on whether the fraudulent email was a fraudulent instruction.

The property management company argued that the fraudulent email here was a "fraudulent instruction" that "directed a financial institution" to transfer funds and should be covered by the policy because "[e]very action [the employee] took to facilitate the transfer of funds was the direct result of having been duped by the fraudster's email."

In contrast, the insurer argued that because the fraudulent emails were sent to the insured rather than directly to a financial institution without the company's knowledge, there was no coverage.

The Ninth Circuit sided with the property management company. It reasoned that the sole purpose of the fraudulent email was to instruct the employee to initiate a wire transfer. The court said that it would be "hard pressed" to construe the email as doing anything but directing a financial institution to debit the company's account and transfer money from it. Otherwise, the fraudulent instruction definition, which anticipates an instruction sent to the insured before the bank, would be superfluous.

The case is *Ernst & Haas Mgmt. Co. v. Hiscox, Inc.,* No. 20-56212 (9th Cir. Jan. 26, 2022).

California Federal Court Applies Pollution Exclusion to Environmental Enforcement Action

A California federal court found that a sudden and accidental exception to a pollution exclusion did not apply to a gradual pollution claim arising from the insured's routine operations; the few sudden and accidental events were not a substantial cause of the damage for which the insured was liable.

The Case

The City of West Sacramento filed an environmental enforcement action against R&L Business Management as the successor in interest to a plating company. In March 2021, the court entered a stipulated judgment against the R&L defendants in favor of the City.

Arrowood sued the City in California federal court for a declaration that it did not have to satisfy the stipulated judgment because the four insurance policies it and its predecessor had

issued to the R&L defendants between 1976 and 1986 did not provide coverage. Arrowood argued that the underlying action involved various environmental releases that happened during the insured's normal plating processes. These releases were not unexpected or unforeseen and therefore were not "occurrences."

Arrowood also argued that even if they qualified as "occurrences," they were barred by the policies' pollution exclusion. The pollution exclusion applied to "bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . contaminants or pollutants into or upon land, the atmosphere or any water course or body of water."

The City contended that various releases through a concrete floor, a hole in the wall, a sewer, a dumpster, a fire, and a rainstorm were "occurrences" that resulted in contamination. It also argued that the pollution exclusion did not apply because much of the discharged pollutants traveled through the ground into groundwater, which the City contended was not a "water course or body of water."

The Decision

The court granted Arrowood's motion and denied the City's motion.

The court determined that a few releases were occurrences – two fires that damaged the grinding and polishing room at the site, firefighting efforts involving accidental spraying of waste materials, and a large rain event in 1986.

But the court found that there was no coverage for these releases because of the policies' pollution exclusion. The court rejected the City's argument that the pollution exclusion did not apply because some of the discharged pollutants traveled through the ground into groundwater, which the City contended did not constitute a "water course or body of water." The court said that a common-sense reading of the pollution exclusion revealed that it referred to discharges

"initially made" "into or upon land . . . or any water course or body of water" regardless of the later fate of the discharged contaminants. Because it was undisputed that all relevant discharges were "into or upon land" or, in the case of any airborne releases from the two fires, "into . . . the atmosphere," the court held that the pollution exclusion applied.

The court also found that an exception to the pollution exclusion for "sudden and accidental" discharges was inapplicable. The court observed that to qualify for the exception, the insured must prove that a sudden and accidental event was also "a substantial cause of the injury or property damage for which the insured is liable." The court determined that even if the rain and fire events were sudden and accidental, the evidence demonstrated that the pollutants released from each was trivial and *de minimis.* A reasonable trier of fact could not conclude pollution from either the fire or rain events was a substantial factor in causing the damage for which the insureds were liable.

For this reason, the court held that Arrowood had no duty to satisfy the judgment against the R&L defendants.

The case is *Arrowood Indem. Co. v. City of W. Sacramento*, 21-cv-00397 (WBS)(JDP) (E.D. Cal. Jan 12, 2022).