Louisiana Supreme Court Finds No Coverage for Covid-19 Shutdown Orders, Reversing Appellate Court

A restaurant in New Orleans' French Quarter brought a coverage action in Louisiana state court for lost income due to Covid shutdown orders. Following a bench trial, the trial court ruled for the insurer. The appellate court reversed, finding the policy term "direct physical loss" ambiguous, and could mean the loss of use of the property. Because the insured was deprived of the full use of its property due to capacity limitations, the court found that coverage was triggered.

The Louisiana Supreme Court reversed. The court held that loss of use alone could not be "direct physical loss." While Covid shutdown orders reduced the restaurant's in-door dining capacity, that "loss" was not physical in any tangible or corporeal sense.

The court also found support in the policy's coverage for lost income during a "period of restoration," which began 72 hours after a "direct physical loss of or damage to property" and ended when the property is "repaired, rebuilt or replaced" or "business is resumed at a new permanent location." The insured never had to repair, rebuild, or replace anything. While social distancing and increased cleaning practices were implemented, the structure of the property did not physically change.

The court acknowledged that some dictionary definitions of "repair" apply to intangible things but found that those definitions made no sense where repair was linked to "rebuild" and "replace," which suggested fixing a physical defect.

The court also rejected the insured's argument that an available virus exclusion was not included in the policy. The court made clear that its analysis was confined to the four corners of the policy, and that it did not consider extrinsic evidence.

The case is *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, No. 2022-C-01349 (La. Mar. 17, 2023). Note: The Louisiana Supreme Court joins the majority of jurisdictions that have ruled on this issue. Policyholders pursuing Covid-19 business interruption claims were reinvigorated by the intermediate appellate court's decision. But Louisiana law now firmly supports the insurers' position that these claims are not covered.

Louisiana Federal Court Strictly Enforces 21-Day Notice Requirement for Pollution Claim

On May 7, 2020, Jaxson Energy had a diesel spill at its Mississippi facility. Jaxson had commercial general liability and environmental impairment liability coverage with Admiral. The policy required Jaxson to report pollution incidents "as soon as practicable."

But an endorsement changed the notice requirement to 21 days for sudden and unintended discharges of pollutants at scheduled locations. It was undisputed that the May 7, 2020 spill was a sudden and unintended discharge of pollutants at a scheduled facility.

Jaxson notified Admiral of the spill on June 5, 2020, 29 days after the spill. Admiral denied coverage for late notice. Jaxson sued for breach of contract and bad faith.

Jaxson argued that the notice was as soon as practicable, and that Admiral was not prejudiced by the eight-day delay. But the court rejected Jaxson's argument and enforced the policy as written. While most pollution incidents must be reported to the insurer as soon as practicable, the policy had a different requirement for sudden and unintended discharges at

scheduled facilities. The court found that the policy was unambiguous, and that Jaxson failed to report the diesel spill within 21 days as required.

Jaxson contended that it did not know about the 21-day requirement, suggesting a factual issue remained over whether it had received the endorsement when the policy was "secured." But Jaxson couldn't support its argument with evidence and there was proof that the same endorsement was used in its policy for the previous year. The court emphasized that ignorance is not an excuse, noting that failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.

Jaxson argued that its eight-day delay was reasonable in light of the Covid-19 pandemic. But the court found that Jaxson presented no evidence that the pandemic prevented it from notifying Admiral of the incident. Jaxson contacted environmental agencies, the municipality, and local environmental cleanup companies on the day of the spill. Thus, the pandemic was no barrier to reporting the spill to Admiral.

Jaxson argued that Admiral was not prejudiced. The policy was issued to Jaxson in Louisiana but had a New York choice of law clause. New York Insurance Law § 3420(a)(5) requires that an insurer show prejudice to "invalidate" a claim because of untimely notice. But the court observed that the statute applied only to policies issued or delivered in New York, and thus the policy was governed by New York's common law "no-prejudice" rule.

The court next held that even if the "as soon as practicable" language applied, Jaxson's notice was not as soon as practicable because it notified others of the spill immediately but waited about a month before informing Admiral. Jaxson failed to present evidence explaining why it was not practicable to notify Admiral when it notified others about the incident. It was also not lost on

the court that Jaxson expected the cleanup would be completed by May 15, 2020 (nearly two weeks before the 21-day notice period expired).

Timely notice was a condition precedent to coverage. The court found that Jaxson failed to identify a reasonable excuse for its noncompliance.

The court also found that Admiral had no obligations under the commercial general liability coverage part because of the pollution exclusion.

The lesson here: Specific time element reporting requirements will be strictly enforced and must be adhered to.

The case is *Jaxson Energy, LLC v. Admiral Ins. Co.*, No. 22-940 (E.D. La. March 14, 2023).

Eleventh Circuit Holds That Insurer Did Not Waive Pollution Exclusion Despite Not Raising It as a Basis for Denial in Its Disclaimer Letter

A property developer was an additional insured under its contractor's insurance policy. Nearby residents sued the developer and contractor for causing a runoff of water, sediment, silt, mud, and other pollutants onto their properties. The property developer sought a defense from the insurer, but the insurer declined because it was unclear whether the alleged property damage was caused by the contractor's work. The insurer did not assert the pollution exclusion in its denial letter.

The property developer sued the insurer for breach of contract. The insurer asserted the pollution exclusion as an affirmative defense in its answer. When the insurer moved for summary judgment, the property developer argued that the insurer waived the exclusion by not including it as a reason for denial in its initial disclaimer letter.

The dispute was governed by Georgia law and the property developer looked to the Georgia Supreme Court's *Hoover* decision to support its waiver argument. In *Hoover*, the Georgia Supreme Court addressed whether an insurer could deny coverage while still reserving its right to argue a defense based on untimely notice. The court found that the insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future. Having found the insurer's reservation of rights improper, the *Hoover* court then found that the insurer's continued failure to fairly inform the insured of its intention to raise a late notice defense meant that it had waived that defense.

But the Eleventh Circuit explained that *Hoover* was based on a policy defense, rather than a coverage defense. A "policy defense" is one under which an insurer denies coverage based on the insured's failure to fulfill a procedural condition of the insurance policy. Examples of policy defenses that may be waived include conditions as to other insurance, conditions requiring proof of loss, and conditions requiring timely written notice.

A "coverage defense," by contrast, is an assertion that the insurance policy does not cover the specific injury in question, and includes provisions such as exclusions. While policy defenses may be waived, coverage defenses cannot.

The Eleventh Circuit held that because the insurer's assertion of the pollution exclusion was a coverage defense, that defense could not be waived. The insurer could pursue the defense even though it did not raise the exclusion initially when denying coverage on other grounds.

The case is *Century Cmtys. of Ga., LLC v. Selective Way Ins. Co.*, No. 19-14697 (Feb. 27, 2023).

New Jersey Appellate Court Finds No Coverage for Settlement Without Insurer's Consent

31-01 Broadway Associates, LLC (Broadway) owned a commercial building in Fair Lawn, New Jersey that had been used continuously as a dry-cleaning business since 1950. The property had subsequent owners, including the Greco family from 1979 to 1983 and the Hahn family from 1983 to 2002.

In 2009, the New Jersey Department of Environmental Protection (DEP) informed the then property owners of the presence of perchloroethylene (PCE) on the property due to an underground fuel oil storage tank. DEP advised the property owners that the property needed remediation under state environmental laws.

The Hahn and Grecos families each had liability insurance policies from the 1980s. In 2012, Broadway sued the Hahn and Greco families for contribution. That suit settled for $1.5 million with an assignment of the Hahns' and Greco's claims against the two insurers. The insurers did not consent to the settlement. Broadway then brought a coverage action in New Jersey state court. The trial court ruled for the insurers, finding that the insureds breached the insurance policies by settling without the carriers' consent.

The Appellate Division affirmed. The policies explicitly required the insureds to provide notice of any claim and to cooperate in the company's investigation. The policies also prohibited the insureds from prejudicing the insurer's subrogation rights. And the policies prohibited an action against the insurer unless the insured's obligation was fixed by a judgment or "written agreement of the insured, the claimant and the Company."

The court found that a 2010 letter to the insurers about the claim from Broadway, not the insureds, was insufficient because it failed to provide notice of an actual claim by an insured. The letter did not refer to the insured's actual name, but to a trade name it used.

The lesson: Consent provisions in insurance policies will be enforced. Claimants and policyholders who settle behind an insurer's back jeopardize coverage.

The case is *31-01 Broadway Assocs., LLC v. Travelers Cas. & Sur. Co.*, Docket No. A-1850-20 (N.J. Super. Ct. App. Div. Mar. 15, 2023).

West Virginia Supreme Court Applies Employer's Liability Exclusion Based on "Any" Insured Language

Focusing on the words "any insured" compared to "the insured," the West Virginia high court held that an employer's liability exclusion applied against a non-employer insured for claims arising from employment with a coinsured.

An individual was killed while working in an underground Pennsylvania coal mine owned by Dana Mining, a wholly owned subsidiary of Mepco Holdings, LLC. The decedent was employed by Mepco, LLC. The decedent's estate filed a wrongful death action against Dana Mining. Dana Mining tendered the complaint to Federal Insurance Company.

Federal denied coverage, citing an Employer's Liability exclusion (ELE). The exclusion applied to losses arising out of "any: 1. employee . . . of any insured arising out of and in the course of: a. employment by any insured . . . ." The exclusion applied "1. regardless of the capacity in which any insured may be liable; 2. To any insured against whom a claim or suit is brought, regardless of whether such claim or suit is brought by an employee . . . of: a. such insured; or b.

any other insured . . . ." Federal filed a declaratory judgment action. Applying Pennsylvania law, the trial court ruled for the decedent's estate.

The Supreme Court of West Virginia reversed the trial court's ruling. Predicting how the Pennsylvania Supreme Court would rule, the court held that the ELE unambiguously evidenced an intent to exclude coverage for claims or suits by "any employee" against "any" of the insureds, whether or not he or she was an employee of the specific insured seeking coverage. The court criticized the lower court's reliance on ELE decisions exclusions which referred to "the insured," rather than "any insured."

The court also disagreed with the lower court's reliance on the policy's "Separation of Insured" provision, which stated: "[T]his insurance applies[] as if each named insured were the only named insured; and separately to each insured against whom claim is made or suit is brought." The court reasoned that this endorsement sought to clarify the meaning and application of policies that used "the insured" and to ensure that "the insured" was read as meaning "the insured seeking coverage." The court said the "Separation of Insureds" provision did not apply to an ELE exclusion that used the "any insured" language. The court noted that other exclusions in the policy used the term "the insured" and the "Separation of Insureds" provision informed those exclusions.

The case is *Fed. Ins. Co. v. Neice*, No. 21-0735 (W. Va. Jan 10, 2023).

Michigan Court of Appeals Finds No Coverage for TCPA Violations

A lender hired a broadcasting service to conduct a fax advertising campaign. The broadcasting company did not first contact the recipients for permission to send the ads. A class

action suit was filed against the lender alleging violations of the Telephone Consumer Protection Act (TCPA) for sending unsolicited fax advertisements.

The court entered judgment against the lender but stated in the judgment that the lender had no intent to injure anyone.

The lender assigned its insurance rights to plaintiffs, who sought coverage under the personal and advertising injury and property damage provisions of the lender's liability policies. The insurer declined, and a suit followed.

Under the personal and advertising injury coverage, plaintiffs argued that there was injury arising from publication of written or electronic material that violated a person's right of privacy. But the policy had a "statutory right of privacy" exclusion that barred coverage for personal and advertising injury "[a]rising out of the violation of a person's right of privacy created by any state or federal act." The exclusion, however, did not apply to "liability for damages that the insured would have in the absence of such state or federal act." The policy did not define "right of privacy."

Plaintiffs argued that the exception applied because the TCPA provides a remedy for specific forms of intrusions into seclusion, a privacy right that long preexisted the TCPA. They argued that the TCPA did not create the privacy right, but rather it only enhanced the remedy. Plaintiffs asserted that the right to be free from intrusion into seclusion, which it defined as "the right to be left alone," is a common-law right deeply embedded in Michigan law.

The Michigan Court of Appeals rejected this argument, finding the none of the elements of intrusion upon seclusion were satisfied nor was there any judicial authority for the position that the receipt of an unsolicited fax gives rise to a cause of action for damages for invasion of a common-law right of privacy outside the TCPA. As the court found that the lender would not have

been liable absent the TCPA, it concluded that the exception did not apply and that coverage under the personal and advertising injury provision was barred by the statutory right to privacy exclusion.

The court next addressed the plaintiffs' claims under the property damage coverage. Plaintiffs argued that by receiving the faxes, plaintiffs lost the use of their fax machines during transmission of the unsolicited faxes and used toner and paper. Coverage depended on whether the property damage was caused by an "occurrence," defined as an "accident." The court considered this issue together with the exclusion for property damage "expected or intended from the standpoint of the insured."

There was no dispute that the lender intended to transmit fax ads. The court found that the natural and probable consequences of this intentional act were the use of the recipients' fax machine and supplies. Thus, there was no "occurrence." And even if there were an "occurrence," the expected or intended exclusion would apply. The court explained:

> The uncontested facts in this case establish that [the lender] intentionally sent commercial solicitations via fax machines. [The lender] intended the recipients' machines to receive the message, print the message, and hoped that the recipients would reply to the message by engaging in a profitable commercial transaction with [the lender]. [The lender] did nothing accidentally or unintentionally. Because the events giving rise to this action were in their entirety the specific and intentional result of [the lender's] specific and intentional business strategy and plan, the events could not and do not meet the definition of an "occurrence" covered under the policy.
>
> [The lender's] acts and the consequences that resulted were intended by the insured, and therefore, the acts were not accidents and the consequences of their intended acts created a direct risk of harm that the insureds should have expected, negating plaintiffs' claim for coverage for any qualifying occurrence.

The case is *Bridging Cmtys., Inc. v. Hartford Cas. Ins. Co.*, No. 355955 (Mich. Ct. App. Mar. 2, 2023).

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