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February 2024 | Insurance Update | WWW.RIVKINRADLER.COM

Ninth Circuit Affirms That Insurers Have No Duty to Defend Opioid Distributor Because Suits Did Not Allege an Occurrence

McKesson Corporation, a distributor of pharmaceuticals, was accused of deliberately flooding the market with opioids. McKesson sought a defense from its commercial general liability insurers. The insurers filed a declaratory judgment action to get clear of any duty to defend because the suits did not allege bodily injury caused by an Occurrence, defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The district court awarded partial summary judgment for the insurers, and McKesson appealed.

McKesson argued that it was entitled to a defense because the complaints included a cause of action for negligence and had allegations about things McKesson "should have known." McKesson argued that there was a potential for coverage because more than just deliberate conduct was alleged.

The Ninth Circuit disagreed, finding the suits alleged exclusively deliberate conduct. McKesson's alleged liability arose not from merely shipping opioids to its pharmaceutical customers. Rather, plaintiffs sought to hold McKesson accountable for the way it distributed opioids: by flooding the market, concealing facts, disregarding its duties, and ignoring risks. This was not conduct, the Ninth Circuit noted, that plausibly could have been done by accident.

In reaching this conclusion, the court looked not to the legal theories for recovery, but to the facts alleged. That intentional conduct may give rise to a cause of action for negligence does

not transform that conduct into an accident. And when the complaints referred to things McKesson "knew or should have known," that just meant there was a foreseeable risk of harm stemming from McKesson's conduct. Put differently, the phrase "should have known" is a way of saying that the reasonable person standard controls the question of unreasonable risk and foreseeability. The actor's subjective inability to appreciate the risk is immaterial. The court explained that the "should have known" language was included for its legal effect, not as a factual contention. In any event, the court noted that under California law, the insured's subjective intent is irrelevant to the consequences of the insured's deliberate actions; only the intent to act is considered.

The Ninth Circuit acknowledged that even if the insured acted deliberately, there may be an accident if some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. But the Ninth Circuit found that the suits alleged no such thing. The suits alleged injuries from opioid addiction, overdoses, and death that stemmed from McKesson's alleged scheme to increase the sale of opioids. The court rejected McKesson's argument that the conduct of downstream actors, such as doctors, pharmacists, and opioid addicts more immediately produced the injuries and should be viewed as an intervening event. The court found that the injuries were not alleged to be unexpected or unforeseen in light of McKesson's intentional acts.

"At bottom," the court noted, "the complaints charge McKesson with intentionally oversupplying opioids on a massive scale." The court said: "It is simply not credible that when doctors prescribed the drugs McKesson allegedly pushed, when pharmacists filled those prescriptions with drugs McKesson distributed, and when end users became addicted to those drugs, overdosed, resorted to heroin, and died, that was a mere 'matter of fortuity.'" Thus, the

results of McKesson's deliberate conduct were not alleged to have been unexpected or unforeseen.

As the suits did not allege an accident, the Ninth Circuit held that there was no potential for coverage, and the insurers had no duty to defend.

The case is *AIU Inc. Co. v. McKesson Corp.*, No. 22-16158 (9th Cir. Jan. 26, 2024) (unpublished). Even though the case is unpublished, it expresses an important point. Coverage under a CGL policy depends on accidents, not negligence. Where the insured engages in deliberate conduct with foreseeable results, there is not an accident no matter what legal theory the claimant may pursue.

Fourth Circuit: Infestation Exclusion Bars Claim for Roof Damage Caused by Turkey Vultures

Mitchellville Plaza Bar submitted a claim to its insurer, Hanover, for extensive damage to its roof. Hanover retained a forensic engineer who concluded that the damage pointed to an animal chewing or a bird pecking on the edges of the membrane. The engineer's report included photos of birds on the building's roof and a statement by the engineer about buzzards tearing off patches on the roof.

Mitchellville's own inspector concluded that the roof damage was caused by vultures and later testified to seeing 50 to 75 turkey vultures perched on the roof at least ten times.

Hanover's policy had an exclusion for damage caused by "nesting or infestation, or discharge or release of waste products or secretions by insects, birds, rodents, or other animals." Hanover denied coverage and Mitchellville sued for breach of contract and bad faith.

The question came down to whether there was an "infestation."

Applying Pennsylvania law, the Fourth Circuit concluded that the vulture presence on the roof constituted "infestation" under a plain and ordinary understanding of the term. Looking to dictionary definitions, the court observed that "infestation" means "persistent, invasive presence of unwanted creatures in a specific area and in a group large enough to be troublesome and destructive." The court found that the evidence of substantial vulture activity at the property for many months met this definition. It affirmed the district court's order awarding Hanover summary judgment on Mitchellville's breach of contract and bad faith claims.

The case is *Mitchellville Plaza Bar LP v. Hanover Am. Ins. Co.,* No. 22-2089 (4th Cir. Jan. 19, 2024) (unpublished).

California Court of Appeal Finds Professional Liability Policy Does Not Cover Copyright Suit Against Investment Advisor

The insured, Kayne Anderson Capital Advisors, was an investment advisor specializing in the energy sector. Energy Intelligence Group (EIG) published *Oil Daily*. EIG sued Kayne for copyright infringement, accusing Kayne of making unauthorized copies of *Oil Daily*. Kayne ultimately conceded that its infringement was willful but raised entrapment as a defense. Kayne argued that, rather than taking measures to track and prevent copying of *Oil Daily*, EIG knowingly allowed its subscribers to continue making illegal copies for years before finally suing them and seeking enormous damages. Kayne and EIG eventually settled the suit for $15 million, after Kayne had spent $10 million defending the action.

Kayne tendered the suit to its professional liability insurers. The policies covered liability arising from any claim made against Kayne for a wrongful act by or on behalf of it in the performance of or failure to perform investment advisory services. The insurers denied coverage.

Kayne contended that the claim fell withing the professional liability coverage because it used *Oil Daily* as an essential tool in providing investment advice to clients. Kayne argued that at a minimum, the insurers had to fund Kayne's defense because there was a potential for coverage.

Kayne then sued its insurers for breach of contract in California state court. The court awarded the insurer's summary judgment and Kayne appealed.

The California Court of Appeal affirmed. It found that the policy unambiguously limited coverage to wrongful acts in the performance of Kayne's professional investment advice services. Coverage did not extend to wrongful administrative acts ancillary to such services. Although *Oil Daily* helped Kayne's employees stay informed about oil industry developments, the claim was about the way Kayne acquired *Oil Daily* and had nothing to do with the special risks inherent in the practice of the profession of being an investment advisor. The court noted that the advice to clients would have been the same had Kayne paid for each copy of *Oil Daily* that it used. As the court put it, "the copyright infringement suit here was an ancillary administrative decision to dodge paying additional subscription fees."

As the claim fell outside the scope of coverage provided by the insuring agreement, the court did not need to reach the insurers' arguments that Kayne's willful acts were barred under California Insurance Code § 533 and the exclusion for "intentional and knowing violation of the law."

Because EIG never alleged misconduct by Kayne in the performance of investment advisory service, the insurer had no duty to defend or indemnify Kayne.

The case is *Kayne Anderson Cap. Advisors, L.P. v. AIG Specialty Ins. Co.*, No. B324066 (Cal. Ct. App., 2d App. Dist. Jan. 23, 2024). **Case Note:** This case is unpublished and cannot be cited

under California court rules. But we found the case to be interesting and the decision well-reasoned.

Ninth Circuit Finds Pollution Exclusion Doesn't Cover Injuries from Wildfire Debris

A truck driver became ill from exposure to airborne wildfire debris during the loading and unloading of his truck in California. The truck driver sued the California Department of Resources, Recycling and Recovery, and the prime contractor that hired the trucking company that he worked for. The truck driver alleged that defendants did not protect him from the "clouds of toxic dust" because they did not provide him with respiratory equipment or warn of the need to avoid exposure to the dust.

The insured, Brad Ingram Construction, was impleaded into the suit. The allegations did not specify the composition of the dust except to say that the wildfire waste consisted of "ash, debris, metal, concrete, and contaminated soil." The truck driver alleged that onsite workers stirred up the dust deposited in the environment by the fire while loading debris and again when the debris was uncovered and dumped at the waste facility.

Brad Ingram's insurer, Wesco Insurance Company, brought a declaratory judgment action in federal court. Wesco sought a ruling that it had no duty to defend Brad Ingram. The district court ruled for Wesco. Brad Ingram appealed.

The Ninth Circuit reversed. The court observed that, under California law, pollution exclusions apply only to "injuries arising from events commonly thought of as pollution, i.e. environmental pollution." To determine whether a pollution event has occurred, a court should consider both the character of the substance and whether exposure occurred due to a mechanism specified in the policy. Neither factor is dispositive.

Applying that standard, the court held that while wildfire debris may be considered a pollutant in some cases, the mechanism of exposure described in the underlying complaint did not clearly constitute an "event commonly thought of as pollution." The court added that any doubt as to whether facts establish the existence of a duty to defend must be resolved in the insured's favor.

For this reason, the court reversed the trial court and held that Wesco had a duty to defend Brad Ingram in the litigation.

The case is *Wesco Ins. Co. v. Brad Ingram Constr.*, No. 22-16584 (9th Cir. Jan. 23, 2024) (unpublished).

Supreme Court of Alaska Finds that Policy Exclusions for Airplane-Related Injuries Includes Incidents Arising from Disassembled Plane

In 2011, Matthew Mrzena purchased a 1946 Piper PA-12 airplane. Mrzena stopped using the Piper in 2014 when it failed an annual inspection and was no longer considered airworthy. In particular, the Piper's exterior fabric covering was in disrepair. To repair the covering, Mrzena removed the wings, tail rudder, and elevators from the fuselage, leaving the rest of the fuselage and many other parts intact.

In 2019, Mrzena purchased a new residence where he planned to live with his now-wife Lisa Thompson. During the summer, Thompson and Mrzena moved the Piper to the new home. As part of the move the Piper needed to be pushed out of the garage and onto a trailer. Mrzena was pushing from the back of the Piper, with Thompson at the front, when Thompson became pinned under the Piper's nose. Thompson sustained severe injuries.

Mrzena held two homeowner insurance policies with United Services Automobile

Association (USAA) at the time of Thompson's injuries. The policies excluded injuries "arising out of" the ownership, maintenance, use, loading or unloading of an aircraft. The policy defined "aircraft" as "any conveyance used or designed for flight." Thompson argued that the policies should nonetheless cover her injury because the aircraft became mere "parts" after her husband removed the wings, elevators, and tail rudder. USAA filed a declaratory judgment action for a ruling that Thompson's personal injury claims were excluded from coverage under the homeowner's insurance policies. The superior court ruled for USAA. Thompson appealed.

The Supreme Court of Alaska affirmed. The court held that Thompson's injuries arose from her husband's ownership of the aircraft. The court observed that "arising out of" is interpreted broadly and is not limited to proximate causes. The court reasoned that, even if the aircraft were disassembled at the time of the injury, the exclusion applied to injuries arising out of the "maintenance" of the aircraft. As the superior court logically observed, maintenance often requires removing parts to repair or replace them. In those cases, the plane does not stop becoming an aircraft.

Nor did it matter, the court added, that the property damage section of the policy distinguished between "parts" from the thing itself. Those sections of the policy involved damage to things, not bodily injury. And the property section did not use the broad "arising out of" language.

In sum, the court held that, considering the reasonable expectations of the insured, the USAA homeowner's policies excluded coverage of Thompson's injuries because they "arose out of" Mrzena's ownership and maintenance of the Piper.

The case is *Thompson v. United Servs. Automobile Ass'n*, S-18462 (Alaska Jan. 26, 2024).

California Court of Appeals Finds No Wrongful Eviction Coverage for Tenant That Was Not a Natural Person

Michael Giotinis and others owned a commercial property in Berkeley. Giotinis brought an unlawful detainer action against their tenant, Pathos Management Group LLC. In turn, Pathos and its owner and members cross-complained against Giotinis and others.

Travelers Property Casualty Company of America declined to defend Giotinis against the cross-complaint because the coverage for wrongful eviction claims applied only to eviction from "premises that a person occupies," and Pathos was a limited liability company, not a natural person.

Giotinis sued Travelers for its failure to defend. The trial court ruled for Traveler, finding that was no potential for coverage and thus no duty to defend the Pathos action. Giotinis appealed.

The California appellate court affirmed. Relying on prior California case law, the court held that the term "person" in the wrongful eviction coverage only applied to natural persons. The court pointed to several provisions in the policy that distinguished between persons and organizations.

The court also rejected the insureds' argument that they reasonably expected coverage of wrongful eviction claims by organization tenants because the policy also provided "Business Owners Property Coverage" and they were in the business of renting out commercial premises that would likely be leased to corporations. The court reasoned that the insured could not have such an "objectively reasonable" expectation because of how the policy distinguished between person and organization.

The court also disagreed that some of the underlying claims potentially fell within coverage

for wrongful eviction. The court acknowledged that while the underlying complaint continued general allegations that the natural persons operated the subject property, the causes of that relied on enforcement of the lease which were brought only on behalf of Pathos. And the lease attached to the cross-complaint recited that only Pathos was a tenant.

Because there was no potential for coverage, the court affirmed the trial court's ruling for Travelers.

The case is *Giotinis v. Travelers Prop. Cas. Co. of Am.*, A165714 (Cal. Ct. App. Jan. 23, 2024).

Case Note: This case is unpublished and cannot be cited under California court rules. But it addresses an interesting issue and may show how courts view the term "natural person" when considering the wrongful eviction offense.