Nebraska Supreme Court Holds That Assignee Lacks Standing to Assert First-Party Bad Faith

A few years back, the Nebraska Supreme Court ruled that a policyholder may validly assign a post-loss breach of contract claim for insurance proceeds under a homeowner's policy (although the Nebraska Legislature later limited such assignments). It now took up the issue of whether a contractor has standing to assert first-party bad faith claims against the insurer. Or put differently, whether a policyholder can validly assign to a non-policyholder, a cause of action for the tort of first-party bad faith.

After a 2013 storm, a contractor, Millard Gutter Company, obtained assignments from policyholders of Shelter Mutual Insurance Company and made claims for storm damage to the insured properties. Millard then sued Shelter for breach of contract and first-party bad faith. Millard asserted two theories as to why it had standing to assert first-party bad faith. First, it argued that as an assignee, it has standing to assert any existing bad faith claims that the policyholders had when the assignments were made. Second, it argued, that it can assert its own claims for first-party bad faith based on the insurer's post-assignment conduct.

The court rejected both arguments.

As to the first argument, it noted that first-party bad faith is an intentional tort. It treated a claim for first-party bad faith like other personal torts where the proceeds of such an action (absent a contrary statute) are assignable, but the right to prosecute is not. Assuming without

deciding that the proceeds from first-party bad faith actions can be validly assigned under Nebraska law, the court held that a policyholder cannot validly assign the right to prosecute or control such an action. So regardless of the validity for other purposes, the post-loss assignments from Shelter's policyholders could not give Millard standing to prosecute the policyholders' tort actions for first-party bad faith against Shelter.

As to the second argument, the court found there was no basis for Millard's contention that Shelter owed it an obligation of good faith and fair dealing. The court said the implied covenant of good faith and fair dealing depends on a contractual relationship between the policyholder and insurer. There was no contractual relationship between Shelter and Millard, and the post-loss assignments did not create one. The tort of first-party bad faith, the court explained, does not extend to non-policyholder beneficiaries—even those who claim to have been harmed by an insurer's failure to settle with them—because non-policyholders lack a contractual relationship with the insurer.

Thus, the court ruled that Millard lacked standing to bring a first-party bad faith claim. The policyholders remained the real parties in interest and were the only ones withstanding to assert claims of first-party bad faith against the insurer.

The case is *Millard Gutter Co. v. Shelter Mut. Ins. Co.,* No. S-20-907 (Neb. Oct. 14, 2022). The court also issued a companion ruling the same day in *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.,* No. S-19-1089 (Neb. Oct. 14, 2022).

Delaware Supreme Court Finds Virus Exclusion Bars Coverage for Covid-19 Business Interruption Claim

The insured, APX Operating Company, operated six family entertainment centers and two water parks. Government shutdown orders during the Covid-19 pandemic required APX to suspend certain operations in 2020. APX sought coverage for related losses under its commercial lines policy. Its insurer, HDI Global Insurance Co., denied coverage for the loss, citing a pollution and contamination exclusion.

The exclusion applied to "contamination including but not limited to the presence of pollution or hazardous material." "Pollution and/or contamination" meant "the presence of any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, bacteria, virus, or hazardous substances" identified in various environmental statutes.

APX filed suit. The Delaware superior court held that even if plaintiff could establish "direct physical loss or direct physical harm" under the policy's coverage grant (which it did not decide), coverage was still excluded by the pollution and contamination exclusion. The court rejected APX's argument that the exclusion was limited to traditional environmental pollution. No such limitation appeared in the policy, which specifically referred to viruses. The court also rejected APX's attempts to separate the government closure orders from the virus. The exclusion included viruses that "cause[] . . . loss of use to insured property."

In a one-page order, the Delaware Supreme Court affirmed the decision for the reasons stated in the superior court order.

The case is *APX Operating Company, LLC v. HDI Global Insurance Co.*, C.A. No. N21C-03-058 (Del. Oct. 5, 2022).

Third Circuit Holds That Suit Alleged Trademark Infringement, Not Trade Dress Infringement, and Thus Was Excluded

The insured, Dedicated Business Systems International (DBSI), was an authorized reseller of Avaya communications technology. Avaya held trademarks associated with its communications technology. After the authorized-reseller arrangement ended, one of DBSI's officers allegedly continued to access Avaya's software license portals without authorization and distributed pirated licenses to customers for a profit. DBSI was accused of using Avaya's trade name and marks to falsely represent that the software was valid and authorized by Avaya. Avaya sued DSBI for trademark infringement.

DSBI tendered the suit to its CGL insurer. The policies excluded claims "[a]rising out of the infringement of copyright, patent, *trademark*, trade secret or other intellectual property rights." But the exclusion did not apply to infringement in an advertisement of copyright, *trade dress*, or slogan. The issue was whether the suit alleged trade dress infringement.

The court noted that claims for trademark infringement and trade dress infringement have distinct elements. A claim for trademark infringement has three elements: (i) a valid and legally protectable mark; (ii) owned by the plaintiff; (iii) that, when used by the defendant to identify goods or services, "is likely to create confusion concerning the origin of the goods or services." A claim for trade dress infringement has different elements. It requires an articulation of the specific features of the distinct trade dress sought to be protected followed by proof that an infringing

design is non-functional; distinctive, either inherently or through secondary meaning; and likely to confuse consumers.

The court found that the complaint did not potentially state a claim for trade dress infringement. It never used the term "trade dress" nor did it include two essential elements of a trade dress infringement claim: non-functionality and distinctiveness. Thus, the Third Circuit held that because the complaint did not potentially state a trade dress claim, the insurer had no duty to defend DSBI in the suit and affirmed summary judgment for the insurer.

The case is *State Farm Fire Cas. Co. v. Hines,* No. 21-2354 (3d Cir. Oct. 14, 2022) (applying New Jersey law).

Fourth and Eleventh Circuits Weigh Coverage for Golf Cart Accidents

A recurring question is whether policyholders are covered for accidents involving golf carts driven on public roads. Two federal circuit courts recently took up this issue. Both cases involved golf carts driven by minors.

In the Fourth Circuit case – *Liberty Mutual Fire Insurance Company v. Sutton* – a twelve-year-old passenger was injured when the eleven-year-old driver made an abrupt turn. The golf cart was owned by the driver's grandparents but kept at the home of the driver's parents. A claim was made under the parents' homeowner's policy.

The policy excluded "motor vehicle liability." But that exclusion had some exceptions. One was for golf carts owned by the insured and operated on a golf course or in a private residential community. Another was for vehicles designed for recreational use. The dispute was over which provision controlled – the golf cart-specific exception or the more general exception.

If the golf cart exception applied, then there would be no coverage because the golf cart was owned by the driver's grandparents (not the policyholders) and was being driven on a public road at the time of the accident. The more general exception was for vehicles designed for recreational use off public roads and not owned by the insured. The claimant argued that the recreational use exception controlled because the golf cart was not owned by the insured.

The Fourth Circuit disagreed. It reasoned that North Carolina follows the "specific-over-the-general" canon of contract construction. In a conflict, the more specific provision controls over the general. Applying that rule to the homeowner's policy, the court explained, "leaves no ambiguity," because if the insurer had intended golf carts to be treated as recreational vehicles, it would not have included a separate exclusion for golf carts. Because the specific exception governed the golf cart accident, and the terms of that exception were not satisfied, there was no coverage.

In the Eleventh Circuit case – *GEICO General Insurance Company v. Gonzalez* – the issue was whether a golf cart qualifies as a "private passenger auto." A passenger in a golf cart was severely injured after it collided with a car and the passenger was ejected. The accident happened on a public road while being driven by the insured's minor daughter. The insured did not own the golf cart.

The policy covered injury arising from the use of a "non-owned auto," defined as "a private passenger, farm, or utility auto or trailer not owned by, furnished or available for regular use for either you or your relative." "Private passenger auto" was defined as a "four-wheel private passenger, station wagon or jeep-type auto, including a farm or utility auto as defined." The court found that this language did not exclude golf carts. The court reasoned that the definitions of "private passenger auto," "farm auto," and "utility auto" had a common (although implicit)

element: all could be driven legally and safely on public roads. In interpreting "private passenger auto," the Eleventh Circuit found that it need not be designed specifically for roadway use, only that it can be used legally and safely on public roads.

The court observed that Florida law allows golf cart use on designated county roads and municipal streets, on certain state park road, and to cross state highways in specified locations. The court further noted that golf carts are ubiquitous on public roads in golfing and beach communities throughout Florida and are frequently encountered on neighborhood streets traveling to or from a nearby golf course, as was the case here. The court thus held that the golf cart qualified as a "private passenger auto."

The cases are *Liberty Mut. Fire Ins. Co. v. Sutton*, No. 21-1277 (4th Cir. Oct. 19, 2022) and *GEICO Gen. Ins. Co. v. Gonzalez* No. 21-13304 (Sept. 29, 2022).

Fifth Circuit Applies Total Pollution Exclusion to Crude Oil Leak Claim

The insured, Central Crude, discovered a crude oil leak on its property and a neighboring tract owned by Chevron in Paradis, Louisiana. Central Crude had a commercial general liability policy with Liberty Mutual. The policy required Liberty Mutual to pay sums "to which [the] insurance applies" and to defend Central Crude against suits for covered damages. The policy also contained a total pollution exclusion endorsement.

The Fifth Circuit, applying Louisiana law, held that the pollution exclusion barred coverage. The court noted that pollution exclusions in Louisiana were meant to bar coverage for environmental pollution and this case involved exactly that. The factors for whether a case involved environmental pollution are: (1) whether the insured is a polluter under the exclusion; (2)

whether the injury-causing substance is a pollutant; and (3) whether there is a "discharge, dispersal, seepage, migration, release or escape" of a pollutant.

As to the first factor, the court noted that Central Crude is a pipeline company that transports large volumes of oil and is the type of business that presents a risk of pollution. As to the second factor, the parties agreed that crude oil is a pollutant. As to the third factor, it was undisputed that a "dispersal" or "release" of crude oil occurred.

The court rejected Central Crude's contention that the exclusion applied only if the insured was found responsible for the release or discharge of the pollutant. The court determined that the exclusion had no requirement that the party responsible for the dispersal be determined. The court added that the focus was on the actions of the "alleged" polluter and that imposing a fault requirement would contravene the Louisiana Supreme Court's instruction that pollution exclusions be read to exclude coverage for environmental pollution.

The case is *Cent. Crude, Inc. v. Liberty Mut. Ins. Co.,* No. 21-30707 (5th Cir. Oct. 26, 2022).

Seventh Circuit Finds No Coverage For Volunteers in Fireworks Accident Under Wisconsin Law

Two volunteers were injured in a Fourth of July fireworks accident in Wisconsin. The fireworks distributor was sued for personal injuries. The distributor's insurer, T.H.E. Insurance, filed a declaratory judgment action. The policy excluded coverage for claims "arising out of injuries or death to shooters or their assistants hired to perform fireworks displays or any other persons assisting or aiding in the display of fireworks."

The district court found no duty to defend or indemnify.

The Seventh Circuit affirmed. The court framed the issue as whether the exclusion extended to volunteers or only to those assisting hired shooters or hired assistants. The court observed that the exclusion applied to two distinct groups: hired shooters and their hired assistants and "any other person" assisting or aiding the fireworks display. The court found that the word "or" before "any other persons assisting or aiding in the display" meant that phrase stood alone and applied to any person who assisted the fireworks display whether or not they assisted a hired person.

The court's conclusion was unaffected by the fact that the exclusion contained some surplus language. For example, the phrase "any other person assisting or aiding" necessarily included "shooters or their assistants hired to perform." Still, the court said, the rule against surplusage concerned choosing between reasonable interpretations; "[i]t does not require injecting ambiguity into a wordy provision that is otherwise clear."

For these reasons, the court affirmed the district court and found the insurer had no duty to defend or indemnify.

The case is *T.H.E. Ins. Co. v. Olson*, Nos. 22-1143 (7th Cir. Oct. 17, 2022).

Alabama Federal Court Applies Pollution Exclusion to Organo-Ash Claim

The insured, International Paper Company (IP), entered into a Waste Services Agreement (WSA) with a third party, Land Clearing. The contract required Land Clearing to handle, transport, and dispose of Organo-Ash for IP.

Another party, JRD Contracting, sued IP in Alabama state court claiming that IP damaged their property through the deposit of Organo-Ash. IP separately sued Land Clearing in Tennessee

state court, saying Land Clearing owed IP indemnity against the Alabama action under the WSA. Land Clearing's insurer, Harleysville Preferred Insurance Company, filed a declaratory judgment action. IP was considered an insured under Land Clearing's policy for certain coverages.

The policy excluded coverage for "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of "pollutants." "Pollutants" meant "any solid, liquid, gaseous or thermal irritant or contaminant, including 'waste.'" "Waste" included "materials to be recycled, reconditioned or reclaimed."

The underlying complaint alleged that Organo-Ash placed on JRD's property contained harmful materials, substances, and toxins. The court said that it need not look further when the complaint implicates the exclusion, and the exclusion was unambiguous.

That IP found beneficial value in the Organo-Ash for secondary purposes did not negate the definition of waste, which included recycled, reconditioned, or reclaimed materials.

Thus, the court applied the exclusion and entered judgment for Harleysville.

The case is *Harleysville Preferred Ins. Co. v. Int'l Paper Co.,* 1:20-cv-340-TFM-B (S.D. Ala, Oct. 7, 2022).

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