Eighth Circuit Holds That Concurrent-Proximate-Cause Rule Does Not Apply to Negligence Claims Arising from an Assault

The Eighth Circuit affirmed that an insurer need not cover a judgment against a bar and its owner for negligent hiring and failure to provide adequate security arising from an assault by one of its employees. The court found that the concurrent-proximate-cause rule did not apply when the policy broadly excluded claims arising out of assault, battery, and physical altercations.

The Case

After a patron left the insured's bar, a bar employee attacked him in the parking lot, striking the patron repeatedly on his head and body. The patron sued the bar and its owner. The case went to trial and the jury returned a verdict for the patron, finding the insured liable for (1) failing to provide safe travel, failing to protect, failing to warn, failing to provide adequate security and (2) negligent hiring, retaining, or supervision.

The bar's insurer filed a declaratory judgment action seeking a ruling that it need not indemnify the bar and its owner because the policy's exclusion for assault, battery, and physical altercation applied. The exclusion was broad and excluded negligence claims arising out of the assault, including negligent hiring, negligent supervision, and failure to warn.

The district court granted the insurer's summary judgment motion and the insured appealed.

The Eighth Circuit's Decision

The Eighth Circuit affirmed. It found that the patron's claim "undeniably fit the policy's definition of assault, battery, and physical altercation."

The bar and its owner argued that the exclusion did not apply to them because the claims against them are for negligence. Rejecting this argument, the court noted that the policy is concerned with how the bodily injury arose, not how the lawsuit arose. At most, the court found, the patron's injuries arose out of the insureds' negligence along with assault, battery, and physical altercation. But the policy anticipated this situation and stated that it applied to negligent hiring, training, or supervision. Similarly, it did not matter that the bar owner did not commit the assault because the exclusion applied regardless of the direct or indirect involvement of the insured.

The court next considered the insureds' negligent-proximate-cause argument. That rule provides that where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable as long as one of the causes is covered by the policy. Under the rule, the injury must have resulted from a covered cause that is truly independent and distinct from the excluded cause. The insureds argued that even if the assault and battery exclusion applied, their negligence should be treated as a separate, covered cause of the patron's injury.

The court disagreed and found that the concurrent-proximate-cause rule did not apply because the insureds' negligence was not a *covered* cause. As discussed above, the policy excluded various negligence-based claims caused by or arising out of the assault, including failure to supervise or keep the premises in a safe condition, failure to warn or supervise, negligent hiring, and so on.

The court was not convinced that the negligence claims were truly independent and distinct from the assault claim. It found that the scope of foreseeable harm was narrow. According to the petition, the insureds knew about the employee's violent and belligerent reputation. The harms that flow from failing to restrain such a person, the court noted, are few: they include assaults, batteries, and physical altercations. It was not merely incidental that the insureds' negligence resulted in those things.

But in any event, because neither the insureds' negligence nor the assault and battery counts are covered causes, it does not matter how independent and distinct they are. The concurrent-proximate-cause rule simply does not apply.

The court affirmed the district court's grant of summary judgment to the insurer.

The case is *Great Lakes Ins. v. Andrews,* No. 21-1725 (8th Cir. May 10, 2022).

North Carolina Court of Appeals Finds No Duty to Defend Claim Involving Gun Death, Despite Negligence Allegations

A North Carolina court ruled that a shooting by the insured did not constitute an accident under a liability policy even if the insured did not intend to injure or kill, finding that intent can be inferred from the act itself.

The Case

Defendant Blaine Dale Hague had a physical altercation with Baron Thomas Cass. Cass removed himself from the conflict by walking away. But Hague took out a handgun and fired multiple shots, some of which struck Cass and killed him.

Cass's estate brought a wrongful death suit against Hague in North Carolina state court, alleging that defendant breached his duty of care and that Cass died because of defendant's

grossly negligent acts. Hague had a personal liability policy with North Carolina Farm Bureau Insurance Company.

The policy defined an "occurrence" as "an accident[,] [which] includes loss from repeated exposure to similar conditions." The policy also included an intentional act exclusion, which provided that Personal Liability Coverage "does not apply to bodily injury or property damage which results directly or indirectly from . . . [a]n intentional act or injury resulting from an intentional act of an insured or an act done at the direction of an insured."

The N.C. Farm Bureau sued in North Carolina state court for a declaratory judgment asserting that the policy did not provide liability coverage for the estate's claim. The trial court granted judgment on the pleadings to the N.C. Farm Bureau. Hague appealed.

The Decision

The North Carolina Court of Appeals affirmed. It applied the inferred intent rule. Under North Carolina law, where the term "accident" is not defined in a policy, the third party's injuries must not have been intentionally or substantially certain to occur. Sometimes, intent to injure may be inferred from an act that is substantially certain to result in injury. The court held that firing a gun in another's direction constituted such an act, even if there were no intent to kill or injure.

The court rejected Hague's argument that a finder of fact must determine whether the allegations of the underlying suit are covered by the policy. The court emphasized that, in addressing a duty to defend, the question is not whether some interpretation of the facts as alleged could bring the injury within the policy. Rather, the question is whether the facts as alleged, assumed to be true, stated a covered injury.

For these reasons, the court affirmed the judgment of the trial court and ruled that N.C. Farm Bureau had neither a duty to defend nor indemnify Hague for the underlying action.

The case is *N.C. Farm Bureau Ins. Co. v. Hague*, No. COA21-540 (N.C. Ct. App. May 3, 2022).

Ninth Circuit Reinforces "Suit" Requirement

Upholding the district court's ruling, the Ninth Circuit found that a liability insurer had no duty to defend or indemnify a policyholder for the costs of replacing defective glass panels where the policyholder wasn't sued. As the insurer had not breached the insurance contract or acted unreasonably, the policyholder's bad faith claim was dismissed as well.

The Case

The policyholder, a glass fabricator, sold about 180 panels of reflective glass to a subcontractor. The panels developed a polarization defect. The subcontractor and its general contractor demanded that they be replaced.

The policyholder tendered the claims to its liability insurer, requesting that the insurer acknowledge that it would defend the policyholder against such claims. The insurer denied based on a lack of property damage. The policyholder then sued the insurer for breach of contract, bad faith, and declaratory judgment.

The district court sided with the insurer and dismissed the action. The policyholder appealed.

Ninth Circuit's Decision

The Ninth Circuit affirmed.

Under the policy, the insurer owed a duty to defend "suits," not claims. "Suit" was defined as a "civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged."

The policyholder conceded that no "suit" had been filed but argued that the "suit" requirement was a condition precedent that could be excused. It argued that it should be excused here because the insurer's denial was based on a lack of property damage. The Ninth Circuit, like the district court, rejected this argument, finding that the law is clear: an insurer does not have to defend and investigate until the policyholder tenders a third-party lawsuit to the insurer. The court ruled that the absence of a suit doomed the policyholder's breach of contract claim.

The Ninth Circuit also rejected the policyholder's claim for breach of the implied covenant of good faith and fair dealing. Because the policyholder had not successfully pleaded a claim for breach of contract, it could not sustain a claim for bad faith.

As the policyholder had no live claims, its declaratory judgment action was dismissed.

The case is *Glasswerks LA., Inc. v. Liberty Ins. Co.,* No. 21-55303 (9th Cir. May 6, 2022). Note that this case is unpublished and citation may be limited.

11th Circuit Affirms That Attorney General's Unfair Business Claim Is Not Covered

The Eleventh Circuit found that a claim against a medical practice by the Georgia Attorney General for unfair and deceptive business practices fell outside the coverage of a professional liability policy and was otherwise barred by the antitrust and intentional acts exclusions.

The Case

The insured, Elite, operated a medical practice that provided regenerative medicine products and services to patients suffering from joint pain. The state attorney general (AG) filed a civil action against Elite for violating Georgia's Fair Business Practices Act. The AG alleged that Elite made false and misleading representations to consumers about Elite's regenerative medicine products and services in its advertising materials. Essentially, Elite said that its products were superior to conventional medical treatments in curing diseases and health conditions. The AG's complaint also included a count for using a computer network to engage in deceptive acts.

Elite tendered the suit to its professional liability insurer, who denied coverage. Elite then filed a declaratory judgment action in federal district court seeking a defense. The district court dismissed the action. Elite appealed.

Eleventh Circuit's Decision

The Eleventh Circuit upheld the district court's decision.

It first found that the AG's claims did not allege a negligent act, error, or omission in Elite's performance of medical services. The claims were instead about Elite's marketing and advertising, which the court noted required no medical training.

Elite argued that any violation of the Fair Business Practices Act was unintentional. But the court said that didn't matter. In assessing the duty to defend, the issue is whether a covered claim has been asserted, not whether the insured is actually liable.

Elite contended that the claim fell within the policy's coverage grant because Elite provided live seminars that it says qualifies as "instruction" under the "covered professional services" definition. But the court rejected this argument too because Elite was reading the word

"instruction" in isolation. When read in context, "instruction" relates to durable medical equipment, not regenerative medicine.

The court next found that even if the AG's claims were "covered professional services," they were barred by the Antitrust/Deceptive Trade Practices exclusion. That exclusion precluded coverage for "false, deceptive, or unfair trade practices" or "deceptive and misleading advertising" – exactly what was asserted against Elite in the AG's action.

Elite conceded that the AG's allegations fell within the terms of the exclusion. But Elite argued the Antitrust/Deceptive Trade Practices exclusion was ambiguous because the policy also had an exclusion for intentional acts. The court swiftly rejected this argument as well. That the AG's unfair and deceptive trade practices claims may also involve intentional conduct does not mean the Antitrust/Deceptive Trade Practices exclusion is susceptible to more than one reasonable interpretation. Ordinary rules of contract interpretation, the court found, require that the unequivocal language of the Antitrust/Deceptive Trade Practices exclusion be enforced.

The Eleventh Circuit agreed with the district court: the insurer had no duty to defend.

The case is *Elite Integrated Med., LLC v. Hiscox, Inc.,* No. 21-13151 (11th Cir. May 31, 2022).

Eighth Circuit Finds Silica-Related Dust Exclusion Bars Claim

The Eighth Circuit held that a silica-related dust exclusion unambiguously applied to a dust-related property damage claim.

The Case

MNDKK hired Dingmann Brothers Construction to install a garage door in its building. Dingmann's subcontractor dry cut the wall without using dust protection. The resulting dust

covered the inside of the building and its contents. The dust was cleaned up before it could be tested, but the wall from which the garage door was cut tested positive for silica.

MNDKK submitted a first-party claim to its insurer, Great Lakes Insurance, for clean-up costs and property damage. Great Lakes paid MNDKK's claim and then sought to recover from Dingmann, stating that the damages were from "concrete dust" after "[c]oncrete dust was spread throughout the entire 10,000 square foot building and covered all of the items in the store."

Dingmann's insurer, Grinnell Mutual Reinsurance Company, refused to indemnify Dingmann, citing a silica exclusion. That provision barred coverage for "[a]ny loss, cost or expense arising, in whole or in part, out of the . . . cleaning up, removing, . . . or in any way responding to or assessing the effects of, 'silica' or' 'silica-related dust.'"

Grinnell began a declaratory-judgment action in Minnesota federal court to determine whether it had a duty to indemnify Dingmann. The district court granted summary judgment to Grinell. MNDKKK and Great Lakes appealed.

The Decision

Applying Minnesota law, the Eighth Circuit affirmed the district court's grant of summary judgment to Grinell. The court rejected MNDKK and Great Lake's argument that the cleanup provision did not apply because the damage was due to silica or silica-related dust itself, not its effects. Their argument was based on grammar – a purported misplaced comma. But the court disagreed and found that the comma before "silica" in the exclusion revealed that the phrase "the effects of" belonged with the phrase immediately preceding it, rather than with "silica' or "silica-related dust." Under a contrary interpretation, the court held, it would be difficult to separate losses due to silica from losses due to the effects of silica.

The court also disagreed with MNDKKK and Great Lakes that the silica dust exclusion could not apply because it barred the same things as a property-damage exclusion. The court observed that unlike a conflict between an exclusion and term of coverage, there was nothing remarkable about the presence of two overlapping exclusions. The court emphasized that nothing prevents an insurer from taking a "belt and suspenders" approach to drafting exclusions.

For these reasons, the court affirmed the district court's order holding that the silica exclusion applied.

The case is *Grinnell Mut. Reinsurance Co. v. Dingmann Bros. Constr. of Richmond, Inc.*, 21-2712 (8th Cir. May 18, 2022).

Pollution Exclusion Bars Sediment Runoff Claim, Coverage Not Illusory, Georgia Federal Judge Finds

Rejecting the policyholder's illusory coverage argument, a federal court in Georgia ruled that a developer, whose construction project caused sediment deposits to pollute a nearby pond, could have no reasonable expectation that such a claim would be covered where the policy had a pollution exclusion.

The Case

The insured-developer removed trees and vegetation next to claimant's property. Claimant discovered that her pond had discolored and blamed the developer for causing sediment to wash downhill onto her property. She sued the developer. The developer notified its liability insurer. The insurer reserved its rights on coverage and then filed a declaratory judgment action.

The coverage dispute centered on the pollution exclusion. The policy did not apply to "pollution," defined as property damage arising from the "actual, alleged, or threatened"

discharge of pollutants. The term "pollutants" was defined as "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 Decision

The court found that the pollution exclusion applied. There was no real dispute over whether sediment runoff qualified as a pollutant. Instead, the insured argued that the exclusion was void. Applying it to a developer commonly engaged in this type of work, the insured argued, would avoid the primary coverage risk.

The court rejected the insured's illusory coverage argument. It explained that all policy exclusions restrict coverage. Indeed, that's their purpose. But merely limiting the circumstances for which coverage is provided does not make the coverage illusory. The policy covers occurrences that could arise from its insured's land development activities other than depositing sediment runoff on adjacent property. Nor could the insured have a reasonable expectation that the policy covered sediment runoff when it contained a clear exclusion to the contrary.

The court thus found that the pollution exclusion applied, and the insurer had no coverage obligation.

The case is *Employers Mut. Cas. Co. v. Tiger Creek Dev., Inc.,* No. 4:21-CV-65 (CDL) (M.D. Ga. May 25, 2022).

Alaska Federal Court Applies Pollution Exclusion to Carbon Monoxide Claim

An Alaska federal court found that a pollution exclusion barred coverage for a death caused by carbon monoxide at a cabin in the country.

The Case

Plaintiffs'17-year-old son died while using a bathtub at a cabin in Alaska. An autopsy revealed that he died from acute carbon monoxide poisoning. An investigation concluded that the cabin owners were at fault.

The cabin owners sought coverage from their homeowners insurer, Garrison Property and Casualty Insurance Company. Garrison denied coverage based on a pollution exclusion.

The cabin owners signed a confession of judgment to the plaintiffs for $1.6 million and assigned their rights to pursue coverage under the homeowners policy to the plaintiffs. The plaintiffs brought a declaratory judgment action against Garrison in Alaska federal court. The parties cross-moved for summary judgment.

The Decision

The district court granted Garrison's motion and denied the plaintiffs' motion. Applying Alaska law, the court held that the pollution exclusion unambiguously applied to carbon monoxide. The court rejected the plaintiffs' argument that the pollution exclusion clause was limited to the unintentional escape of pollutants from containers that were meant to keep the pollutants sequestered. The court held that, even though Alaska courts construe coverage broadly and exclusions narrowly, Alaska follows jurisdictions that interpret pollution exclusions literally and by their plain terms.

The court also held that the policyholders could not have had an objectively reasonable expectation that their policy would cover bodily injury from carbon monoxide. The court emphasized that carbon monoxide is a gas and has a toxic effect on inhalation.

For these reasons, the court found that the claim was not covered and granted Garrison's motion for summary judgment.

The case is *Estate of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, 20-cv-00041-SLG (Alaska May 25, 2022).

Illinois Federal Court Finds No Duty to Defend Public Nuisance Claim

An Illinois federal court held that an insurer did not have a duty to defend a public nuisance claim because the claim alleged neither an "occurrence" nor "personal injury."

The Case

Cambridge Mutual Fire Insurance Company filed a declaratory judgment action for a ruling that it did not owe defendants Terry Gaca and Janet Waymen a duty to defend. Claimant alleged that defendants maintained a boarding house and a parking facility for large trucks on the claimant's property. The underlying suit included claims for public nuisance.

Cambridge moved for summary judgment in the declaratory judgment action.

The Decision

The court, applying Illinois law, granted Cambridge's motion. The court agreed with Cambridge that there was neither an "occurrence" nor "personal injury" alleged under the policy.

The court held that there was no "occurrence" because the underlying complaint, on its face, alleged injuries that were intentional, not accidental. The complaint alleged that defendants knew their use of the property as a boarding house and truck lot violated local ordinances, and they even sued the town to challenge the legality of the ordinances.

The court also held that there was no "personal injury," defined as "injury arising out of ... [t]he wrongful eviction from, wrongful entry into, or invasion of right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner,

landlord or lessor ....” This language, the court noted, required that the invasion be committed by the owner of the property. Here, however, the insured did not own the property, the claimant did.

The court rejected defendants’ other arguments. The court found that Cambridge did not violate Illinois Insurance law which required insurers to respond to “inquiries and complaints” within 21 days. The court found that this provision did not apply to formal “claims” by an insured.

The court also rejected the defendants’ argument that Cambridge was equitably estopped from denying coverage because it reserved about $44K for their claim. The court noted that Cambridge did not misrepresent any facts nor did not offer to provide a defense only to reverse course. Thus, the court concluded, defendants failed to establish detrimental reliance.

The court granted Cambridge’s motion and found no coverage for the claim.

The case is *Cambridge Mut. Fire Ins. Co. v. Gaca,* 20 C 2447 (N.D. Ill. May 17, 2022).

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