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Ninth Circuit: Costs of Complying with Subpoena in Opioid Investigation Not Covered

Affirming the district court's ruling, the Ninth Circuit held that a drug company could not recover from its D&O insurer costs it incurred in complying with the government's subpoenas directed at illegal opioid profits. The ruling turned on the meaning of "arising out of" in a goods and products exclusion.

The Case

Sentynl Therapeutics markets two prescription opioid pain relievers. As part of an investigation into companies illegally profiting from opioids, the U.S. Attorney's Office for the District of New Jersey served a subpoena on Sentynl. Sentynl looked to its directors and officers liability insurer for reimbursement of its costs in complying with the subpoenas. The insurer declined and Sentynl sued for breach of contract and the implied covenant of good faith.

The D&O policy excluded coverage for "[l]oss in connection with a Claim arising out of, based upon or attributable to any goods or products manufactured, produced, processed, packaged, sold, marketed, distributed, advertised or developed by [Sentynl]."

The Ninth Circuit's Decision

In determining whether the exclusion applied, the court looked to the definition of "arising out of." It found that the term is broader than "caused by" and is ordinarily understood to mean "originating from," "having its origin in," "growing out of" or "flowing from" or in short, "incident

to, or having connection with.'" The court disagreed with Sentynl that the term must be narrowly construed because it appears in an exclusion, explaining that such rule applies only if the term were ambiguous, which it is not.

The court then found that Sentynl's involvement in the investigation originated from, grew out of, or flowed from its opioid products. And it found that the exclusion was not limited to claims based on a defect in the character of the products.

The court also rejected Sentynl's argument that the policy was illusory. The court explained that an exclusion does not render coverage illusory unless it entirely eliminates coverage. The court identified claims that the exclusion would not bar even under a very broad definition of "arising out of."

The court concluded by noting that the policy covered only claims for "Wrongful Acts," and there was no evidence that any current or former employee had been accused of any such acts.

The case is *Sentynl Therapeutics v. United States Spec. Ins. Co.,* No. 21-55370 (9th Cir. March 9, 2022).

Florida Federal District Court: Amtrak's Notice Was Too Late, Unable to Rebut Presumption of Prejudice

A federal district court judge in Florida found that Amtrak's notice to an insurer more than two years after being served with a lawsuit was untimely as a matter of law and that Amtrak could not offer a reasonable explanation for not discovering the policy sooner. The court also found that Amtrak failed to rebut the presumption that the insurer was prejudiced by its delay.

The Case

An Amtrak train collided with a car, severely injuring the car's driver. The accident occurred after an employee of a company hired to maintain the railroad tracks deactivated the signals and gate arms while performing relay testing.

The maintenance company was hired by the South Florida Regional Transportation Authority, a state agency. As required by their contract, the maintenance company purchased a railroad protective insurance policy from Steadfast that named the transportation authority as an insured. Amtrak qualified as an "insured" under the policy.

About a month after the accident, Amtrak sought information from the regional transportation authority about the signal failure and requested a copy of any insurance policies that it maintains. The transportation authority didn't respond, and Amtrak didn't follow up.

Steadfast first learned of the accident more than two years later, when the maintenance company's own insurer tendered defense and indemnity to Steadfast. Steadfast denied coverage because the maintenance company was not insured under the railroad protective policy, and because notice was late.

Three months later, Amtrak and the transportation authority, for the first time, requested reimbursement from Steadfast for defense and indemnity. Amtrak contended that it first learned of the railroad protective policy with Steadfast at a mediation only five weeks earlier. Steadfast denied based on late notice. Amtrak sued.

The Decision

On summary judgment, Amtrak argued that its notice was reasonable and as soon as practicable because it notified Steadfast just over a month after learning of the railroad protective

policy. Steadfast argued that notice provided two years and four months after the accident was unreasonable and untimely.

Applying Florida law, the court observed that it must first determine whether notice was timely, and if not, whether the insured rebutted the presumption of prejudice.

Promptness of notice is often an issue of fact, but the court can decide the issue as a matter of law when no reasonable jury could find it to be timely.

The court found that Amtrak's notice was untimely. Amtrak was immediately aware of the accident. And shortly afterward, it contacted the transportation authority about insurance that covered Amtrak as an insured. The transportation authority didn't respond, but Amtrak failed to explain why it didn't follow up. Amtrak argued that its due diligence was irrelevant, but the court disagreed. Amtrak's letter to the transportation authority contemplated the existence of coverage. Amtrak could not reasonably explain why it did not follow up until years later. As Amtrak's notice to Steadfast came more than two years after being sued, the court found that no reasonable jury could conclude that it was timely.

It next considered prejudice. To rebut the presumption of prejudice, Amtrak argued that Steadfast's insured, the transportation authority, knew of the accident almost immediately. But the court said that the insured's knowledge could not be imputed to the insurer. Indeed, doing so would essentially eliminate the policy's notice requirement.

Even so, Amtrak argued that Steadfast knew of the suit about 8 months before it was resolved and had time to investigate and conduct any supplemental discovery needed. But this was still over two years after the accident and the filing of the lawsuit. The court found Amtrak's statements to be too conclusory because Amtrak did not explain how Steadfast could engage in discovery when, by this point in the litigation, discovery was closed and the parties had already

filed motions for summary judgment. The court was not persuaded that the district judge would have re-opened discovery to allow Steadfast to take discovery on behalf of Amtrak, who had been a party in the case since the date it was filed.

It also rejected Amtrak's argument that a report prepared just after the accident laid out all of the material facts and that Steadfast's own investigation would not have revealed anything different even had it been notified earlier. The court said that "the purpose of a provision for notice and proof of loss goes beyond mere causation and is 'to enable the insurer to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud.'"

Simply stating that Steadfast was not prejudiced, the court emphasized, was insufficient for Amtrak to meet its burden and overcome the presumption of prejudice. Thus, the court held that Amtrak could not recover any costs from Steadfast.

The case is *National R.R. Passenger Corp. v. Steadfast Ins. Co.,* No. 8:20-cv-1134-CEH-CPT (M.D. Fla. March 26, 2022).

Delaware Supreme Court: Coverage for Securities Class Action Under Claims-Made Policy Was Excluded as Related to Earlier-Filed Class Action

The Delaware Supreme Court held that a securities class action and a later follow-on action were related actions such that later-issued claims made policies did not cover the follow-on action.

The Case

The insured, First Solar, Inc. manufactured solar panels and sold photovoltaic power plants. In March 2012, First Solar stockholders filed a class action lawsuit, the *Smilovits* Action, against First Solar alleging that it violated federal securities laws by making false or misleading public

disclosures. National Union Fire Insurance Company of Pittsburgh covered the *Smilovits* Action under a 2011-12 $10 million "claims made" directors and officers insurance policy.

In June 2015, while the *Smilovits* Action was pending, First Solar stockholders who opted out of the *Smilovits* Action filed the *Maverick* Action. The *Maverick* Action alleged violations of the same federal securities laws as the *Smilovits* Action, plus violations of Arizona statutes, and asserted claims for fraud and negligent misrepresentation.

When the plaintiffs filed the *Maverick* Action, First Solar had a $10 million "claims made" policy with National Union for 2014-15 and a $10 million layer of excess coverage with XL Specialty Insurance Company. The 2014-15 Primary Policy excluded coverage for "Related Claims." A Related Claim was "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were . . . alleged in a Claim made against an Insured." And a Related Claim would be treated as first made at the time of the previously made claim under certain conditions.

First Solar settled the *Smilovits* Action in January 2020 for $350 million. All primary and excess insurers under the 2011-12 policies paid their policy limits. Having settled the *Smilovits* Action and exhausted all coverage under the 2011-12 policies, First Solar began to arbitrate a settlement of the *Maverick* Action. It sought coverage under the 2014-15 Primary Policy and the XL Specialty Policy for the *Maverick* Action.

First Solar eventually settled the *Maverick* Action for $19 million without a coverage commitment from National Union or XL Specialty. After the insurers denied coverage, First Solar sued the insurers in Delaware Superior Court for breach of contract and declaratory relief. The Superior court found that the *Maverick* action was "fundamentally identical" to the first-filed

action and was therefore excluded from coverage under the later-issued policies. First Solar appealed.

The Decision

The Delaware Supreme Court affirmed the judgment of the Superior Court. To begin with, the court held that, although the Superior Court reached the correct conclusion, it applied an incorrect standard in requiring that the actions be "fundamentally identical." The court held that absolute identity was not required. Rather, the inquiry should have focused on the terms of the policy, that is, whether the two actions arose out of, were based upon, or attributable to the any facts or wrongful acts that were the same or related to each other.

Under the circumstances, the court held that the actions were sufficiently similar because they involved the same alleged misconduct – that First Solar made material misrepresentations about its solar power capabilities as part of a fraudulent scheme to increase stock prices. The court rejected First Solar's argument that it was immaterial that the *Smilovits* action centered on "historical performance" representations while the *Maverick* action dealt with predictions of grid parity or forward-looking statements. The court found that these differences were not meaningful to the relatedness inquiry because both actions focused on First Solar's alleged misrepresentations about the cost of solar power.

The court added, that if there was any doubt about its conclusion, First Solar had attempted to consolidate the two underlying actions based on relatedness and the substantial overlap of the facts.

Accordingly, the court affirmed the judgment of the Superior Court.

The case is *First Solar, Inc. v. Nat'l Union First Ins. Co.*, No. 217 (Del. Mar. 16, 2022).

Illinois Appellate Court: No Coverage for Pollution Claims That Began Before Retroactive Date of Policy

An Illinois appellate court ruled that a retroactive date limitation on pollution coverage applied even though the intermittent nature of the releases meant some releases occurred after the retroactive date.

The Case

The insured, Medline Industries, Inc., was sued in Illinois state court for injuries allegedly caused by emissions of ethylene oxide gas (EtO) from Medline's medical instruments sterilization facility in Waukegan (the Waukegan facility).

Medline bought a claims-made premises pollution liability insurance policy from Illinois Union Insurance Company. The policy covered "pollution conditions" that "first commence, in their entirety, on or after the retroactive date. . . and prior to the expiration of the 'policy period.'" The "retroactive date" of the policy was September 29, 2008.

Illinois Union denied coverage because the underlying complaints alleged that the Waukegan facility (whether owned by Medline or its predecessors) released EtO since 1994, before the retroactive date of the policy.

Medline sought a declaration in Illinois state court that Illinois Union owed Medline defense and indemnity for all of these underlying lawsuits. Medline interpreted "pollution condition" to mean that each discrete emission is a new "pollution condition." Medline argued that the complaints alleged intermittent release pollution conditions of Et0 and each intermittent release was a separate "pollution condition." Illinois Union countered that pollution over many years from a single source should be treated as a single pollution event.

The trial court found that Illinois Union had no duty to defend and therefore no duty to indemnify Medline for the lawsuits. Medline appealed.

The Decision

The appeals court affirmed.

The court noted that, under the eight corners rule, it could only consider the policy and the four corners of the complaint to determine whether a duty to defend existed. Medline had asked the court to consider a decision from the underlying action striking references to the continuity of emissions and statements from the plaintiffs affirming that they did not plead that the emissions were uninterrupted but were released after each sterilization cycle.

The court made clear that even if it looked beyond the policy and underlying complaints, it would still conclude that the emissions were alleged to have commenced before the retroactive date. The court noted that Medline's added evidence only raised an issue as to the whether the emissions were continuous, not that they began in 1994. The court held that emissions that were intermittent did not avoid the bar of the retroactive date because they still "first commenced" before the retroactive date.

For these reasons, the court affirmed the judgment of the trial court and ruled that Illinois Union had no duty to indemnify Medline for the lawsuits.

The case is *Union Ins. v. Medline Indus.*, No. 2-21-0175 (Ill. App. Ct. 2d Dist., Mar. 4, 2022).

On Second Thought, Court Finds Target Data Breach Is Covered

A Minnesota federal court reconsidered its earlier ruling on whether stolen payment card data from a major retailer presented a covered claim, this time finding that there was a loss of use of property.

The Case

Hackers stole payment card data and personal contact information of Target's customers. Banks that issued the payment cards had to cancel and reissue them and sought the costs from Target. Target settled with the banks and sought to recover the settlement sum from its general liability insurer.

Target claimed that it suffered "property damage" – loss of use of tangible property that was not physically injured – and that the "property damage" was caused by an "occurrence." The insurer disagreed and Target sued for a declaratory judgment.

Last year, the court granted the insurer's summary judgment motion, finding that the compromised payment cards lost their value, not their use. As there was no way to approximate the value of being unable to use a payment card, the court held that there was no nexus between the damages and the loss of use. Thus, Target had not established a connection between the damages incurred for settling claims related to replacing the payment cards and the value of the use of those cards, either to the payment-card holders or issuers.

Target moved to amend or alter the judgment. Target argued that the court erred by holding that the inoperability of the payment cards did not constitute loss of use within the meaning of "property damage."

The Decision

Motions to alter the judgment are rarely granted, but this was one of those rare instances. The court revisited the three requirements for coverage under the policy: (1) a loss of use (2) of tangible property not physically injured (3) caused by an "occurrence."

The court first considered if there was an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Applying Minnesota law, the court observed that an accident includes the acts of the insured and the consequences of the insured's acts. The court found that there was an "occurrence" because the data breach was an accident, and the cancellation of the payment cards resulted from Target's discovery of the data breach.

The court next considered whether "loss of use" includes customers' inability to use payment cards after a data breach. The court could not find legal authority directly on point but was persuaded by the Eighth Circuit's *Eyeblaster* decision that found a virus-infected computer met the definition. Analogizing to that case, the court found that the data breach compromised the payment information listed on the payment cards and caused the banks to cancel and reissue the cards. Once canceled, the payment cards – although still in existence – lost their use and function. Thus, the court found that Target's settlement was a cost incurred due to the loss of use of the payment cards.

Turning to the third requirement – tangible property not physically injured – the court considered whether the electronic data exclusion impaired coverage. That term was defined as "information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS,

tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment."

The insurer argued that Target is actually seeking compensation for the missing data, not the payment card itself.

The court disagreed. It found that the payment cards were the property for which Target sought coverage. The payment cards were tangible property that were not physically injured. It was the use of those cards, not the use of the electronic data, that was lost.

The court vacated its prior ruling that Target's claim was unrelated to the loss of use of tangible property not physically injured and ordered the insurer to indemnify Target for its settlement with the banks.

This case raises interesting questions and will probably be appealed. The payment cards are essentially a replacement for cash and are not property in the way we ordinarily think about that term. Target settled with the banks. The banks did not suffer a loss of use, the customer did. The banks reissued the cards so that they can make a profit, not to compensate the customer for its losses.

The case is *Target Corp. v. Ace Am. Ins. Co.,* No. 19-cv-2916 (WMW/DTS) (D. Minn. March 22, 2022).

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