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Illinois Supreme Court Finds No Ambiguity in Mechanical Device Exclusion

Reversing the intermediate appellate court, the Illinois Supreme Court found that a "mechanical device" exclusion in an auto policy was unambiguous and was not void as against public policy. It was the first time that the Illinois high court had addressed this exclusion.

The Case

Claimant was injured while assisting his father in his grain farming operations. Claimant backed up a grain truck to an auger that was used to move grain from one truck to another. In attempting to open the gate on the grain truck, claimant stepped into the auger and sustained a serious injury to his leg.

He sued his father because the safety shield on the auger had been removed. His father also owned the grain truck. He accepted a settlement funded by certain liability insurers, but separately pursued payment from the auto insurer.

The auto insurer denied coverage based on the policy's "mechanical device" exclusion, which barred coverage for "the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the [covered] vehicle."

In the ensuing declaratory judgment action, claimant pointed to the Illinois Vehicle Code, which mandated that an owner's liability policy extend coverage to permissive users. Claimant argued that "use" includes the loading and unloading of grain. He contended that the mechanical

device exclusion was void as against public policy because it conflicted with the permissive use statute.

The trial court sided with the insurer, but the intermediate appellate court reversed. Courts in other jurisdictions found the mechanical device exclusion to be unambiguous and enforceable. But the appellate court distinguished those case on the basis that they involved self-powered or motorized machines. In contrast, the auger could not move grain unless it was hooked up to an external power source. The appellate court was concerned that the insurer's interpretation would allow for coverage only for injuries arising when grain is unloaded from the insured truck by hand or hand truck. The appellate court found the exclusion to be ambiguous and construed it against the insurer.

The insurer appealed.

The Illinois Supreme Court's Decision

The Illinois Supreme Court reversed the appellate court.

It found that the mechanical device exclusion is capable of only one reasonable interpretation and that it clearly applied to the facts here.

The state high court criticized the appellate court for reading in a requirement that a mechanical device must be self-powered or motorized. Not only did the rulings in other cases not turn on whether the devices were self-powered or motorized, but the appellate court violated rules of contract construction by focusing on the facts of those other cases, rather than the plain meaning of the terms in the exclusion itself.

The Illinois Supreme Court also rejected claimant's argument that the mechanical device exclusion applies only when property is being moved *onto* an insured truck, as opposed to off of an insured truck, as was the case here. Claimant's argument was based on consideration of two

other exclusion that immediately preceded the mechanical device exclusion in the policy. The court found that the three exclusions were independent and found claimant's narrow reading of the mechanical device exclusion to be unreasonable.

Finally, the court disagreed that the mechanical device exclusion violates Illinois public policy. In a previous decision, the Illinois Supreme Court held that the state's mandatory insurance laws do not preclude parties from excluding certain risks from liability coverage and that exclusions in auto policies are permissible so long as they do not differentiate between named insureds and permissive users. The court found that the mechanical device exclusion did not differentiate between named insureds and permissive users.

The case is *State Farm Mut. Auto. Ins. Co. . Elmore,* No. 125441 (Ill. Dec. 3, 2020).

New Jersey Federal Court Finds No Coverage for Email Spoofing Scheme Under E&O Policy

A federal district court in New Jersey held that an exclusion for improper use, theft, stealing, conversion, embezzlement, or misappropriation barred coverage for losses relating to an email spoofing scheme in which the insured was duped into sending real estate loan proceeds to a fraudulent account.

The Case

The insured, Authentic Title Services, Inc, was a title agent for insurance policies underwritten by Fidelity National Title Insurance Company. Greenwich Insurance Company insured Authentic under a Title Professional Liability Errors and Omissions insurance policy for the period of May 25, 2015 to May 25, 2016.

In March and April 2016, Authentic acted as title agent and settlement agent for a real estate transaction for a property in South Orange, New Jersey. Quicken Loans was the mortgage lender, and it transferred the loan proceeds to Authentic on March 30, 2016, the day before the originally scheduled closing date. Authentic deposited the funds into a settlement account at TD Bank. Although they had been deposited into Authentic's settlement account, the funds remained the property of Quicken. The closing was postponed, and emails ensued between Authentic's Mark Maryanski and Quicken's Brittany Clark and others concerning return wire instructions for Authentic to use in sending the loan proceeds back.

On April 4, 2016, an Authentic employee received an email from "BrittanyClork@quickenloans.com" (an email address different from Clark's legitimate email address by one letter), with what appeared to be wiring instructions for the return of the funds. The email was actually from an unknown third party posing as Clark, and it directed Maryanski to transfer the funds to a specified account at Chase Bank and to confirm only by email.

In April 2016, when it became clear to both Maryanski and Quicken that the funds had been diverted to the fraudulent account, Maryanski reported the incident to Fidelity, which issued title insurance for the real estate transaction. The diverted funds were withdrawn by an unknown party and never recovered. Fidelity contacted Greenwich, advising it of the claim and asserting a claim against Authentic for which it requested immediate payment.

Authentic sought coverage from Greenwich. Greenwich denied coverage. Authentic sued Greenwich in federal court in New Jersey. Greenwich moved for summary judgment.

The Decision

The court granted summary judgment to Greenwich. The court applied the policy exclusion for claims "based on or arising out of . . . the commingling, improper use, theft, stealing, conversion, embezzlement or misappropriation of funds or accounts."

Applying New Jersey law, the court concluded that Fidelity's claim against Authentic and Authentic's claim for coverage under its policy with Greenwich originated from, grew out of, or had a substantial nexus to funds belonging to Quicken that were transferred into the fraudulent account and then were withdrawn by a person or entity other than Quicken and were never recovered.

The court rejected Authentic's argument that the exclusion only applied to conduct by the insured, not to conduct by third parties. The court found that the term "misappropriation" has a clearly understood meaning that includes third-party conduct. Authentic's proposed interpretation would introduce ambiguity where none existed.

The court further noted that other exclusions in the policy referred to conduct by the insured. This, the court ruled, showed that when the parties intended that result, the policy said so expressly.

For these reasons, the court ruled that the plain language of the exclusion applied to the spoofing scheme and granted Greenwich's motion for summary judgment.

The case is *Authentic Title Servs. v. Greenwich Ins. Co*., Civil No.: 18-4131 (D. N.J. Nov 17, 2020).

Copyright Infringement Claim Was Not a Suit or a Covered Advertising Injury, Federal District Court in California Rules

A judge in the Northern District of California held that an insurer had no obligation to reimburse an internet service provider for costs incurred in attempting to secure declaratory relief in a copyright dispute. The court found that the policy's "suit" requirement was not satisfied, nor did the claim allege copyright infringement in an advertisement.

The Case

Hurricane Electric provides internet-related services. Owners of copyright-protected motion pictures sent a cease-and-desist letter alleging that Hurricane failed to act in response to over 290 infringement notices that were previously sent to Hurricane. The notices requested that Hurricane terminate subscribers who had repeatedly infringed upon copyrighted motion pictures. The notices alleged that the subscribers were induced to infringe by promotional language on Hurricane's webpage. The owners claimed that Hurricane was liable for copyright infringement because it had not terminated those accounts.

In later emails, the copyright owners alleged that Hurricane itself had infringed by "rout[ing] the data packets of the infringing material from its account holders to destinations." They further alleged that Hurricane "encourages or materially contributes to the account holders' direct infringements by providing the facilities and means for the account holders' to continue their infringements."

Hurricane filed two declaratory judgment actions seeking rulings that it did not infringe any copyrighted materials and was otherwise shielded from liability.

Hurricane notified its insurer of the copyright claims and sought to have the insurer reimburse Hurricane for the expenses it incurred in the two declaratory judgment actions. The

policy required the insurer to defend against any “suit” seeking damages because of “Personal and Advertising Injury.” The insurer denied coverage on the grounds that the claims did not constitute a “suit” and there was no “Advertising Injury” within the meaning of the policy (“infringing upon another’s copyright, trade dress or slogan in your ‘advertisement’”).

The policy defined “suit” as:

> A civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> > a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
> > b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Hurricane then filed a declaratory judgment action against its insurer. It argued that the insurer was required to pay for Hurricane’s legal costs based on purported contentions that Hurricane’s advertising of services allegedly facilitated copyright infringement.

The Decision

The court rejected Hurricane’s argument and found the insurer was under no obligation to reimburse Hurricane for its legal expenses incurred in the declaratory judgment actions.

The court first found that the cease-and-desist letter was not a “suit.” It was not a civil proceeding, an arbitration proceeding, or other alternative dispute proceeding. The court rejected Hurricane’s argument that its mediation with the copyright claimants satisfied the “other alternative dispute proceeding” prong of the “suit” definition. The court found that the consent requirement was not satisfied. When the insurer was told of the mediation, it reiterated its denial of coverage and declined to participate. Based on such conduct, the court concluded that the insurer could not be found to have consented to the mediation.

Next, the court found that Hurricane's declaratory judgment actions were not related to any "Personal and Advertising Injury" covered under the policy. The copyright infringement claim was not covered because the owners did not allege copyright infringement in Hurricane's advertisements. The cease-and-desist letter stated only that Hurricane encouraged or materially contributed to the account holders' direct infringements by providing the facilities and means (internet service) for the account holders to continue their infringements. The court noted that even if some advertisements might have led customers to services that enabled infringement, there was no allegation of infringement in the advertisements themselves.

As a result, the court granted the insurer's motion for judgment on the pleadings.

The case is *Hurricane Elec., LLC v. National Fire Ins. Co.,* No. 20-cv-05840-CRB (N.D. Cal. Nov. 17, 2020).

False Statements About One's Own Product Is Not Disparagement, and Therefore, Not Advertising Injury, Federal Court in Pennsylvania Holds

A judge from the Eastern District of Pennsylvania found that an insurer had no duty to defend or indemnify Vitamin Energy in a suit alleging trademark infringement, false advertising, and unfair competition. The complaint alleged only that Vitamin Energy made false statements about its own products and did not disparage its competitors' products. Thus, the claim did not assert Advertising Injury as defined by the policy.

The Case

Vitamin Energy, LLC makes liquid energy shots. The owners of the 5-Hour Energy trademarks sued Vitamin Energy under the Lanham Act and Michigan unfair competition laws. The suit alleged that Vitamin Energy advertises its products with a series of misleading and false

statements, including that Vitamin Energy's products deliver improved performance without the use of harmful steroids or steroid-like compounds. Plaintiffs alleged that Vitamin Energy's advertisements implied that its products contain healthier ingredients than other products on the market.

Vitamin Energy requested a defense from its insurer under the Advertising Injury coverage of its policy, and specifically, the offense for:

> [I]njury, including consequential Bodily Injury, arising out of oral or written publication of material that libels or slanders a person or organization or a person's or organization's products, goods or operations or other defamatory or disparaging material, occurring in the course of the Named Insured's Advertisement.

Vitamin Energy's advertisements used a comparative chart. Based on this, Vitamin Energy contended that the complaint against it asserted disparagement because the chart insinuated that 5-Hour Energy is an inferior product and that its ads left the impression that 5-Hour Energy contained steroids or was just as harmful.

The insurer denied coverage on the basis that the complaint did not allege disparagement and was otherwise barred by policy exclusions for intellectual property infringement, unfair competition, the incorrect description of products, and the product's failure to conform to statement of performance.

Vitamin Energy sued its insurer seeking a declaration that it was owed a defense. The insurer moved for judgment on the pleadings.

The Decision

The court first looked to the elements of disparagement. In Pennsylvania, commercial disparagement is an actionable claim where the statement in question attacks the quality of the claimant's goods such that it reduces their marketability.

To make out a claim of commercial disparagement, a claimant must show: 1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; 2) that no privilege attaches to the statement; and 3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement. Similarly, the court recognized that the tort of trade libel arises from the publication of a disparaging statement concerning the business of another.

Reviewing the complaint, the court determined that it accused Vitamin Energy of making false statements only about its own products in its advertising. It did not accuse Vitamin Energy of making false statements about 5-Hour Energy. The court noted that other courts construing similar Advertising Injury language have held that allegations accusing the insured of making false statements about its own products is not disparagement and does not constitute Advertising Injury.

The court rejected Vitamin Energy's argument that the complaint alleged disparagement by implication because it inferred that Vitamin Energy's comparative advertising disparaged 5-Hour Energy. Vitamin Energy's advertisement contained a chart comparing its product to four others, one being 5-Hour Energy. But plaintiffs alleged only that the comparative ad made false statements about the contents of Vitamin Energy's own product, not about 5-Hour Energy itself. As Pennsylvania law does not recognize claims for implicit disparagement, the court stated that it would be inappropriate for it to find that plaintiffs asserted a claim for disparagement by implication. The court further noted that under the Lanham Act, comparative advertising is distinct from product disparagement and trade libel.

The court was bound under the four corners rule by the factual allegations in the complaint. As those allegations did not assert a claim for disparagement, there was no Advertising

Injury. Thus, the court held that the insurer was under no duty to defend or indemnify Vitamin Energy in the suit.

The case is *Vitamin Energy, LLC v. Evanston Ins. Co*., No. 19-3672 (E.D. Pa. Nov. 23, 2020).

Missouri Federal Court Holds That Complaint Grounded in Misleading Marketing of Sugary Cereals Did Not Present a Claim for "Bodily Injury"

A federal judge from the Eastern District of Missouri found that an insurer had no duty to defend or indemnify a cereal manufacturer in a consumer class action suit alleging that it improperly marketed its sugary cereals as healthy. The court found that the complaint did not seek damages because of "bodily injury."

The Case

Plaintiffs filed a putative class action suit on behalf of California consumers against the insured, Post Foods. The complaint asserted causes of action for false advertising and breaches of express and implied warranties, among others. The complaint alleged that Post's breakfast cereals contain high amounts of sugar and that regular consumption will lead to the increased risk of chronic disease. The complaint charged Post with labelling its cereals with various health and wellness claims that suggest the cereals are healthy when they are not.

Post tendered the claim to its insurer for a defense. The insurer denied coverage and Post later sued. Both parties filed summary judgment motions.

The Decision

The issue was whether the class action suit alleged "bodily injury" within the meaning of the policy. "Bodily Injury" was defined as: "Bodily injury, sickness or disease sustained by a

person, including death resulting from any of these at any time; and mental anguish, shock or humiliation arising out of the bodily injury."

The court acknowledged that the complaint contained references to "bodily injury." But the court determined that no "bodily injury" is alleged to have been *sustained* by the plaintiffs. The court explained that although the complaint alleged that there was a chance that someone eating sugary cereals may develop certain conditions, the complaint did not allege that plaintiffs actually suffered any of the potential conditions.

Thus, Post failed to point to any *claim* in the complaint that explicitly alleged "bodily injury." The court held that the allegations of possible harm by consumption of sugary cereals without a claim by plaintiffs that they actually experienced the adverse effects of the cereal is not sufficient to give rise to a duty to defend.

The court further noted that even if the complaint alleged emotional injury, such injury would not be a covered "bodily injury" unless the emotional distress was caused by some physical injury.

As a result, the court granted the insurer's motion for summary judgment and found that it had no duty to defend or indemnify Post in the consumer class action suit.

The case is *Post Holdings v. Liberty Mut. Fire Ins. Co*., No. 4:18CV1741HEA (E.D. Mo. Oct. 30, 2020).

124 Salmonella Cases from Same Restaurant Over Four-Day Period Constituted a Single Occurrence, Texas Federal Judge Rules

A federal court in Texas ruled that 124 separate cases of food poisoning attributed to a single restaurant over a four-day period constituted a single occurrence under a commercial

general liability policy. The court focused on the cause of the injuries, rather than the number of injurious effects.

The Case

The insured, Mediterranean Grill & Kabob Inc. d/b/a Pasha Mediterranean Grill operated a restaurant in San Antonio, Texas. Between August 29 and September 1, 2018, nearly 200 cases of food poisoning from salmonella bacteria were reported in San Antonio, all after the claimants ate at Pasha. The food poisonings gave rise to seven lawsuits. Plaintiffs alleged that Pasha was negligent in the manufacture and preparation of the food and that Pasha's negligence was a proximate cause of the food poisonings at issue.

Travelers Casualty Insurance Company of America was Pasha's primary insurer at the time of the food poisonings under a commercial general liability policy. Some of the claims settled, leaving 124 claimants.

Travelers filed a declaratory judgment in federal court in Texas to resolve the remaining 124 claims. The parties disagreed about whether the 124 separate cases of food poisoning constituted a single "occurrence" or multiple "occurrences." The issue was important because it affected how much insurance would be available to the restaurant. Travelers moved for summary judgment.

The Decision

The court granted Traveler's motion for summary judgment. The court noted that, under Texas law, "the proper focus in interpreting 'occurrence' is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects." The court held that although several events caused a pause or interruption in the injuries in the underlying lawsuits (such as when Pasha closed each night, as well as each time a new batch of food was

prepared), only one cause gave rise to Pasha's liability, and that was Pasha's allegedly contaminated food. The court concluded that Pasha's purported negligence was alleged to have caused one uninterrupted chain of events, meaning there was one proximate, uninterrupted, and continuing cause of the contamination for which it could become liable.

The court held that this conclusion comported with the language of the policies, which included in the definition of "occurrence" "continuous or repeated exposure to the same general harmful conditions." The allegedly harmful condition, the court observed, was food that had been contaminated with salmonella bacteria, individual patrons were continuously exposed to this alleged condition while they ate Pasha's food, and patrons as a group were repeatedly exposed to it.

The court further stated that the insured pointed to no intervening tort or independent negligence which interrupted the proximate and continuing cause of the claimants' injuries, *i.e.,* the salmonella contamination. The court observed that although the precise source of contamination was unknown, this was immaterial because there was no dispute that it originated at the restaurant.

Accordingly, the court granted Traveler's motion for summary judgment and found that Traveler's liability was capped at the policy's $1 million per occurrence limit.

The case is *Travelers Cas. Ins. Co. of Am. v. Mediterranean Grill & Kabob Inc.,* CV No. SA-20-CA-0040 (W.D. Tex. Nov. 4, 2020).

Ohio Appellate Court Applies Fortuity Doctrine to Bar Coverage for Unauthorized Demolition Claim

An Ohio appellate court ruled that claims arising from a contractor's unauthorized demolition of a restaurant was not caused by an "occurrence" because the insured did not take steps to manage its risk to avoid the demolition.

The Case

The case arose from an interior demolition of a restaurant in Oakdale, Pennsylvania. In the months preceding the demolition, the building owner, King Trust, alleged that its tenant, KRG Kings, LLC, breached a lease agreement that required KRG to maintain a restaurant in the building. King Trust filed an action for ejectment against KRG based upon abandonment.

While the ejectment action was pending, King Trust began to explore other options for the space, including leasing the property as a new medical center to Weirton Medical Center. Weirton entered into a lease with King Trust and contacted Neyer, a company that designs and constructs commercial real estate, regarding the renovations. Weirton discussed with Neyer the costs and the work to be performed, including demolition of the existing restaurant, but the parties did not formalize an agreement.

Despite not having a signed contract with Weirton, and without notifying senior management at Neyer, a project manager for Neyer secured the necessary permits and proceeded with the demolition of the restaurant space.

The project manager was unaware that King Trust's right to lease the building to Weirton was being disputed by KRG, as KRG contended that it still had legal possession of the property. Senior management at Neyer knew that an existing tenant had to be released from a lease before

Weirton would finalize a contract with Neyer to begin the renovations but did not know of KRG's identity or its specific claims to the property.

Upon learning of the demolition, KRG added to its counterclaims against King Trust claims for aiding and abetting, tortious conduct, and negligence for allegedly contemplating the demolition of the property. KRG also asserted third-party claims against Weirton and Neyer for trespass, conversion, tortious interference with contractual relations, and negligence. The King Trust and Weirton filed cross-claims against Neyer for contribution and indemnity for demolishing the interior of the property without authorization.

Neyer sought coverage for these claims under its commercial general liability insurance policies issued by Westfield Insurance Company. Westfield agreed to defend Neyer against the claims but reserved the right to later dispute its obligations to indemnify Neyer for any judgment or settlement.

Ultimately, the King Trust litigation settled. Westfield, however, refused to indemnify Neyer for the amount Neyer paid for the settlement on the basis that the claim did not involve an "accident" under the policy.

Neyer sued Westfield in Ohio state court, seeking a declaration of coverage. The parties cross-moved for summary judgment. The trial court granted Neyer's motion for summary judgment and denied Westfield's motion. Westfield appealed.

The Appellate Court's Decision

The appellate court reversed the trial court's decision and remanded the case to the trial court to award Westfield summary judgment.

The court held that the claim was not a "fortuitous accident" because the interior demolition of the restaurant was Neyer's desired result and Neyer controlled the process leading to the damages.

The court rejected Neyer's argument that no one person at Neyer knew that such damages would result. The court found that Neyer could have anticipated that premature performance (*i.e.,* performance without a contract in place) could cause damages to a known third party. The court noted that the anticipated contract with Weirton could have fallen through for any number of reasons, yet Neyer had already demolished the space. The court said "[t]hat senior management did not control or manage its risk does not make the subsequent demolition and damages to KRG an accidental occurrence covered by the Westfield CGL policy."

For these reasons, the court concluded that the trial court erroneously determined that Neyer's unauthorized demolition of the restaurant constituted an "occurrence" within the meaning of Westfield's CGL policy.

The case is *Al Neyer, LLC v. Westfield Ins. Co*., Appeal No. C-200007 (Ohio Ct. App. Nov 25, 2020).

Ohio Appellate Court Applies Vertical Exhaustion Theory to Excess Liability Policies

An Ohio appellate court ruled that vertical exhaustion applied to an asbestos claim and that only the policies below an excess policy had to be exhausted before the excess policy could be triggered.

The Case

The insured, William Powell Company (Powell), manufactured industrial valves. Some valves made before 1987 included components containing asbestos. As a result, Powell began receiving asbestos bodily-injury claims involving its products. Powell sought defense and indemnification under its insurance policies.

Powell filed a declaratory judgment action in Ohio state court seeking resolution of its rights under excess policies issued by OneBeacon Insurance Company and Federal Insurance Company between 1969 and 1977.

Following a three-week bench trial, the trial court concluded that horizontal exhaustion applies and ruled against Powell. Powell appealed, arguing that a horizontal exhaustion method was incompatible with Ohio case law and the policy language of the OneBeacon and Federal policies.

The Appellate Court's Decision

The appellate reversed and concluded that vertical exhaustion applied.

The court reasoned that there was no contractual language in the OneBeacon or Federal policies requiring the exhaustion of other insurance policies in years preceding or following the years for which OneBeacon and Federal sold their excess policies. Rather, the court noted, in all of the policies, the insurance to be exhausted was only modified by the word "underlying." The court noted that Merriam-Webster dictionary defined "underlying" as that "that which lies beneath or below."

The court also noted that OneBeacon and Federal policies defined "underlying insurance," respectively, as "collectible insurance with any other insurer available to the insured covering a loss also covered hereunder" and "any other insurance available to the insured covering a loss also

covered by this policy." Thus, the court noted, because the policies defined "underlying insurance" as insurance available to cover a loss also covered by the excess policy, underlying insurance must have meant insurance covering an occurrence during the policy period.

The court also noted that OneBeacon and Federal likely priced their policies and collected premiums based on the amount of insurance underneath the coverage during the years for which they sold the policies because prior and subsequent policies insured against different risks in different policy periods.

The court also found that vertical exhaustion comported with the "all sums" allocation rule in Ohio, which allows an insured to secure coverage from a single policy of its choice that covers "all sums" incurred as damages "during the policy period." The court also noted that vertical exhaustion provides a degree of predictability and certainty and does not require an insurer to pay more than it contracted to pay for in any given policy year.

Accordingly, the appellate court reversed the trial court's ruling on exhaustion and remanded the case to the trial court for proceedings consistent with its opinion.

The case is *William Powell Co. v. OneBeacon Ins. Co.*, 2020-Ohio-5325 (Ohio. Ct. App. Nov. 18, 2020).