RIVKIN RADLER LLP
ATTORNEYS AT LAW

August 2023 | Insurance Update | WWW.RIVKINRADLER.COM

No Defense Owed to Blue Bell's Directors and Officers, Fifth Circuit Affirms -- Complaint Alleged Neither an Occurrence nor Damages Because of Bodily Injury

Blue Bell Creameries suffered a big financial loss after a Listeria outbreak caused it to shut down its factories and recall its ice cream products. Blue Bell's shareholders sued the company's directors and officers for breach of fiduciary duty, contending that they knew Blue Bell's manufacturing plants repeatedly tested positive for Listeria, yet they continued to make and sell ice cream in conscious disregard of the known risks.

The directors and officers sought a defense under Blue Bell's commercial general liability policies. The policies covered sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage," but only if the bodily injury or property damage is caused by an "occurrence."

The insurers filed a declaratory judgment action to get clear of the duty to defend. After finding the directors and officers qualified as insureds under the policies, the Fifth Circuit compared the policies' coverage grant to the shareholders' allegations.

The court first considered whether the shareholder complaint alleged an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The court found that the injuries were not caused by an accident.

The complaint alleged that the directors and officers "knowingly disregarded contamination risk and safety compliance" and "willfully failed to exercise" their authority. And the complaint alleged facts to show that the directors and officers could have reasonably anticipated the Listeria outbreak. These included notices from health departments in multiple states linking suspected Listeria infections to products made in Blue Bell's facilities, the CDC's conclusion that two of Blue Bell's plants were the source of a Listeria outbreak, and management's receipt of increasingly frequent and continuing positive test results. The court determined that the alleged breach of fiduciary duties stemmed from intentional acts, and the Listeria outbreak and resulting financial harm were the natural and probable consequences of that conduct.

Blue Bell noted there were no allegations that any regulatory body sought to stop the production of ice cream, which one might expect if Listeria contamination was a natural and probable result of the conditions at the facility. Based on this, Blue Bell argued that the shareholder suit did not conclusively show, as a matter of science, that the Listeria outbreak was the natural and probable result of the alleged misconduct. But the court said the relevant question is not whether the complaint conclusively shows scientifically that the injuries were probable. So long as the complaint alleged facts showing that the injuries could be reasonably anticipated, the complaint did not allege an accident. The shareholders alleged that management had received increasingly frequent and continuing positive presumptive test results for Listeria from several governmental authorities and that the company received repeated and positive test results on consecutive samples. These contentions, the Fifth Circuit held, did not allege an "occurrence."

The court next considered whether the suit sought "damages because of bodily injury." Blue Bell argued that because the "damages contemplated by the [shareholder lawsuit] are

factually attributable to bodily injuries suffered by Blue Bell's customers," the damages are because of bodily injury. But the insurers argued that the shareholders only sought to recover financial harm that resulted from the breach of fiduciary duties and that any reference to bodily injury was merely informative and ancillary to the dispute.

The court agreed with the insurers. The shareholder complaint sought damages to compensate Blue Bell's economic loss caused by its directors' and officers' breach of fiduciary duties and did not seek to recover damages on behalf of customers who may have suffered bodily injury from the Listeria outbreak.

The Fifth Circuit supported its conclusion with recent decisions by the Sixth Circuit (Quest Pharmaceuticals), the Ohio Supreme Court (Acuity), and the Delaware Supreme Court (Rite Aid), all decided in the opioid context, along with other cases. It rejected a line of cases cited by Blue Bell involving headsets provided to cell phone users to reduce radiation exposure. The court found that the cell phone cases differed because they involved materially different policy language that included damages claimed by any person or organization for care or loss of services resulting at any time from the bodily injury. The shareholder lawsuits, in any event, did not seek damages for care or loss of services because plaintiffs only sought compensation for breach of fiduciary duties. Thus, the court held that the economic damages sought by the shareholders were not "damages because of bodily injury."

The case is *Discover Prop. & Cas. Ins. Co. v. Blue Bell Creameries*, No. 22-50842 (5th Cir. July 11, 2023).

Ohio Supreme Court Finds Subjective Intent Irrelevant for Assault or Battery Exclusion

The Ohio Supreme Court considered whether an assault and battery exclusion in a commercial general liability policy can be nullified based on the mental state of the person who committed the assault and battery.

The insured operated an adult-care facility. The claimant lived at the facility. He sustained severe injuries to his neck and back when another resident attacked him with a knife. The state charged the attacker with felonious assault, but the trial court found him not guilty by reason of insanity.

The claimant filed a civil suit against the facility. The facility sought defense and indemnity from its CGL insurer, who denied based on the assault and battery exclusion.

The claimant and the facility settled. Under the settlement, the facility assigned its insurance rights to the claimant. The claimant then filed a declaratory judgment action against the facility's insurer. The claimant argued that the assailant lacked the mental state necessary to commit assault or battery at the time of the attack, and the exclusion thus did not apply.

The claimant relied on an earlier Ohio Supreme Court decision that held an exclusion for "expected or intended" injury did not apply when the insured was mentally incapable of committing an intentional act. But the Ohio Supreme Court found that case inapplicable because the language of the two exclusions differed. The assault and battery exclusion applied to "any actual, threatened or alleged assault or battery." The court looked to the plain and ordinary meaning of assault, and found it was commonly understood to mean "the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact."

The court found the attack on the claimant satisfied the meaning of assault.

The act of attacking someone with a knife not only amounts to a willful attempt to harm or a use of force, but it would also cause a reasonable person to be in fear or apprehension of such harm or force. To conclude that [the] attack was not an assault under the policy would rewrite the policy to create an exception where one does not exist.

The court held that the knife attack – plain and simple – qualified as a civil-law assault. The policy excluded coverage for bodily injuries arising from civil assaults. It didn't matter that the attacker was insane.

The case is *Krewinna v. United Specialty Ins. Co.,* No. 2022-0322 (Ohio July 12, 2023).

Sixth Circuit Finds No Coverage for Environmental Property Damage that Began Before Policy Inception

UniControl bought a general commercial liability insurance policy from James River Casualty Company. The policy began in June 2015, and was reissued four times through June 2020. The policy had a "Claims in Progress" exclusion that barred coverage for injury or damage "which begins or takes place before the inception date of coverage." Property damage was excluded "even though the nature and extent of such damage or injury may change and even though the damage may be continuous, progressive, cumulative, changing or evolving."

In February 2020, UniControl was sued in Indiana. The suit alleged that UniControl's predecessors operated a manufacturing facility in Michigan City between 1918 and 1971. The facility had contaminated soil and groundwater. The damage allegedly began no later than 1971 and continued until at least February 28, 2020. UniControl tendered the suit to James River. The insurer denied coverage, filed a declaratory judgment action, and was awarded summary judgment on the duty to defend and indemnify. UniControl appealed.

The Sixth Circuit affirmed. Either Ohio or Indiana law governed the dispute, but it did not matter because the outcome was the same under either law. The court held that the policy unambiguously excluded coverage for property damage that began before the start of the coverage period, even if the damage continued into the policies' coverage periods.

The court rejected UniControl's argument that the policy covered that portion of the property damage that takes place during the policy periods. The court observed that this interpretation rendered the word "begins" in the exclusion meaningless. The court refused to create an ambiguity where none existed.

The case is *James River Cas. Co. v. UniControl, Inc.,* Case No. 22-3721 (6th Cir. July 14, 2023).

Eleventh Circuit Rules that Reservation of Rights Letter Signed by Insured Did Not Give Insurer Right to Reimbursement of Defense Costs

In 2016, Concordia Pharmaceuticals sued Winder Laboratories under the Lanham Act and Georgia law. The complaint alleged that Concordia falsely or misleadingly advertised its product as equivalent to Concordia's product. Winder's insurer, Valley Forge Insurance Company ("VFI"), reserved rights, including the right to seek reimbursement of defense costs for claims not potentially covered. The insureds signed and returned an "Acknowledgment of Defense under a Reservation of Rights" form attached to the reservation of rights letter.

While the underlying action was pending, VFI filed a declaratory judgment action in George federal court against Winder to resolve the coverage questions. The district court held (1) that an exclusion in the policies meant there was no duty to defend, but (2) VFI had no right to reimbursement for earlier defense costs. The parties cross-appealed.

The Eleventh Circuit affirmed the district court's judgment.

As to coverage, the court said that, if the claim had arisen out of Winder's use of another's advertising idea, there would be coverage. But the court held that the policies' exclusion for injuries arising out of a failure of the product to conform with the insured's representations barred coverage. The complaint, the court determined, repeatedly alleged that Winder made misrepresentations about its drugs, which in turn, caused third-party drug databases to make misrepresentations. Thus, VFI had no duty to defend.

The court next considered whether, under Georgia law, asserting a right to reimbursement in a reservation of rights letter entitles an insurer to reimbursement even if the insurance contract did not contemplate a right to recoupment. The court held that VFI did not have a right to reimbursement because the reservation of rights letter did not create a new contract. It didn't matter that it was signed by the insured. There was no consideration for the purported right to reimbursement. The letter was a promise to perform a preexisting contractual obligation.

VFI sought to show consideration because the policy did not give the insured the right to select counsel, but the reservation of rights letter did. The court noted that the policy did not expressly say that the insurer could choose counsel. Boiled down, the insurer went from having to provide a defense (under the contract) to having to provide a defense through counsel of its own choosing or counsel chosen by the insured (under the reservation of rights). Either way, however, the insurer needed to provide a defense. Because the insurer did not have the express right to choose counsel under the policy, the insurer gave nothing up to reach the new arrangement in which the insured had the option of selecting their own counsel. This meant there was no consideration for the alleged right of reimbursement.

The court also rejected the insurer's unjust enrichment argument, finding there is nothing unjust in having the insurer fulfill its contractual obligations.

For these reasons, the Eleventh Circuit affirmed the judgment of the district court.

The case is *Cont'l Cas. Co. v. Winder Labs., LLC*, No. 21-11758 (11th Cir. July 13, 2023).

Michigan Appeals Court Upholds Denial of No-Fault Benefits Based on Intentional Nature of Insured's Acts

An insured was hit by a vehicle while standing in the middle of a dark, unlit highway. At the time of the collision, his arms were outstretched, and he was wearing dark clothing.

The insured received medical treatment for his injuries and filed a complaint in Michigan state court against Allstate Insurance Company for no-fault PIP benefits. The trial court ruled for Allstate. The court found that the insured's actions established that he intended to be hit and injured. Because his injuries were not "accidental," the court ruled, he did not qualify for PIP benefits. The insured appealed.

The Court of Appeals of Michigan affirmed. The court held that reasonable minds could only conclude that the insured wanted to injure himself at the time of the accident. Before the collision, the insured didn't move even after narrowly avoiding being struck by other multiple high-speed vehicles. One such vehicle shined its lights on the insured to alert incoming traffic, yet the insured remained in the middle of the highway.

It did not matter, the court said, that the individual's blood alcohol level was above the legal limit, that his friends described him as a happy person who had no reason to injure himself, or that the individual never explicitly expressed an intent to injure himself. The court further noted that an intoxicated person could still form the requisite intent to injure himself and, even based on circumstantial evidence, no other reasonable conclusion could be drawn from these facts.

The court affirmed the trial court's judgment for Allstate that there was no coverage.

The case is *Mclaren Flint v. Allstate Ins. Co.,* No. 361213 (Mich. July 20, 2023).

Nevada Federal Court Finds SEC Subpoena Did Not Trigger Coverage

In this case, the insured failed to persuade the court that a claim made after its policy expired related back to an earlier inquiry when the policy was in effect.

JanOne had securities coverage under its claims-made insurance policy with Great American. A few days before the policy expired, its director, Tim Matula, received correspondence from the SEC that he would be subpoenaed for a deposition. The subpoena was issued about a week later.

The SEC subpoenaed Matula while investigating another company, Live Ventures, for securities law violations. Matula was "Head of Investor Relations" for Live Ventures but was also a director of JanOne. All correspondence Matula received from the SEC related to Live Ventures and never mentioned JanOne. After being notified of the subpoena, Great American said it would need to review the transcript of Matula's deposition to see if it related to his JanOne employment.

The SEC chose not to depose Matula. But the SEC later subpoenaed two other JanOne employees and sent a Wells Notice to JanOne. A Wells Notice is a formal notification to individuals and firms alerting them of potential violation of securities laws following an SEC investigation.

JanOne's insurance policy covered expenses an insured person incurs in preparing for an "inquiry." The policy defined "inquiry" as: "a request or demand for an Insured Person either to appear at a meeting, deposition or interview or to produce documents relating to the business of the Company or such Insured Person's capacity with the Company." An endorsement treated

"inquiries" as "claims" in some cases. If a "claim" later results from the inquiry, it would relate back to the prior "inquiry" and lock in the policy in effect at the time of the inquiry.

JanOne tendered the Wells Notices to Great American. But Great American denied coverage because the Wells Notice didn't arise out of the Matula inquiry.

JanOne then sued to recover costs related to the SEC claim, which it contended began with correspondence to Matula about his deposition. Great American maintained that there never was an "inquiry" because there was no evidence that the SEC sought to depose Matula in his capacity as a JanOne employee.

The insured insisted that the investigation into JanOne arose out of the Matula deposition. Great American argued that because the Matula deposition never went forward, nothing could have arisen from it.

The court agreed with Great American. Because the Matula deposition never occurred, it was impossible to know whether the deposition would have related to his capacity as a JanOne employee and thus as an insured person under the policy.

The court explained that the planned Matula deposition was the only JanOne-related event that took place while the policy was active. The next event, the issuance of a subpoena to a JanOne employee, did not occur until more than three months after the policy expired. Thus, JanOne's claim for coverage for the SEC investigation is based on the Matula subpoena having already triggered coverage. But the Mutula subpoena did no such thing.

The court found summary judgment to be appropriate because there was no genuine dispute of material fact. Matula did not provide any documents to the SEC, or any sworn testimony. No one knows in what capacity the SEC sought his cooperation. The Matula subpoena did not trigger coverage because there was no proof that it related to his capacity as an insured

person. Thus, there was no "inquiry" under the policy, and any later investigation could not have arisen from an inquiry that never happened.

The case is *JanOne v. Great Am. Ins. Co.,* No. 2:21-CV-1554 JCM (NJK) (D. Nev. July 5, 2023).