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California Court of Appeal Finds "Pit Bull" Exclusion Unambiguous

Melanie Castaneda was attacked by a pit bull while walking past a park. The pit bull, named Bugzy, was owned by Dorian Hernandez. Dorian allowed Bugzy to run off leash at the park.

Dorian lived in her brother's house as a renter. Her brother, Juvenal, had a homeowners policy with Interinsurance Exchange of the Automobile Club (IEAC). Dorian qualified as an insured under the policy. The policy covered liability for bodily injury but had an exclusion for bodily injury arising out of the ownership, custody, or care of certain dog breeds. Pit bulls were at the top of the list.

Castaneda sued Juvenal and Dorian over the pit bull attack. Juvenal notified IEAC of the suit, requesting defense and indemnity. After IEAC completed its investigation, it informed Juvenal that because Castaneda's injuries arose out of the ownership, custody, or care of an excluded dog breed, there was no coverage.

Castaneda's attorney demanded that IEAC pay the full $500,000 liability limits to settle the claims against Juvenal and Dorian. Juvenal's attorney also argued that the pit bull exclusion was ambiguous as applied to Juvenal because the attack did not arise from his ownership, custody, or care of Bugzy. Dorian, not Juvenal, owned and cared for the dog. IEAC disagreed and held firm to its coverage denial.

Juvenal then assigned to Castaneda his rights under the policy in return for her agreement not to enforce a judgment against Juvenal or Dorian. A $7.5 million default judgment was later entered.

Castaneda next sued IEAC for breach of contract and bad faith. She argued that the pit bull exclusion reasonably could be interpreted to apply "*only* if the insured owns, has custody of, or control over the particular dog in question," and Juvenal did not own, have custody of, or control Bugzy. Castaneda

argued that the pit bull exclusion was ambiguous because it did not specify whose ownership, custody, or care of a pit bull would bring a claim within the exclusion.

IEAC argued that Castaneda's interpretation that the exclusion was limited to the person seeking coverage was contrary to the policy's plain language. It argued that the exclusion applies when anyone engages in the excluded act.

The court agreed with IEAC. The exclusion stated that there was no coverage for injury arising out of the ownership of, custody of, or care for *any* pit bull type of dog. The focus of the exclusion, the court found, is on the injury and the way it arose, not on the identity of the person who owned or cared for the dog.

Thus, the court concluded that the pit bull exclusion was not ambiguous. Instead, it clearly withdrew coverage regardless of the identity of the person who engaged in the excluded conduct and did not depend on whether the pit bull's owner was the same person as the person seeking coverage.

The case is *Castaneda v. Interinsurance Exchange of the Auto. Club*, No. D083070 (Cal. Ct. App. Sept. 23, 2024). Although we find this case interesting, it cannot be cited. California Rules of Court prohibit parties from citing or relying on unpublished opinions.

Subpoena Expenses Related to AFFF Litigation Not Covered, Connecticut Federal Judge Rules

This case considers what constitutes a "Claim" under a liability policy.

Shambaugh & Son, LP distributed aqueous film forming foam (AFFF), a fire suppressant used to extinguish flammable liquid fires. AFFF is believed to be harmful, resulting in suits nationwide against manufacturers of AFFF. These suits have been consolidated in a multi-district litigation in federal court in South Carolina.

Shambaugh was not a defendant in those suits. But it received a subpoena requesting documents relating to Shambaugh's distribution of AFFF.

About a month after receiving the subpoena, Shambaugh's counsel learned that the MDL plaintiffs were considering adding AFFF distributors to the litigation. They prepared a chart of potential distributor defendants that they shared with the MDL defendants. Shambaugh was listed on the chart as having distributed 3M's AFFF products from 1955 to 2000.

After Shambaugh's counsel learned of the chart, Shambaugh sent a notice of potential claim or circumstances to Steadfast Insurance Company, attaching the subpoena. Steadfast issued a Contractor's Protective Professional Indemnity and Liability policy to Shambaugh's parent, EMCOR.

Shambaugh responded to the subpoena by searching and reviewing its records and those of its subsidiaries. Shambaugh incurred more than $1.7 million in legal fees in responding to the subpoena. Shambaugh's counsel informed Steadfast that Shambaugh would be seeking recovery of those fees once Shambaugh was named to the AFFF litigation.

Steadfast denied that it owed any coverage for Shambaugh's costs in responding to the subpoena because neither the subpoena nor the chart qualified as a "Claim" under the policy. Steadfast and Shambaugh brought their dispute to court.

The policy defined "Claim" as "a demand received by an Insured seeking a remedy and alleging liability or responsibility on the part of the Named Insured for loss." The policy defined "Loss" to include "Claim Expenses," so it was necessary to look to the definition of that term as well.

"Claim Expenses" included "[f]ees charged by any lawyer designated by the Company" and "all other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a Claim, if authorized by the Company."

In construing these clauses, the court observed that the demand against the insured must both seek a remedy and allege liability for loss. The court looked to Black's Law Dictionary for the meaning of "allege," defined as "declaring or asserting as a matter of fact." So, for there to be a "Claim," the demand must declare or assert as a matter-of-fact Shambaugh's liability or responsibility for a loss.

Shambaugh was identified as a distributor in the subpoena, but the court found that was not an allegation of liability. The information requested in the subpoena may lead to future allegations of liability against Shambaugh, but the subpoena itself made no such allegation. Shambaugh was not a party to the MDL, and perhaps may never be added.

Turning to the chart, the court observed that the chart merely listed *potential* defendants. It did not assert that Shambaugh will be a defendant in the MDL, nor did it declare as a matter of fact that Shambaugh was liable or responsible for loss. At most, the court noted, the chart implies the possibility of future liability for a loss, which does not suffice under the ordinary meaning of "allegation."

Shambaugh relied on a few cases to support its argument that a subpoena is a "Claim." But the court distinguished those cases because the term "claim" was undefined in the policies in those cases or was defined to include a simple demand for non-monetary relief. The Steadfast policy defined "Claim" more narrowly.

The case is *Steadfast Ins. Co. v. Shambaugh & Son, LP*, No. 3:22-cv-1306 (SRU) (D. Conn. Sept. 13, 2024).

Missouri Federal Court Refuses to Apply Pollution Exclusion to Toddler's Ingestion of Breath Drops

An 18-month-old toddler took a bottle of Icy Breeze Cinnamint liquid breath drops from her grandmother's purse. The toddler ingested the liquid breath drops, suffering serious injuries to her esophagus and throat. The breath drops contained cinnamal, which caused the toddler's injuries.

The toddler's family brought a products liability suit against Dollar Tree as the seller and distributors of the breath drops. The seller and distributor, in turn, sued Oralabs, the manufacturer.

Oralabs had a commercial general liability policy with Atain Specialty Insurance Company, which provided coverage for bodily injury that arises from covered products – specifically, including breath drops – after the insured relinquished control of those products. The policy also had a total pollution exclusion for

bodily injury caused by or arising out of in whole or in part, the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

After Atain was notified of the suit, it brought a declaratory judgment action in federal district court in Missouri for a ruling that it had no duty to defend or indemnify the corporate defendants. Dollar Tree and Oralabs moved to dismiss, and the court granted their motion.

The court held that the underlying allegations clearly implicated a covered products claim: (1) the claimant suffered bodily injury; (2) arising from breath drops (a named covered product); and (3) after the corporate defendants had relinquished control of them. There was no ambiguity in that coverage.

The court next found that applying the pollution exclusion to this claim would render the products liability coverage form illusory. The breath drops were meant to be released from the container for ingestion. To exclude coverage based on the movement of breath drops from a contained position to a free one, the court concluded, would deny coverage for the very risk Atain explicitly insured – that is, bodily injury arising from the expected and intended use of a specifically covered product. Because this would render the products liability endorsement illusory and ambiguous, the court construed the ambiguity against the insurer and found the pollution exclusion inapplicable.

The case is *Atain Specialty Ins. v. Dollar Tree Stores, Inc.*, No. 24-CV-787 (E.D. Mo. Sept. 24, 2024).

Independent Adjuster Not on the Hook for Negligence or Conspiracy, Louisiana Court Holds

Hermes Health Alliance, LLC owned property in New Orleans that housed a nursing facility operated by St. Luke. After Hurricane Ida caused major damage to the property in August 2021, St. Luke sued Hermes alleging the property was unfit for use. Hermes contended that it could not afford to repair the property because its insurance claims were denied. Hermes then sued its insurers, Certain Underwriters at Lloyd's.

Hermes also brought a claim against Sedgwick Claims Management Service, an independent adjusting company which handled the claim. Hermes argued that Sedgwick negligently failed to provide

photographs of the building's damage from Hurricane Ida to another defendant, Applied Building Sciences, Inc. (ABS), a contractor who prepared a report on the property damage.

Hermes argues that this affected ABS' ability to evaluate Hermes' property damage. According to Hermes, the ABS report, which does not mention these photographs, discounted Hurricane Ida as the primary cause of damage to the property, instead pointing to other defects such as the age of the facility's roof and negligent maintenance of the facility's HVAC and plumbing systems. Second, Hermes alleged that Sedgwick and ABS "colluded and engaged in a civil conspiracy" to deprive Hermes of insurance benefits.

Sedgwick removed the claims to federal court and then moved to dismiss Hermes' claims. The court granted the motion.

The court held that Hermes had not alleged a viable claim against Sedgwick because, under Louisiana Law, an independent insurance adjustor does not owe a duty to an insured to conduct a proper investigation. In Louisiana, an insurance adjuster owes a duty to a claimant in only very rare circumstances, such as engaging in fraud, or providing the claimant with false information knowing that the claimant will rely on that information. No express claim for fraud was alleged here, only negligence.

Nor was there a plausible claim for civil conspiracy against ABS and Sedwick. There is no cause of action in Louisiana for a claim of conspiracy between an adjuster and an insurer.

The case is *Hermes Health All., LLC v. Certain Underwriters at Lloyd's*, No. 23-cv-2276 (E.D. La Sept. 23, 2024).

Policyholder Argues That Rules of Grammar Support Its Claim for Coverage

On appeal in the Eleventh Circuit is a case about a comma that shows the importance of punctuation in every insurance contract.

ECB USA Inc. retained Constantin Control Associates to audit the financial statements of Schratter Foods, Inc., a company that ECB was acquiring. The audit was improperly performed, and ECB sued Constantin. The parties settled their dispute for $4.2 million. As part of the settlement, Constantin assigned

its insurance rights to ECB. When ECB sought to recover the settlement proceeds, Constantin's insurer, Chubb, denied coverage. ECB sued.

The issue was whether Constantin's policy covered audits of a food services company or only financial institutions.

Constantin's professional liability policy with Chubb covered:

> [m]anagement consulting services meaning services directed toward an expertise in banking finance, accounting, risk and systems analysis design and implementation, asset recovery and strategy planning for financial institutions.

The dispute focused on language at the end of the provision, "asset recovery and strategy planning for financial institutions." ECB argues the qualifier "for financial institutions" only applies to the last antecedent, which would be either "strategy planning" or "asset recovery and strategy planning." But Chubb argues that the clause "for financial institutions" modifies each of the services appearing in the provision before that final phrase.

In early August, an Eleventh Circuit panel sided with Chubb. Applying New Jersey law, the panel held that the absence of a comma makes no difference – the qualifier "for financial institutions" applied to all covered services in the provision. The panel agreed with Chubb that the policy covers only accounting services for financial institutions.

Five days after the panel issued its decision, the New Jersey Supreme Court issued an opinion on the series-qualifier canon that ECB said supports its argument. The Eleventh Circuit panel granted ECB's request for a rehearing but in late August, ruled the same as it did in its first opinion.

ECB has now moved for a rehearing *en banc*. ECB says the panel failed to follow the recent holding from the New Jersey high court.

ECB argues the panel should have applied the "series-qualifier canon." ECB emphasizes that the New Jersey Supreme Court's *Compressor Station* decision held a qualifier only applies to the last antecedent, unless it is separated by a comma. ECB argues the court didn't follow *Compressor Station* and

other New Jersey cases, instead choosing to apply a canon from a secondary source. In its latest petition, ECB urges the court to follow the *Erie* doctrine and apply rules of construction set by New Jersey courts.

ECB says the Eleventh Circuit failed to use the rules for grammatical construction outlined in *Compressor Station*, even after the panel itself admitted the situations were the same. When *Compressor Station* reversed its holding, the panel should have done the same. Instead, the panel's later decision chose to remove reference to *Compressor Station*, while upholding its initial ruling.

The panel predicted in its first August opinion that the New Jersey Supreme Court in *Compressor Station* wouldn't place importance on the lack of a comma. But in fact, the New Jersey Supreme Court held that the absence of a comma between a qualifier and the last item of a series establishes the qualifier modifies only the last antecedent.

ECB cites several New Jersey cases in its rehearing petition in support of its argument that the panel misapplied the holding from *Compressor Station.* And according to ECB, New Jersey law uniformly and consistently applies the same version of the last antecedent rule. ECB says the panel relied on a secondary source to reach its conclusion, not New Jersey law. ECB cites cases from New Jersey courts going back 60 years adopting the doctrine of the last antecedent, not the canon described in the secondary source cited by the panel.

ECB requests that the panel vacate its latest opinion and enter a new one that conforms with the holding in *Compressor Station*. The Eleventh Circuit has yet to rule on ECB's request for a full panel review.

The case is *ECB USA Inc. et al. v. Chubb Ins. of New Jersey et al.,* No. 22-10811 in the U.S. Court of Appeals for the 11th Circuit.