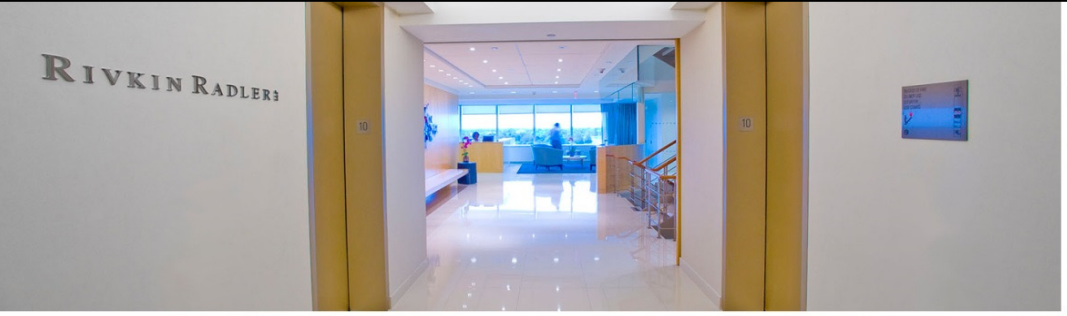

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Sixth Circuit Affirms That Insurers Have No Duty to Defend or Indemnify Government Opioid Suits

Applying Kentucky law, the Sixth Circuit held that a drug distributor was not covered for claims brought by local governments and others over the nationwide opioid epidemic because the lawsuits did not seek "damages because of bodily injury."

The insured, Quest Pharmaceuticals, distributes generic drugs, including opioids. It is a defendant in roughly 77 suits by local governments and other organizations seeking expenses for police, emergency, health, prosecution, corrections, rehabilitation, and other services. Plaintiffs assert violations of the RICO Act, violations of state statutes, and common law claims of public nuisance and negligence. The complaints also say that the plaintiffs' claims "are not based upon or derivative of the rights of others" and that the plaintiffs "do not seek damages for death, physical injury to person, emotional distress, or physical damages to property."

Quest sought a defense from its commercial general liability insurers, who in turn filed declaratory judgment actions. The dispute centered on the meaning of the policies' "because of bodily injury" language. The insurers argued that the claims are not "because of bodily injury" where they did not allege any particular bodily injury and sought only economic damages for costs the local governments incurred in addressing the opioid epidemic. Quest argued that the suits are "because of bodily injury" as they would not have been brought but for injuries caused by opioid abuse and addiction, and thus exist by reason of or on account of those underlying injuries.

There was no Kentucky case directly on point, but other Kentucky cases led the Sixth Circuit to conclude that "because of" is not as broad as Quest argued. In finding no coverage, the court was also persuaded by the Ohio Supreme Court's *Acuity* decision and the Delaware Supreme Court's *Rite Aid* decision, which both found that the government opioid suits did not seek damages because of bodily injury.

Quest cited the Seventh Circuit's *H.D. Smith* case, which held that the insurer there had a duty to defend the opioid suits. But the Sixth Circuit didn't think the reasoning behind that case applied because the Seventh Circuit understood Illinois law to distinguish between coverage "for" bodily injury as opposed to "because of" bodily injury. The Sixth Circuit found that no such distinction exists under Kentucky law.

The Sixth Circuit also examined the policy's "bodily injury" definition and found that the language, "sustained by a person," meant that the lawsuit must be tied to an individual's injury. The government suits, however, did not allege injury to any particular person but instead broadly described societal harms caused by opioid addiction. Because such claims were for economic damages only and did not derive from a particular bodily injury to a person, they were not covered.

The case is *Westfield Nat'l Ins. Co. v. Quest Pharm.,* Nos. 21-6026/6043 (6th Cir. Jan. 13, 2023).

Maryland Supreme Court and Third Circuit Find No Coverage for Covid-19 Business Interruption Losses

Businesses in various Northeastern states sued for insurance coverage for Covid-19 business interruption losses. Their insurers denied coverage. The cases made their way to the Maryland Supreme Court and the Third Circuit.

The Maryland Supreme Court and the Third Circuit (predicting how the Supreme Courts of Pennsylvania and New Jersey would rule) both found no coverage. These decisions follow the overwhelming majority of cases to have considered the issue.

The courts held that "physical loss" means a tangible or concrete alteration of property or a deprivation of that property. The courts distinguished cases finding "physical loss" where a property was rendered wholly useless or uninhabitable. The courts observed that the properties could be used or inhabited, just not in the way the businesses would have liked.

The courts also reasoned that this result was supported by other policy terms providing coverage during "a period of restoration" (Third Circuit) or for "repair or replacement" (Maryland). The Maryland Supreme Court in particular noted that the businesses' property could be wholly restored by the development of an effective vaccine or herd immunity, not by any repair or replacement. The Maryland Supreme Court held that it did not matter that the insurance market offered a broader virus exclusion. There could be no "negative implication" from the absence of such an exclusion.

The Third Circuit similarly held that it did not matter that the policy covered "physical loss" or "damage" to property. There could be physical loss without damage (such as property being stolen). Here, there was neither physical loss nor damage. The Third Circuit acknowledged that "loss" can include loss of use. But not every loss of use is a "physical loss."

The cases are *Wilson v. USI Ins. Serv. LLC*, No. 20-3124 (3d Cir. Jan. 6, 2023) and *Tapestry, Inc. v. Factory Mut. Ins. Co.*, Misc No. 1 (Md Dec. 15, 2022).

Massachusetts High Court Rules That Insurers Have No Common Law Duty to Pay Insured's Costs to Prevent Imminent Covered Loss

Ken's Foods' wastewater treatment facility at its manufacturing plant malfunctioned, causing wastewater to overflow into a tributary. To keep its plant running, it implemented a temporary wastewater treatment process. Ken's Foods spent $2 million on these measures to avoid shutting down its plant, which would have resulted in over $10 million per month in expenses and lost profits.

Ken's Foods submitted a claim under its pollution liability policy and recovered its cleanup costs and the costs to prevent more wastewater from overflowing. But the insurer refused to pay the costs Ken's Foods incurred to avoid suspending its operations after the pollution discharge. Litigation ensued, and the issue came before the Massachusetts Supreme Judicial Court on a certified question from the First Circuit.

The policy paid losses, including lost income and expenses, to reduce lost income resulting from a new pollution event that caused a "suspension of operations" at an insured location during the policy period. "Suspension of operations" was defined as a "necessary partial or complete suspension of 'operations' … as a direct result of a cleanup required by a governmental authority."

The court first observed that there was no suspension of operations. Ken's Foods was not ordered to discontinue operations. Due to creative response measures and the flexibility of government regulators, it was able to keep the plant running. This showed that a partial or complete shutdown was not "necessary." The policy thus did not cover these costs.

Ken's Foods went beyond the policy, contending that there was a common law right for reimbursement of the costs of preventing an imminent covered loss. The Massachusetts Supreme Judicial Court had not faced this issue before, and the few other jurisdictions that had are divided. But the Massachusetts high court declined to answer the question abstractly and concluded that the unambiguous policy language controlled, noting that a common law doctrine cannot displace the clear provisions of the policy. An insurance policy is a contract between two private parties. Those parties are entitled to the benefit of their bargain, including risk allocation, especially when both parties are sophisticated commercial entities.

The preventative costs for which Ken's Foods sought reimbursement were outside the scope of the plain language of the policy. Considering the express allocation of risk and the sophistication of the parties, the court "declined to imply a common-law duty to fill in the gap in coverage."

The court summed up its ruling as follows:

> There is no common-law duty for insurers to cover costs incurred by an insured party to prevent imminent covered loss, when the plain, unambiguous terms of the insurance policy at issue speak directly to the question of mitigation and reimbursement and do not provide coverage, and the costs are otherwise excluded by other provisions of the policy. To provide for recovery in these circumstances would be to rewrite the insurance contract and reallocate the risks negotiated by the parties.

The case is *Ken's Foods, Inc. v. Steadfast Ins. Co.,* SJC-13303 (Mass. Jan. 6, 2023).

Pollutant or Not? Rhode Island Supreme Court Finds Ambiguity When Home Heating Oil Is Spilled in a Basement

The Rhode Island Supreme Court, in a case of first impression for that court, held that a commercial liability policy's pollution exclusion did not apply when home heating oil spilled into a basement of a residential home during a furnace replacement. The court found that the definition of "pollutant" was ambiguous when applied outside of the traditional environmental context.

The policy did not cover "'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutants" was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The court held that it was not necessary for the policy's "pollutant" definition to specifically identify the particular substance at issue.

But it also distinguished a ruling by the Massachusetts Supreme Judicial Court applying the pollution exclusion to home heating oil that leaked into the ground below the house. There, the homeowner was ordered by Massachusetts environmental regulators to remediate the spill. The Rhode Island Supreme Court noted in that case there was "clearly an environmental impact from oil leaking into the ground."

Here, however, the spilled oil was confined to the home's basement, and the claim was made by a homeowner against a heating company for property damage. The court was persuaded by a First Circuit ruling finding the pollution exclusion ambiguous "because an ordinary intelligent insured could reasonably interpret the pollution exclusion clause as applying only to environmental pollution."

The court found at a minimum, the policy was reasonably susceptible to different constructions, and thus must be construed against the drafter and in favor of the policyholder.

The case is *Regan Heating & Air Conditioning v. Arbella Prot. Ins. Co*., No. 2020-170 (R.I. Jan. 28, 2023).

Ninth Circuit Applies Pollution Exclusion to Releases by Automobile Bumper Repair Facility

Arrowood issued several insurance policies to R & L Business Management from 1976 to 1986, which contained pollution exclusions with sudden and accidental exceptions. Arrowood settled a lawsuit brought by the City of West Sacramento for pollution caused by R&L at its automobile bumper repair facility. Following entry of a settlement and judgment, Arrowood sued the City for a declaratory judgment that Arrowood had no duty to satisfy the stipulated judgment. The district court granted summary judgment to Arrowood.

The Ninth Circuit affirmed. Applying California law, the court held that, assuming an occurrence was established, coverage was excluded by the pollution exclusion.

The court further held that none of the discharges pointed to by the City could reasonably be considered sudden and accidental. For example, the City had cited metal dust that was produced when the insured grounded bumpers. But the court determined that R&L employees cleaned the dust as part of their ordinary routine, indicating the releases were not accidental. The court further noted that any evidence of seepage through porous concrete could not be "sudden." The court also found that fires and rainstorms did not cumulatively or individually contribute to R&L's liability. For these reasons, the court found the sudden and accidental exception inapplicable.

The case is *Arrowood Indem. Co. v. City of W. Sacramento*, No. 22-15165 (9th Cir. Dec. 22, 2022). Note: The case was not published and is thus not precedent except as provided by Ninth Circuit Rule 36-3.

Indiana Court of Appeals Applies Lead Exclusion to Personal Injury Claims

The insured, HomeWorks Management Corporation, was sued for various personal injury claims arising out of exposure to lead paint. Homework's insurer, Indiana Farmers Mutual Insurance Company, filed a declaratory judgment action in Indiana state court for a determination that it had no duty to defend or indemnify HomeWorks' claim. The trial court ruled for Homeworks. Indiana Farmers appealed.

The Indiana Court of Appeals reversed the trial court and awarded summary judgment to Indiana Farmers. The court held that the exclusion applied to actual or alleged, threatened, or suspected bodily injury, property damage, personal and advertising injury or medical payments arising out of "asbestos" and "lead." The policy defined "lead" as "lead or compounds or products containing lead in any form or a mixture or combination of lead and other dust or particles."

The court held that the exclusion unambiguously applied to the underlying complaint for lead poisoning and its application to the claim did not violate any public policy.

The case is *Ind. Farmers Mut. Ins. Co. v. Homeworks Mgmt. Corp.*, 22A-PL-1232 (Ind. Ct. App. Dec. 21, 2022).