

Insured Loses On 'Sole Negligence' Language

Insurance Law Update

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By: [Jason Chorley](#)

U.S. Court of Appeals for the Fifth Circuit

In *Barden Mississippi Gaming LLC v. Great Northern Ins. Co.*, ___ F.3d ___, 2011 WL 1262264 (5th Cir. (Miss.) April 6, 2011), the U.S. Court of Appeals for the Fifth Circuit held that an insurer did not have a duty to indemnify an additional insured because the policy provided coverage only for the named insured's "sole negligence" and the named insured was only found 50 percent negligent in the underlying action.

The insured, Barden, owned a casino in Tunica, Miss., and utilized slot machine stools manufactured by Top Line. In accordance with a prior settlement agreement between Barden and Top Line, Top Line agreed to add Barden as an additional insured on Top Line's insurance policy with Great Northern for all claims arising out of Top Line's "sole negligence" regarding the stools. As casino luck would have it, a patron suffered personal injuries allegedly caused by one of Top Line's stools and filed a lawsuit against Barden and Top Line. Barden tendered the lawsuit to Great Northern, but Great Northern denied a duty to defend or indemnify. In a previous appeal in the same matter, the Fifth Circuit, in *Barden Mississippi Gaming LLC v. Great Northern Ins. Co.*, 576 F.3d 235 (5th Cir. 2009), held that Great Northern had a duty to defend because it was possible that Top Line could be found 100 percent liable. The court, however, also concluded that the question of indemnification was premature as the underlying case had not yet reached a verdict. Ultimately, the jury in the underlying action found Top Line 50 percent negligent and Barden 50 percent negligent. As a result, the Fifth Circuit ruled that Great Northern was not obligated to indemnify Barden for the judgment in the underlying case because Top Line was not "solely negligent."

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