



UNITED STATES CIRCUIT COURT DECISIONS

Court of Appeals Affirms Inapplicability of Exclusion in Cheese Contamination Suit

Leprino Foods Co. v. Factory Mut. Ins. Co.
(10th Cir., July 27, 2011)

In a cheese warehouse, flavoring compounds derived from nearby-stored fruit products contaminated a large quantity of cheese worth an estimated \$13 million. The policyholder's "all-risk" insurance policy with the insurer excluded contamination unless it was caused by "other physical damage." When the insurer refused coverage on the basis of the contamination exclusion, the policyholder brought the instant declaratory suit. A jury determined the contamination was caused by other physical damage and therefore covered by the insurance policy.

On appeal, the insurer contended that the verdict was not supported by sufficient evidence because Colorado law required expert testimony, as opposed to lay testimony, to prove causation. The appeals court, however, concluded the policyholder presented sufficient expert testimony and the contamination exclusion did not apply to preclude coverage. The court of appeals also did not find error in the district court's jury instructions and its evidentiary ruling on the policyholder's revised cold-storage guidelines.

Fifth Circuit Reverses Ruling That Excess Insurer Owed Prejudgment Interest

Gabarick v. Laurin Maritime Inc., et al.
(5th Cir., Aug. 9, 2011)

A shipping accident occurred on the Mississippi River, resulting in an oil spill and several underlying lawsuits. The insurers appealed the district court's decision requiring them to pay prejudgment interest on the funds deposited into the court's registry in an interpleader action.

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The excess insurers argued that the district court erred by: (1) finding that coverage under the excess policy was triggered by the primary insurer's filing of an interpleader complaint; (2) holding that a marine insurer that files an interpleader action and deposits the policy limits with the court is obligated to pay legal interest in excess of the policy limits; and (3) applying the incorrect interest rate and awarding interest from the incorrect date.

The court of appeals held that because the excess insurers' liability had not been triggered at the time the excess insurers filed their interpleader complaint, the district court erred in finding that they unreasonably delayed in depositing the policy limit into the court's registry and in holding them liable for prejudgment interest.

Circuit Court Denies Applicability of Pollution Exclusion as Release Was Caused by Other Specified Loss

Macheca Transp. Co. v. Philadelphia Indemnity Ins. Co.
(8th Cir., Aug. 9, 2011)

The policyholder in this environmental coverage dispute sued its insurer for damages resulting from a pipe rupture in the policyholder's warehouse. An ammonia leak occurred on the sixth floor of the warehouse after a refrigeration pipe ruptured due to the failure of the ceiling support system from which the pipes were suspended. Investigation revealed that the weight of ice that had accumulated on the pipe contributed to the failure. The refrigeration pipe fell and landed on pallets of product inside the warehouse. Ammonia leaked from the ruptured pipe, causing further damage to the warehouse floors and walls, as

well as the product stored inside the warehouse.

The pollution exclusion did not apply. The court noted that the all-risk policy contained three categories of exclusions. One category of exclusions (the B.1 exclusions) precluded coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'" In contrast, the other two categories (the B.2 and B.3 exclusions) lacked such language, and, therefore, only precluded coverage if the excluded event was the sole cause of loss. If a covered cause of loss was "a cause" of loss, the B.2 and B.3 exclusions did not preclude coverage.

The pollution exclusion was a B.2 exclusion, wherein the policy would not cover loss "caused by or resulting from . . . [d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants.'" However, the pollutant exclusion contained an exception that stated: "But we will pay for resulting 'loss' to Covered Property when the discharge, dispersal, seepage, migration, release, or escape of 'pollutants' is caused by any of the 'specified causes of loss.'" Thus, if a "specified cause of loss" was a cause of the escape or release of a pollutant, the policy provided coverage because the pollutant exclusion was a B.2 exclusion rather than a B.1 exclusion.

The court held that it is undisputed the weight of ice accumulating on the refrigeration pipe was "a cause" of the pipe's rupture, which in turn caused the release of the ammonia. The court further noted that the insurer conceded that "If there was a covered event that caused the release of pollutants, then that would be covered." The policyholder was entitled to partial summary judgment on liability under its weight-of-ice claim because the weight of ice was

a specified cause of loss.

Eleventh Circuit Affirms Applicability of Pollution Exclusion in Bacterial Contamination Action

Markel Int. Ins. Co., Ltd. v. Florida West Covered RV & Boat Storage, LLC
(11th Cir., Aug. 11, 2011)

A third party alleged he was forced to wade through retained flood water to retrieve his personal property from a storage unit that he leased from Florida West. The underlying complainant alleged that he "contract[ed] bacterial poisoning," "a severe bacterial infection," and "injury" due to "milling[s] from roadwork" which had mixed with the flood water. In response to the complaint, Florida West sought protection under its standard commercial general liability insurance (CGL) policy with Markel.

The issue was whether the state court complaint alleged facts that fell within the scope of two policy exclusions contained in the Markel CGL policy. The district court granted summary judgment in favor of Markel, finding that Markel was not obligated to defend or indemnify Florida West under the CGL policy because the absolute pollution exclusion and absorption/inhalation/disease exclusions applied to defeat coverage.

The policyholder, Florida West, argued that the district court improperly relied on the dictionary definitions of "irritant" and "contaminant" without considering whether millings are irritants or contaminants under environmental regulations and case law from other jurisdictions. The policyholder also argued that the court erred in even considering whether millings constituted

a pollutant because the underlying complaint alleged that bacteria caused the infection.

On appeal, the court agreed with the district court that, pursuant to a reasonable reading of the complaint, millings mixed with flood water constituted a “pollutant” within the meaning of the absolute pollution exclusion. The appellate court agreed with the district court that it was the product’s “ability to produce an irritating effect [that] places the product[] within the policies’ definition of an ‘irritant.’” “Consequently, a product that causes no harm when used properly still may be classified as a pollutant under the exclusion. The appeals court held it was “of no moment that the complaint does not actually use the words ‘irritant,’ ‘contaminant,’ ‘pollutant,’ or ‘pollution’” as the millings were specifically alleged to have produced the bacterial poisoning and infection.

Fifth Circuit Reverses Holding Against Policyholder Involving Offshore Oil Pollution Claims

Jefferson Block 24 Oil & Gas, LLC v. Aspen Ins. UK Ltd.
(5th Cir., August 29, 2011)

The insured was the part-owner of offshore oil and gas leases, an associated platform, wells, and pipelines. The insured submitted a claim under the policy for indemnification of the removal costs it incurred in responding to a leak involving a 16-inch right-of-way oil pipeline. The underwriters denied the claim. The policyholder sued defendant insurers, alleging that the insurers wrongfully refused to indemnify it for oil pollution removal costs under an insurance policy that involved liabilities arising under the Oil Pollution Act of 1990. The district court for the Eastern

District of Louisiana granted summary judgment in favor of the underwriters and the policyholder appealed.

The appellate court determined that the pipeline was a “covered offshore facility” within the scope of coverage afforded by the policy because (1) the policy was ambiguous with respect to the issue of coverage for the pipeline since the policy’s schedule of insured facilities referred to an appendix that listed only the locations of facilities, and whether the pipeline was a facility “thereon” one of the locations on the form could not be determined through reference to the plain language of the policy; (2) the extrinsic evidence in the record did not conclusively resolve this ambiguity, and (3) the contra-insurer rule applied and the ambiguity should have been resolved in favor of the insured since the insured offered a reasonable interpretation and did not draft the ambiguous provisions.

[UNITED STATES DISTRICT COURT DECISIONS](#)

District Court Grants Summary Judgment to Insurer on Environmental Claims

Colony Ins. Co. v. Wallace
(S.D. Florida, June 28, 2011)

Approximately 90 plaintiffs sued the defendant policyholder for claims alleging negligence, nuisance, and violation of the Florida Pollutant Discharge Prevention and Control Act as a result of the dispersal of pollutants from the Dania defendant’s property.

Specifically, in March 2001, the Dania defendants purchased approximately 16 acres of land adjacent to residential neighborhoods in Dania Beach, Florida. Prior to the purchase, the Dania property

was used for dredged sand fill and as a landfill for construction and demolition debris, medical waste, petroleum products, and various chemicals. Scott & Son Engineering and the Dania defendants cleared the property and prepared the property for development, causing pollutants to be dispersed and discharged into the surrounding areas, and failed to take steps in protecting the residents from contact with the hazardous pollutants.

The Colony CGL policy issued to Scott & Son contained a hazardous materials exclusion and occurrence exclusion clause. The issue was whether the exclusions applied to bar the injury claims under the policy.

It was undisputed that the policy coverage period was from January 2004 to January 2006. However, the plaintiff’s testimony revealed that her symptoms began sometime between 2002 and 2003. Thus, the court held that it was clear that the plaintiff’s symptoms occurred prior to the policy’s effective date and, thus, there was no duty to provide coverage for the claim.

The court held that, as the plaintiff alleged her bodily injuries arose from excessive dust, noise, and damage caused by the construction and discharge of pollutants at the site, the alleged injuries were caused by hazardous materials as defined in the policy. Therefore, the claims did not fall within the policy’s coverage.

District Court Grants Summary Judgment to Insurer, Holding Environmental Claims Were Reported Outside Claims-Made Policy Term

Webb Operating Co. v. Zurich American Ins. Co.
(E.D. Michigan, July 8, 2011)

The policyholder (Webb Operating Company) operated a gas station in Highland Park, Michigan and purchased "Storage Tank System Third Party Liability and Cleanup Policy" from defendant Zurich American Insurance Company in 2002. The policy covered cleanup costs resulting from a leak or "release" of fuel from the underground storage tanks located on the plaintiff's property. The insurer sold the plaintiff policies on an annual basis and the policyholder renewed with the defendant every year since 2002.

In June 2006, one of Webb's underground storage tanks failed a "tank tightness" test during an inspection. The policyholder hired Huron Environmental LLC to perform remediation services in connection with the failing tank. Webb and Huron decided to "close" the tank; however, the policyholder's president decided not to submit Huron's bill (\$8,050) to the insurer under the 2005-2006 policy because the deductible was \$5,000 and because he did not want a policy claim to raise premiums or affect future insurability.

Huron continued to monitor the tank and oversee remediation efforts at Webb's gas station for the next three years. During this time, the cost of the remediation services grew to a point at which the policyholder became unable to pay. As a result, the policyholder filed a claim with the insurer sometime in October 2009, believing the loss was

covered under the 2005-2006 policy or, alternatively, under the 2009-2010 policy.

The court determined that the policies in question were "claims-made" policies and, thus, coverage was unquestionably conditioned upon the policyholder filing a claim within the specifically defined reporting period and not upon the release simply occurring. Moreover, the court held that under Michigan law, the insurer was not required to show prejudice on a claims-made policy. Therefore, as it was undisputed that the policyholder discovered the release in 2006, but did not give the insurer notice of the claim until late 2009, there was no coverage for the release. Likewise, the court rejected coverage under the 2009-2010 policy because it was the discovery of a release that triggered coverage, not the discovery of the costs to remediate. Accordingly, the court held the insurer had no coverage obligations under either policy.

Pollution Exclusion Held Unambiguous in Chinese Drywall Case

Dragas Management Corp. v. Hanover Ins. Co.
(E.D. Virginia, Aug. 8, 2011)

A Chinese drywall claim was initiated by the management company of three housing developments. The court did not find that the pollution exclusion was not so broad as to be ambiguous. Moreover, in following the holding in *Travco Ins. Co. v. Ward*, 715 F.Supp. 2d 699 (E.D. Virginia 2010), the court held that the reduced sulfur gases contained in the drywall were a pollutant under the policy, and that these gases were dispersed into the atmosphere, causing the alleged property damage. The court granted the insurer's motion that the CGL and

umbrella policies barred recovery based on the absolute pollution exclusion.

Court Applies Fact-Based Allocation Method for Determining Remedial Costs

Peabody Essex Museum, Inc. v. United States Fire Ins. Co.
(D. Massachusetts, Aug. 24, 2011)

After liability was determined, the insurer moved for partial summary judgment on the damages allocation method, claiming that the district court should use the "time-on-the-risk" method, which would result in a finding that the insurer owed only ten percent of the remedial costs claimed. Applying Massachusetts law, the court held that the "time-on-the-risk" method is the default allocation method, where the triggered policy bears a proportionate share of the total damages, but the court also recognized that a "fact-based" allocation where the courts can precisely and accurately determine what injury for damage occurred during each policy period. In considering the evidence produced by both parties, including reports on the applicable spread of contamination and the cost of specific remediation, the court found the evidence permitted a fact-based allocation.

The court found the insurer's duty to defend the insured was attached, since the court previously held that the Notice of Responsibility issued against the insured sufficiently triggered the duty. Because the insurer failed to fully reimburse the legal costs of the insured for more than two years after that finding, the court found the insurer violated the Massachusetts deceptive business practices law and awarded double damages on the unreimbursed legal fees.

Virginia Court Denies Coverage for Chinese Drywall Claims

Evanston Ins. Co. v. Harbor Walk Dev., LLC
(E.D. Virginia, Sept. 9, 2011)

Several homeowners filed suit against Harbor Walk Development to recover damages for injury and damage allegedly caused by Harbor's installation of Chinese drywall in their homes. Evanston had issued three commercial general liability insurance policies to Harbor that contained language obligating Evanston to defend and indemnify Harbor from lawsuits if certain conditions were met. The policies provided coverage for injury or damage caused by Harbor's accidental conduct, but excluded coverage for injury or damage that "would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." Evanston filed a declaratory judgment action, seeking a declaration that it was not obligated to defend or indemnify Harbor in the underlying lawsuits because the pollution exclusion applied. The homeowners, in contrast, argued that the pollution exclusion was ambiguous because it was unclear whether it applied to traditional pollution or non-traditional pollution. As a result, the homeowners argued that the exclusion should be construed against Evanston and, therefore, found inapplicable.

The court granted Evanston's motion for summary judgment and noted that nothing in the pollution exclusion suggested the parties intended only traditional or outdoor pollution scenarios to be excluded from coverage. Rather, the court stated that the pollution exclusion clearly and unambiguously applied to injuries caused by both

traditional and non-traditional pollution. The court opined that the pollution exclusion barred coverage for the homeowners' claims because the sulfides and noxious gases alleged in the underlying lawsuits amounted to "pollutants" within the meaning of the policy and that the underlying complaints alleged movement of the gases that fell within the scope of the pollution exclusion.

District Court Holds Single Occurrence Under Policy Where Multiple Suits Alleged Hospital Cleaned Surgical Instruments With Elevator Hydraulic Fluid

Mitsui Sumitomo Ins. Co. of Am. v. Automatic Elevator Co.
(M.D. North Carolina, Sept. 13, 2011)

The defendant-insured was hired to perform two elevator repair projects and the work spanned over the effective dates of two sequential insurance policies. In completing the repairs, the defendant-insured improperly labeled and stored used hydraulic fuel in plastic barrels labeled with the name of a common cleaning agent used by the insured hospital in cleaning surgical instruments. The hospital mistakenly used the hydraulic fluid to clean surgical instruments, leading to 150 patients asserting claims against the hospital and related defendants.

The two policies in question each included a \$1 million per-occurrence limit and a \$3 million aggregate limit. The insurer made available \$1 million for the settlement of the claims, claiming it was only one occurrence which resulted in bodily injury during the latter of the two policies. The court agreed and further declined to expand the policy where the scope of work involved multiple elevators, regardless of whether of not

work on an individual elevator took place during multiple policy periods. Instead, the court found that because only one elevator was serviced during the second policy period in which bodily injuries were claimed, coverage under that policy was all that was available.

The hospital further argued that the elevator company's negligence lead to over 100 surgeries in which hydraulic-fluid washed instruments constituting multiple occurrences invoking the broader aggregate limits. To the contrary, the court agreed with the insurer, who argued that the elevator company's negligence in improperly storing and labeling the used hydraulic fluid, despite being volitional, was one single "accident" and that under North Carolina law, the "cause approach" dictated only a single occurrence of negligence for the purposes of the policy's liability limits.

Policy's Binder Held Insufficient to Invoke Pollution Exclusion in Marine Oil Spill

State Nat'l Ins. Co. v. Settoon Towing, LLC
(E.D. Louisiana, Sept. 23, 2011)

A vessel struck a well head, causing extensive damage and resulting in the uncontrolled spray of crude oil. The insured's vessel captain failed to report the incident and denied his ship's involvement until more than 30 days after the incident when confronted with irrefutable evidence by the Coast Guard. The principal issues involved the applicability of the pollution exclusions in the insured's marine insurance policies and the activation of the sudden and accidental buyback provisions. The insurer defended under a reservation of rights, but filed a declaratory judgment action.

The insured argued that the insurer cannot rely on the pollution exclusion because the policy was not delivered to the insured before the collision. As such, the insured claimed it was not aware of the conditions of the policy or what was required to obtain coverage, i.e., what time limitations existed. In contrast, the insurer argued that delivery of the binder was sufficient and that the terms of pollution exclusion were common to the marine industry and generally known by the insured. The court agreed with the insured, finding that the binder did not clearly communicate the pollution coverage exclusion and buyback denying the insurers declaratory action.

The excess carrier also similarly denied coverage, claiming that the insured did not have notice of the occurrence within 72 hours and that they failed to report the occurrence to the insurers within 30 days. The court concluded that the insurer had knowledge of the oil spill within 72 hours, but not of the event which caused the oil spill, therefore the insured did not meet the 72-hour clause of the buy-back provision. Even if the ship captain's knowledge of the event was imputed on the company, the insured failed to provide written notice of the event within 30 days to the excess carriers. Despite the captain's dishonest behavior, the court agreed with the excess carriers and denied the availability of the pollution buyback provisions in those policies.

Reinsurance Agreement Did Not Provide Direct Cause of Action Against Reinsurer for Underlying Environmental Claims

Canal Ins. Co. v. Montello, Inc., et al.
(N.D. Oklahoma, Sept. 26, 2011)

Montello was the distributor of products used in the drilling industry. One of its products was a drilling mud that contained asbestos. Defendant Montello was sued by numerous individuals who were allegedly exposed to asbestos through Montello's products. Montello sought coverage from the group of insurers alleged to have insured the defendant during the time period it distributed the asbestos-containing product. In addition, Montello brought claims against the reinsurer National Indemnity Ins. Co. (NICO), alleging NICO is liable based on a recent reinsurance agreement the reinsurer made with CNA, which was a direct insurer of defendant Montello during the relevant time periods.

Montello alleged that the reinsurance agreement required CNA's asbestos and environmental pollution liabilities would be transferred to NICO, thus shifting responsibility for a portion of Montello's asbestos litigation to NICO and thereby making NICO directly liable to Montello for any covered loss. Montello further alleged that CNA ceded or will cede approximately \$1.6 billion of net asbestos and environmental liabilities to NICO under a retroactive reinsurance agreement with an aggregate limit of \$4 billion.

The issue before the court was whether the reinsurance agreement between NICO and CNA provided a direct cause of action to CNA's insureds and, specifically, to Montello. In ruling against Montello, the court noted that a basic law of insurance is that the existence of

a reinsurance contract does not allow an insured to proceed directly against the reinsurer absent two exceptions.

The first exception argued by Montello was that the reinsurance contract between NICO and CNA contained a "cut-through" clause. However, in denying the applicability of this exception, the court noted that while the existence of a cut-through clause in the contract would provide a direct cause of action against NICO, the agreement and other incorporated agreements did not contain such a clause, either express or implied. Thus, while NICO agreed to undertake extensive administrative services under the reinsured policies issued by CNA, the agreement was insufficient to establish an implied cut-through provision in favor of Montello for two reasons. First, the agreements contained "express negation clauses" in which NICO disavowed undertaking any direct liability to a third party by virtue of the agreement. The court held that under New York law, the existence of a "negating clause" is dispositive on the issue of whether the contract creates third-party beneficiaries. Second, the court held that under the Second Circuit precedent in *Jurupa Valley Spectrum v. National Indemnity Co.* 555 F3d 87 (2d Cir 2009), the agreements that authorized NICO to administer claims for the benefit of the reinsured cannot be read to create a direct link to the original insured.

The court denied the second exception argued by Montello that the nature of the agreement created "assumption reinsurance" wherein the reinsurer steps into the shoes of the ceding company with respect to the reinsured policy, assuming all its liabilities. Again under *Jurupa, supra*, the court held that because NICO had not assumed all of CNA's liabilities under the agreement, the reinsurance contract did not create

assumption reinsurance and NICO was not directly liable to Montello under that theory as well.

Insurer Obligated to Defend as Alleged Negligence Constituted an Occurrence Under Policy

Harleysville Mut. Ins. Co. v. Glenn A. Ford & Son Drilling Contr.
(W.D. Pennsylvania, Sept. 27, 2011)

The insurer sought a declaratory judgment, claiming it was not required to defend and indemnify the pollution of a water supply because the pollution was a result of negligence not covered as an “occurrence” under the applicable insurance policy. The insured argued that the pollution of the water supply was accidental and not the result of negligence, therefore qualifying as an occurrence. The intervener cross-claimant claimed the District Court’s exercise of jurisdiction over the declaratory action was more appropriately adjudicated in the already pending underlying state action.

The court found that its jurisdiction was discretionary, but that a multitude of factors favored the exercise of jurisdiction including judicial economy, fairness, and the fact the related state action would not likely result in a comprehensive disposition of all issues. That court concluded that it was not gratuitously interfering in the state court action and denied the intervener’s motion to dismiss.

The district court held that the resolution of the related state action could only result in either 1) no loss to indemnify or 2) a loss that resulted from negligence not covered under the policy. Nonetheless, the court found that because the allegations in the complaint alleged possible negligence by other

parties, the duty to defend attached as a potential accidental occurrence under the policy.

Insurer Required to Defend and Indemnify Hotel in Legionnaires’ Case Due to Non-Applicability of Pollution and Bacterial Exclusions

Westport Ins. Corp. v. VN Hotel Group LLC, et al.
(M.D., Florida, Oct. 11, 2011)

The insurer of a hotel chain disclaimed coverage to its insured hotel based on a wrongful death action in which a hotel guest contracted Legionnaires’ disease after using the hotel hot tub. The issue was whether the policy’s pollution exclusion or fungi or bacteria exclusion applied to bar coverage.

In holding against the insurer and against the application of the exclusions, the court concluded that while bacteria may be considered a contaminant, the Legionella bacteria that caused the injury was not a “pollutant” under the policy, as it was not a solid, liquid, gaseous, or thermal substance.

The court held that the fungi or bacterial exclusion did not apply to the facts, as the spa tub did not constitute a “structure” within the meaning of the policy and, even if it did, the exception would bring the claim back within the grant in coverage. The court appeared to strain its analysis to find coverage, concluding that the exclusion would be excepted because the bacteria were contained in a “good or product intended for bodily consumption.” In relying on similar case precedent, the court reasoned that the spa has economic utility and that such consumption was “bodily” because “the utilization in the satisfaction of wants was relating to the body.”

This breach of contract action arises out of the refusal of several **insurance** companies to provide **coverage** under liability policies held by a dry cleaning business, House of Clean, Inc. (HOC). HOC’s **insurance** claims were made after the release of certain hazardous material on real property in Andover, Massachusetts. The plaintiff filed a motion to amend the complaint for the fourth time, asserting violations of Chapter 93A related to payment of defense-related costs and indemnity.

The court held that HOC did not show good cause for adding a Chapter 93A claim at the eleventh hour shortly before trial and discredited policyholder’s argument that it was prevented from discovering earlier relevant information. The court held that HOC’s proposed amendment would be futile, as the allegations of delay in performing a coverage investigation did not provide support of a Chapter 93A violation. The application to amend the complaint was denied.

UNITED STATES STATE COURT DECISIONS

Transfer of Communicable Disease From Commercial Bus Driver to Passengers Was Not an Insured Risk Under Commercial Auto Policy

Lancer Ins. Co. v. Garcia Holiday Tours et al.
(Texas Supreme Court, July 1, 2011)

In a case of first impression, the insurer filed this declaratory coverage action to determine its obligations under its business auto policy stemming from injuries suffered by passengers due to alleged infection of a communicable disease by the company bus driver.

The policyholder operated a commercial bus company and contracted with a school district to provide a bus and driver for a field trip. After the field trip, the bus driver was hospitalized with tuberculosis (TB). Several passengers from the field trip also tested positive for latent TB, and thereafter sued the driver and the policyholder for the resultant infection by the driver. The insurer refused to defend the claim, asserting that it did not insure the company for that type of risk. The trial court concluded that the policy covered this type of occurrence and rendered summary judgment that the **insurance** carrier owed a duty to indemnify the insured. The court of appeals agreed that the policy might provide **coverage** for such a claim but reversed the summary judgment and remanded the case to the trial court to resolve a factual dispute about whether the passengers had contracted the disease while in the vehicle.

On appeal to the Supreme Court, the issue was whether the transmission of a communicable disease from the driver of a motor vehicle to a passenger is a covered loss under a business auto policy which afforded coverage for bodily injuries resulting from the vehicle's use. On review, the court held that the transmission of the TB from the driver to the passengers was not a risk assumed by the insurer under the policy because the passengers' injuries did not result from the vehicle's use but rather from the insured's use of an unhealthy driver. The bus, itself, in its capacity as a mode of transportation, did not produce, and was not a substantial factor in producing, the passengers' injuries.

The court relied on prior precedent noting that for liability to "result from" the use of a motor vehicle, there must be a sufficient nexus between its use as a motor vehicle and the accident

or injury. Likewise, in order to invoke coverage under an insurance policy, a motor vehicle's use must be a producing cause or cause in fact of an accidental injury. To be a producing cause of harm, the use must have been a substantial factor in bringing about the injury, which would not otherwise have occurred. When a vehicle merely furnishes a place for an accident or injury to occur, it is not a substantial factor, and the causal link is insufficient to invoke coverage (i.e., where a vehicle is a mere situs of injury, fungible with any other situs, it is not being "used" under the terms of the policy).

Pollution Exclusion Held to Encompass Carbon Monoxide Releases in Residential Homes

Midwest Family Mutual Ins. Co. v. Wolters, et al.

(Minnesota Court of Appeals, Aug. 22, 2011)

This environmental coverage matter involved whether a homeowner's exposure to carbon monoxide in an underlying suit was precluded by the policy's pollution exclusion. The appellate court held that the insurer did not have a duty to defend the contractor because the policy's pollution exclusion was not limited to purely environmental pollutants.

Specifically, the court noted that Minnesota has taken a "non-technical, plain-meaning approach" to interpreting the pollution exclusion and does not follow the majority view of other jurisdictions, which limits the exclusion to traditional forms of environmental pollution. Consequently, the court held that the pollution exclusion encompassed carbon monoxide releases in a residence, and thereby excluded coverage.

Supreme Court of South Carolina Adopts Time-on-the-Risk Approach for Progressive Property Damages

Crossmann Comm. of North Carolina v. Harleystville Mut. Ins. Co.

(Supreme Court of South Carolina, August 22, 2011)

In this environmental coverage matter, the policyholder developer sued its insurer, seeking a judgment declaring that its CGL policies provided coverage for progressive property damages sustained by homeowners due to water penetration to the condominium units.

The Supreme Court affirmed the trial court's finding of coverage based on an "occurrence," but reversed the trial court's finding of the insurers' joint and several liability. Specifically, the Supreme Court adopted the "time on the risk" framework for determining an insurer's responsibility under a CGL policy, thereby overruling *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 561 SE 2d 355 (2002), which mandated a joint and several approach.

Court of Appeals Reverses Trial Court Grant of Summary Judgment for Policyholder, Holding It Could Not Recover Pre-Notice Expenditures for Environmental Cleanup

The Travelers Ins. Co. v. Maplehurst Farms Inc.

(Court of Appeals of Indiana, Aug. 24, 2011)

This environmental coverage matter involved an attempt by the policyholder to recover costs and expenses from various insurers that were incurred in remediating an environmental cleanup

prior to notifying the insurers of an underground storage tank leak.

The court held that the policyholder could not recover the costs of expenditures incurred prior to notifying their insurers of the tank leak and that the trial court erred in granting summary judgment, as it was contrary to established precedent precluding pre-notice recovery. Further, because the policyholder entered into a settlement agreement without the insurers' consent in violation of the policy provisions, recovery was precluded as well.

Pollution Exclusion Deemed Ambiguous as a Matter of Law

Tyson Foods Inc. v. Allstate Ins. Co., et al.
(Superior Court of Delaware, Aug. 31, 2011)

In this environmental coverage dispute, plaintiff chicken house owners (CHOs) sought a declaratory judgment against its insurers seeking a determination that they owed a duty to defend and indemnify the CHOs in underlying lawsuits. The underlying actions alleged the CHOs' improper disposal of poultry-waste-contaminated water resources caused property damage and bodily injury.

The insurers asserted that there was no such duty due to the application of the policy's pollution exclusion. However, the court held that the underlying complaints triggered the policies and they alleged property damage or bodily injury within the policy periods. The court held that under Arkansas law, pollution exclusions were ambiguous, as a matter of law, such that there was a possibility that they did not preclude coverage.

Supreme Court of Vermont Affirms Use of Time-on-the-Risk Approach in Petroleum Contamination Case

Bradford Oil Company, Inc. v. Stonington Ins. Co., et al.
(Supreme Court of Vermont, Sept. 11, 2011)

The policyholder brought this environmental coverage suit seeking a declaration on coverage for its cleanup liabilities involving petroleum contamination from a gas station. The coverage periods of the policies issued by the insurer covered only a portion of the total time that contamination was allegedly occurred.

The controversy in this appeal was between the State of Vermont, which runs the Vermont Petroleum Cleanup Fund (VPCF), and Stonington Insurance Co., which insured Bradford Oil, the owner of the underground storage tanks, for approximately a three-and-a-half-year period.

The State appealed from the trial court's judgment limiting Stonington's liability to a 4/27 share of past and future cleanup costs and awarding the State \$45,172.05. On appeal, the State argued: (1) the application of time-on-the-risk allocation in *Towns v. Northern Security Insurance Co.*, 2008 VT 98, 184 Vt. 322, 964 A.2d 1150 did not preclude joint and several liability under all standard occurrence-based policy language; (2) the circumstances here, including the reasonable expectations of the insured and the equity and policy considerations, supported imposing joint and several liability on Stonington for all of the State's VPCF expenditures; and (3) even if time-on-the-risk allocation would be appropriate, Stonington was not entitled to such allocation because

it failed to show sufficient facts to apply that allocation method in the present case. The Vermont Supreme Court, however, affirmed the trial court holding that *Towns, supra* did control under the circumstances, and that the court was unconvinced by the State's reasonable expectations, equity, and policy arguments to distinguish the recent decision.

Illinois Appellate Court Reverses Trial Court on Applicability of Pollution Exclusion, Citing Ambiguity

Erie Ins. Exchange v. Imperial Marble Corp.
(Appellate Court of Illinois, September 15, 2011)

Plaintiff insurer filed this action seeking a declaration that it did not have a duty to defend or indemnify its policyholder under a CGL policy in an underlying class action suit for personal injuries due to permitted emissions from the policyholder's manufacturing operations. The policyholder used volatile chemicals creating odorous emissions that were dispersed into the atmosphere, but which were authorized by a permit issued by the Illinois EPA in compliance with the Clear Air Act.

The policyholder raised two issues on appeal: whether the trial court erred in granting summary judgment for the insurer on coverage and whether it erred in denying the policyholder's estoppel defense. The appellate court concluded that the underlying complaint alleged an occurrence under the policy, as the intended release of contaminants under the permit resulted in unintended harm. Also, the court held that the policy's pollution exclusion was arguably ambiguous as to whether the emission of hazardous materials in levels permitted

by the IEPA permit constituted traditional environmental pollution excluded under the policy.

Virginia Supreme Court Affirms Global Warming Claims Do Not Constitute Occurrence Under Policy

The AES Corp. v. Steadfast Ins. Co.
(Supreme Court of Virginia, Sept. 16, 2011)

This action for declaratory relief involved the unique factual circumstances stemming from an appeal as to whether the civil complaint filed against the policyholder asserting release of greenhouse gases contributing global warming and subsequent damage resulting therefrom alleged an “occurrence” under the policy. The policyholder is a Virginia-based energy company that holds controlling interests in companies specializing in the generation of electricity in numerous states, including California.

The underlying complaint was filed by a native community located on an Alaskan barrier island (City of Kivalina). It alleged damage to the village caused by global warming through the emission of greenhouse gases. This resulted in the premature melting of sea ice that caused erosion of the shoreline, thereby rendering the village uninhabitable. The complaint further alleged that AES “intentionally emits millions of tons of carbon dioxide and other greenhouse gases into the atmosphere annually” and that AES “knew or should have known of the impacts of [its] emissions” of carbon dioxide.

The Virginia Supreme Court cited case law for the general proposition that “[a]n intentional act is neither an ‘occurrence’ nor an ‘accident’ and therefore is

not covered by the standard policy.” However, it noted that even though the insured’s action starting the chain of events was intentionally performed, when the alleged injury results from an unforeseen cause that is out of the ordinary expectations of a reasonable person, the injury may be covered by an occurrence policy provision. As such, the dispositive issue was whether the complaint can be construed as alleging that Kivalina’s injuries resulted from unforeseen consequences that a reasonable person would not have expected to result from AES’s act of emitting greenhouse gases.

The policyholder asserted that the environmental harm suffered by Kivalina were unintended consequences of AES’s intentional release of carbon dioxide and greenhouse gas emissions. The court disagreed, noting that Kivalina plainly alleged that AES intentionally released carbon dioxide into the atmosphere as a regular part of its energy-producing activities. Kivalina also alleged that there is a clear scientific consensus that the natural and probable consequence of such emissions is global warming and damages such as Kivalina suffered. Thus, the natural and probable consequence of that intentional act was not an accident under Virginia law. Moreover, the court held that the allegations of negligence are not synonymous with allegations of an accident, and, in this instance, the allegations of negligence did not support a claim of an accident. Even if AES did not intend to cause the damage that occurred, the gravamen of Kivalina’s nuisance claim was that the damages it sustained were the natural and probable consequences of AES’s intentional emissions.

The court held that even if AES were actually ignorant of the effect of its actions, Kivalina alleged its damages were the natural and probable

consequence of AES’s intentional actions. Thus, the complaint did not allege that the property damage was the result of a fortuitous event or accident, and such there was no coverage for this loss under the relevant CGL policies.

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