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Delaware Supreme Court Affirms No Coverage Ruling in CVS Opioid Suit

Various parties, including local governments and healthcare providers, have sued opioid manufacturers, distributors, and retailers over the opioid crisis. CVS is a defendant in these suits and sought coverage under its liability policies.

The insurers issued policies that covered sums CVS "becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' caused by an 'occurrence.'"

Some of the policies had a Pharmacist Liability Endorsement modifying coverage for "damages because of 'bodily injury' arising out of a 'pharmacist liability incident.'" Others had a Druggist Liability Endorsement stating that bodily injury or property damage "arising out of the rendering of or failure to render professional health care services as a pharmacist shall be deemed to be caused by an 'occurrence.'"

The insurers brought a declaratory judgment action in Delaware seeking a declaration that they owed no duty to defend. The Superior Court, relying on the Delaware Supreme Court's 2022 decision in *Rite Aid*, ruled for the insurers, and held that the underlying lawsuits did not seek damages because of any specific person's bodily injury or damage to any specific property.

CVS appealed, arguing that the Pharmacist Liability and Druggist Liability endorsements provided broader coverage than the policies in *Rite Aid* and that the court erred in concluding that the lawsuits did not allege damages because of bodily injury.

The Delaware Supreme Court affirmed.

In *Rite Aid*, the court held that policies covering lawsuits "for" or "because of" bodily injury do not require insurers to defend their insureds when the plaintiffs in the underlying lawsuits seek only their own

economic damages. There must be "more than some linkage between the personal injury and damages to recover 'because of' personal injury."

The Endorsements

The same "because of" language was at issue in CVS's coverage dispute as well. The Pharmacist Liability and Druggist Liability endorsements did not modify the requirement that damages be "because of" bodily injury or property damage. Rather, they simply modified the "occurrence" requirement to include incidents involving pharmacists.

No Specific and Individualized Injury

The court also found that the underlying suits did not allege "damages because of" bodily injury.

In *Rite Aid*, the court recognized three classes of plaintiffs within the scope of coverage: (1) the person injured, (2) those recovering on behalf of the person injured, and (3) people or organizations that directly cared for or treated the person injured. For claims involving a "class three" plaintiff, coverage is available only if the plaintiff seeks to recover the costs of caring for an individual's personal injury.

CVS argued that some of the suits satisfied *Rite Aid's* "specific and individualized" injury standard for direct coverage. The complaints in those suits contained allegations about the number of residents treated, the medication provided, the number of doses administered, and the costs per dose. For example, the City of Philadelphia alleged that it administered nearly 10,000 doses of naloxone in 2015 at $37 per dose. But the court held that these allegations did not demonstrate that plaintiffs treated an individual with an injury caused by the insured. And other allegations on treatment programs and other services provided to opioid victims sought recovery of plaintiffs' economic losses, not for any specific, individualized bodily injury.

CVS next argued that the underlying suits by governments on behalf of individuals who suffered bodily injury should be categorized as derivative actions. For example, CVS argued that Philadelphia's suit was derivative in nature because the city wanted CVS to pay for care and treatment of every resident

suffering from opioid addiction. And the *Summit* suit was supposedly derivative in nature because the county sued on behalf of the municipal corporation and its residents.

The Delaware Supreme Court was unpersuaded. It viewed the suits as seeking to recover generalized damages incurred by the municipality and its residents, and did not seek damages because of specific, individualized bodily injury.

The Delaware high court also confirmed that its analysis in *Rite Aid* applied equally to "property damage" claims. Some of the suits sought the costs to clean up public parks and other areas of needles and opioid-related debris. The court found that none of the suits alleged damage to any specific property, only generalized harm.

CVS also argued that suits by public hospitals satisfied *Rite Aid* because the counties were seeking damages on behalf of public hospitals for cost related to treatment of opioid victims. But again, the court found that the allegations did not allege actual specific and individualized damage and were not based on proving damage on an individual basis. Rather, the complaints merely referenced unreimbursed treatment costs and an increase in operating costs. The court applied this same reasoning to suits by other hospitals and medical providers.

CVS next argued that third-party payor suits potentially triggered coverage. These plaintiffs allegedly paid significant costs for opioid addiction treatment for covered members and medical care needed to treat opioid side effects. Again, the court found that these allegations did not concern specific bodily injuries to an individual, but only aggregate harm. These third-party payor costs, the court noted, differed from costs a mother, for example, might seek for her child's medical care.

CVS argued that it was premature for the Superior Court to grant summary judgment under "indemnity-only" policies. CVS argued that indemnification was not ripe because the facts were not fully established. But the Delaware Supreme Court agreed with the lower court that the nature of the claims and relief sought by the underlying plaintiffs fell outside the scope of coverage. Because the suits did not

involve specific and individualized personal injury or property damage, they did not allege the type of liability covered under the policies.

Finally, CVS argued that its settlement agreement showed that it was sued for damages because of bodily injury. But the court held that the settlement agreement could not serve as a reliable coverage indicator because the settlement process leaves the insurers on the outside and could be collusive.

The case is *In re CVS Opioid Ins. Litig.*, No. 482, 2024 (Del. Aug. 18, 2025).

Delaware Supreme Court Holds Payments by Insured's Corporate Parent Do Not Count Toward SIR in Liability Policy Held by Subsidiary

Aearo developed and distributed Combat Arms Earplugs in the late 1990s. In 2008, 3M acquired Aearo and continued to produce these specialty earplugs.

Beginning in 2018, 3M and Aearo were named in thousands of lawsuits alleging that defects in the earplugs caused hearing-related injuries. 3M and Aearo settled the earplug suits for $6.01 billion.

3M submitted a claim under three insurance policies issued to Aero, each with a $250K self-insured retention (SIR). 3M claimed that it paid over $370 million in defense costs. Aearo paid about $411,000, although there remained questions over precisely what that payment was for.

The insurers took the position that legal costs paid by 3M did not satisfy the SIR in the Aearo policies. 3M argued that payments by either Aearo or 3M satisfied the SIR.

After the insurers denied coverage, 3M brought a coverage action in Delaware. The Delaware Superior Court ruled for the insurers, finding that the SIRs had not been satisfied. 3M and Aearo appealed.

The Delaware Supreme Court affirmed.

The issue centered on the term "you" and whether a corporate parent could satisfy the SIR on behalf of its subsidiary.

The term "you" was defined as the named insured on the declarations page (and for certain policies, subsidiaries of the named insured). Each policy listed Aearo as the named insured, not its parent,

3M. The policies unambiguously stated the "you" must satisfy the SIR, and the court found that meant Aearo. The court emphasized that respect must be given to the separateness of distinct legal entities, and that it would not disregard that distinction. There was no evidence that Aearo paid anything toward the SIRs.

Aearo and 3M contended that even if Aearo had to satisfy each SIR, that did not prevent the policies from being triggered. The court disagreed, finding that the SIRs functioned as conditions precedent. Unlike a deductible, where the insurer must respond from dollar one subject to later reimbursement from the insured, an SIR represents the insured's initial responsibility and must be satisfied before there is any coverage under the policy.

The court also rejected 3M's and Aearo's alternative argument that even if Aearo, and not 3M, had to satisfy the SIR, its failure to do so only meant that each insurer was entitled to a setoff equal to the SIR and that each insurer still must pay defense costs exceeding the setoff. The court reasoned that Aearo's and 3M's argument would render meaningless the condition precedent nature of the SIRs. Nor did it matter that the policies had maintenance clauses. These maintenance clauses were designed to protect an insurer from having to drop down in the tower if a lower-level policy was not kept. They were not meant, as Aero and 3M suggested, to protect the insured by creating a setoff if the insured failed to satisfy the SIR.

For these reasons, the court affirmed the lower court's ruling granting summary judgment for the insurers.

The case is *In re Aearo Techs. LLC Ins. Appeals*, 2025 Del. LEXIS 309 (Del. Aug. 12, 2025).

North Carolina Federal Court Permits Insurer to Settle Without Insured's Consent; Says Insurer Need Not Put Insured's Interests Ahead of Its Own

A man sustained significant injuries when the railcar in which he was riding collided with a front-end loader operated by an employee of Martin Marietta Materials, Inc. He sued Martin Marietta, who submitted a claim with its liability insurer, Ace American.

The policy had a $3 million deductible. Ace had both the right and the duty to defend.

Martin Marietta was represented by its outside counsel, Stradley, with whom it had a longtime relationship. Stradley recognized that a railroad accident had the potential for a multi-million verdict but thought there was a reasonable chance for a verdict below $1 million based on the claimant's comparative negligence (riding on the wrong side of the train, being inattentive, and not wearing the proper footwear).

Ace thought Stradley had undervalued the claim and hired another attorney, Parks, to assist in the defense. Parks felt a verdict under $1 million was unlikely and believed a verdict above $4 million was possible. Parks opined that a reasonable verdict range was between $2 million and $3 million.

After Martin Marietta refused to counter claimant's $2.75 settlement million demand, Ace took over settlement negotiations and offered $2 million. That offer was rejected.

At trial, claimant's counsel said that he was seeking damages above $9 million. Martin Marietta then told Ace that any settlement must be made with its consent and that it would consider any settlement without its consent to be a voluntary payment.

Ace ultimately settled the case for $2.5 million and sought reimbursement from Martin Marietta, as this was within the deductible. Martin Marietta refused and sued Ace in federal court in North Carolina. Martin Marietta contended that Ace breached its duty of good faith by failing to adequately consider Martin Marietta's interests when Ace settled the case.

The court disagreed. It found that bad faith does not arise when the parties have an honest disagreement over the value of a claim. And it found that the law does not require insurers to give equal consideration to the interests of their insureds. Although the insurer must give due regard to the interests of their insured, this does not mean that the insurer must give more consideration or weight to the interests of the insured than the insurer's own interests.

The court found that Ace had considered Martin Marietta's interests when negotiating the settlement because it did not force Martin Marietta to accept claimant's $2.75 million demand and negotiated a lower settlement amount.

The court also found that Ace's settlement was not a voluntary payment because the policy gave Ace the right to defend and settle any claim or suit. Ace was liable for Martin Marietta's obligations under the settlement agreement, and thus, Ace's payment to the claimant was not voluntary. And because Ace had authority to settle the action, Martin Marietta was not excused from reimbursing Ace for the deductible.

The court similarly rejected Martin Marietta's claim under North Carolina's Unfair and Deceptive Trade Practices Act. Given that an insurer may act in its own interests in settling a claim, the court said it did not see how this settlement could violate the UDTPA.

The court held that Martin Marietta had to reimburse Ace for the $2.5 million settlement.

The case is *Martin Marietta Materials, Inc. v. Ace am. Ins. Co.*, No. 5:23-CV-313-FL (E.D.N.C. July 15, 2025).

Sixth Circuit Finds No Occurrence for Self-Defense Shooting

Matthew Mollicone believed his wife Kim was having an affair with Daniele Giannone. Matthew drove to Giannone's house with Kim in the car to confront him. After Matthew displayed his firearm, Giannone fired a warning shot. A gunfight ensued. After a pause in the fighting, Giannone retrieved a second firearm and returned to his driveway. As Kim was backing out of the driveway with Matthew in the passenger seat, Giannone shot at the car, claiming he was aiming at Matthew after seeing a gun from the passenger window. During this exchange, Kim was fatally shot in the neck.

At the time, Giannone was covered by a State Farm homeowner's insurance policy that provided coverage for bodily injury "caused by an occurrence," defined as "an accident." The policy also contained an intentional-acts exclusion with an exception for "the use of reasonable force to protect persons or property." State Farm filed a declaratory judgment action against Ms. Mollicone's estate and Giannone in federal court for a ruling that it had no duty to defend or indemnify Giannone. The district court granted summary judgment to State Farm.

The Sixth Circuit affirmed. The Court noted that, under Michigan law, an accident is "something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." Further, unforeseen consequences are not accidental when the intended act creates a direct risk of harm which could have reasonably been expected.

Giannone's conduct was not accidental and thus not a covered occurrence because he subjectively intended to cause harm and the greater harm that ultimately resulted was foreseeable. Nor did it matter for the Occurrence analysis that Giannone was apparently acting in self-defense. Intentional acts taken in self-defense can still be accidents.

Accordingly, the court affirmed the district court's judgment awarding summary judgment to State Farm. The case is *State Farm Fire & Cas. Co. v. Giannone*, 24-1264 (6th Cir. Aug. 5, 2025) (Unpublished). Consult 6th Cir. R. 32.1 for citing unpublished cases in the 6th Circuit.

Texas Federal Court Finds No Occurrence for Claims Based on Insured's Payments to Terrorist Organizations to Protect Foreign Projects

Ericsson Inc. and related companies were sued for allegedly violating the Federal Anti-Terrorism Act by aiding and abetting foreign terrorist organizations ("FTO") in attacks across Iraq, Afghanistan, Syria, Turkey, and Niger that resulted in the death of American service members and civilians. The suits claimed that Ericsson paid protection money to the FTOs so the FTOs would not attack Ericsson's projects.

Travelers Property Casualty Company of America brought a declaratory judgment action in Texas federal court for a ruling that insurance policies they issued to Ericsson did not provide coverage for the underlying suits.

The court held that Travelers had no duty to defend. Applying the eight-corners rule of comparing the insurance policies against the underlying pleadings, the court concluded the underlying suits did not allege an "occurrence" or accident. Rather, the underlying suits alleged intentional conducts – payments to FTOs – which resulted in injuries that ordinarily follow from or could reasonably be anticipated to follow from the intentional act. In this case, the FTS used the monies to fund the killing and injuring of individuals.

While the underlying suits mentioned reckless conduct, these mentions went to the legal theories involving Ericsson's mens rea when intentionally making the payments. There was no allegation that the payments weren't voluntary.

The case is *Travelers Prop. Cas. Co. of Am. v. Ericsson Inc*., 23-cv-1068 (E.D. Tex. Aug. 18, 2025).

Minnesota Federal Court Holds That Abuse of Process Differs from Malicious Prosecution and Is Not Covered

A Minnesota federal judge held that a policy that covers only malicious prosecution does not extend to claims for abuse of process.

ASI, Inc. sued Toy Quest and others, alleging RICO violations, fraud, and abuse of process. Toy Quest tendered the suit to its liability insurer, Great American, seeking defense and indemnity under the policy's Personal and Advertising Injury coverage. That coverage applied to certain offense enumerated in the definition of "Personal and Advertising Injury," including malicious prosecution.

Great American defended under a reservation of rights and then moved for declaratory judgment. Toy Quest argued that the policy was ambiguous on whether the policy's malicious prosecution offense included abuse of process.

The court recognized that while abuse of process and malicious prosecution share similarities under Minnesota law, they are distinct torts. The parties chose a specific list of torts in the contract. That list includes malicious prosecution but omits abuse of process. The court found it unreasonable that an average insured would understand a liability policy that required a duty to defend against specific, enumerated claims would also cover additional, unstated claims, even if legally similar.

The court held that "malicious prosecution" in the policy is not ambiguous and does not also include the separate tort of abuse of process.

As abuse of process is not covered, the policy was not triggered, and Great American had no duty to defend.

The case is *Great Am. E&S Ins. Co. v. Toy Quest Ltd.*, No. 24-3367 (JRT/DTS) (D. Minn. Aug. 18, 2025). The court also issued a similar ruling the same day in *Valley Forge Ins. Co. v. Aquawood, LLC*, No. 24-3769 (JRT/DTS) (D. Minn. Aug. 18, 2025), which arose out of the same underlying suit.