Indiana Supreme Court Adopts Efficient and Predominant Cause Analysis in Finding That Liquor Liability Exclusion Applies

The Indiana high court held that an insurer with a liquor liability exclusion had no duty to defend or indemnify a show club because drunk driving caused by the negligent service of alcohol led to claimant's injuries. The court found that all allegations of negligence were inextricably intertwined with dram shop liabilities.

The Case

The insured, through separate limited liability companies, owned two show clubs: Big Daddy's and Little Daddy's. A patron of Big Daddy's had too much to drink, got out of hand, and was tossed from the club earlier that evening by the police.

A bouncer at Little Daddy's, who from time to time also worked at Big Daddy's, decided to stop by Big Daddy's to see if they needed any help. He wasn't on the clock that night. The off-duty bouncer saw the intoxicated patron lingering around the Big Daddy's parking lot. The two argued, and the bouncer threatened the patron with bodily harm if he didn't leave. The patron then got in his truck, drove off, and collided with claimant's vehicle.

Claimant sued Big Daddy's, Little Daddy's, and their owner, Daniel Parks under Indiana's Dram Shop Act. Claimant alleged that defendants served the patron alcohol when they knew or should have known that he was inebriated, allowed him to leave without obtaining other transportation, and failed to notify the police.

Big Daddy's and Little Daddy's had separate businessowners policies and liquor liability policies with Illinois Casualty. The two show clubs and Parks tendered the suit to Illinois Casualty for defense and indemnity. The insurer promptly filed a declaratory judgment action seeking to get clear of any duty to defend or indemnify under the businessowners policies. Those policies excluded bodily injury claims for which an insured may be liable by reason of causing or contributing to the intoxication of any person or furnishing alcoholic beverages to a person under the influence of alcohol. Both the claimant and insureds opposed Illinois Casualty's summary judgment motion.

The trial court found that the insurer had no duty to defend under the businessowners policies, but the intermediate appellate court reversed.

The Indiana Supreme Court's Decision

The Indiana Supreme Court reinstated the trial court's grant of summary judgment for the insurer.

The court rejected the insureds' argument that the liquor liability exclusion in the businessowners policy was ambiguous and held that the claims of serving the patron while he was intoxicated and failing to obtain alternate transportation clearly fell within the exclusion.

The court next considered the remaining claims, and for these, it applied the efficient and predominant cause analysis. It found that the efficient and predominant cause of the collision was the patron's drunk driving after he was served alcohol at Big Daddy's. It disagreed that the insureds had liability beyond dram shop liability. Instead, it found the claims of allowing the patron to leave in his vehicle and the failure to call police were inextricably intertwined with the underlying negligence and could not have happened but for the patron driving drunk after being served alcohol at Big Daddy's.

The dispute next turned to the bouncer's employment status. The insureds and claimant conceded that the liquor liability policy issued to Little Daddy's didn't apply because neither Little Daddy's nor the bouncer served any alcohol to the patron. But they contended that Parks was owed a defense under the businessowners policy for this same reason, that is, because neither Little Daddy's nor the bouncer caused or contributed to the patron's intoxication. They argued that a factual question remained over the bouncer's employment status on that night, thus giving rise to a duty to defend.

The court rejected this argument too. Given the evidence, it did not agree that the bouncer acted as an employee of Little Daddy's when he forced the patron to leave Big Daddy's parking lot. If anything, he was a volunteer employee under Big Daddy's policy and because all of the allegations were inextricably intertwined with Big Daddy having caused or contributed to the patron's intoxication, the liquor liability exclusion in Big Daddy's policy applied.

But even if the bouncer were acting as an employee of Little Daddy's, the exclusion would still apply because the complaint alleged that Little Daddy's contributed to the patron's intoxication and failed to obtain alternate transportation. And the remaining allegations – that Little Daddy's allowed the patron to leave Big Daddy's in his vehicle and failed to notify law enforcement – the court explained, are inextricably intertwined with allegations that Little Daddy's caused or contributed to the patron's intoxication.

The court's analysis focused on the nature of the allegations in the complaint. And at the same time, it wouldn't allow creative arguments to hide the reality that the efficient and predominant cause of the injury was drunk driving precipitated by the service of alcohol – conduct excluded by the policy.

The case is *Ebert v. Ill. Cas. Co.,* No. 22S-PL-8 (Ind. June 16, 2022).

Oklahoma Supreme Court: Earthquakes Caused by Oil and Gas Operations Are Due to an Occurrence, Claim Not Barred by Pollution Exclusion

The Oklahoma Supreme Court found that an oil and gas driller could not have expected that its wastewater disposal practices would result in seismic activity, and thus held that property damage claims by neighboring residents was caused by an "occurrence." It also found a pollution exclusion inapplicable because the damage was allegedly caused by underground pressure, not the polluting nature of the wastewater.

The Case

Crown Energy is an oil and gas producer. As part of its operations, it stores large volumes of wastewater in underground disposal wells.

Nearby residents complained of increased seismic activity, which it blamed on underground pressure from the disposal wells used by Crown and others. The residents filed a class action suit for property damage.

Crown tendered the suit to its commercial general liability insurer, who denied coverage because the damage was not caused by an "occurrence" and because the pollution exclusion in the Oil and Gas Endorsement otherwise applied. Crown then filed a declaratory judgment action in Oklahoma state court.

Crown prevailed before the trial and intermediate appellate courts and the dispute made its way up to the Oklahoma Supreme Court.

Oklahoma Supreme Court's Decision

The Oklahoma high court affirmed.

The court first considered if the alleged property damage was caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same

general harmful conditions." The insurer argued that because Crown intentionally injected wastewater into the disposal well, its activities could not constitute an accident. It also contended that the seismic activity at the heart of the residents' lawsuit was the natural and probable consequence of Crown's wastewater disposal activities.

And for these contentions, the insurer relied on the residents' allegations in the complaint. That's how the duty to defend is typically measured, but the court said the residents' self-serving allegations were insufficient to show that the oil and gas industry knew that its wastewater disposal practices could cause earthquakes. And even if the residents' allegations were sufficient evidence, the mere fact that there is some risk of seismic activity, the court added, does not mean seismic activity is the natural and probable consequence of those activities. The court found that Crown, a sophisticated oil and gas operator, could not have expected earthquakes would occur when it injected wastewater at high pressure deep into the ground, no matter what plaintiffs claimed. Thus, the court held that the earthquakes were accidental, and any alleged damage was caused by an "occurrence."

It next considered the pollution exclusion. The insurer argued that the pollution exclusion applied because the claims arose out of the discharge of toxic liquids, waste materials, contaminants, or pollutants into or upon the land. The insurer supported its argument with Oklahoma regulations describing wastewater as a "deleterious substance."

But Crown argued that the pollution exclusion did not apply because the property damage was caused by pressure and displacement, not the polluting nature of the wastewater.

The insurer argued that the court should broadly construe the exclusion based on its "arising out of" language. But the court did not see how the pollution exclusion could apply when the damage was not due to the wastewaters' toxic or polluting nature. Nor was the court

persuaded that the pollution exclusion, because it appeared in the Oil and Gas Endorsement, was an operational exclusion requiring broader effect.

The court found that even though wastewater may have the toxic and deleterious qualities of a "pollutant," the damage it allegedly caused to the residents was not attributable to those qualities. In siding with Crown, the court held that the pollution exclusion did not clearly and unambiguously preclude coverage for the residents' claims.

The case is *Crown Energy co. v. Mid-Continent Cas. Co.*, No. 116989 (Okla. June 14, 2022).

Fifth Circuit Finds No Duty Defend Where Insured Never Asked to Be Defended

The Fifth Circuit, applying Texas law, held that an insured must specifically request a defense of an underlying claim before the duty to defend is triggered.

The Case

In July 2016, Moreno worked as a painter for N.F. Painting, Inc. on a project for Beazer Homes. While on site, Moreno fell from a ladder and sustained serious injuries.

In November 2016, Moreno sued N.F. Painting and Beazer Homes for damages in Texas state court, alleging negligence, gross negligence, and negligence per se in connection with his fall. N.F. Painting was insured by Sentinel Insurance Company under a businessowners policy. Beazer Homes was an "additional insured" under the Sentinel policy. N.F. Painting's policy covered business liability, including personal injury, up to $1,000,000.

N.F. Painting did not seek defense or coverage from Sentinel when it was served with Moreno's original state court petition nor did it forward the suit papers that it received to Sentinel for that purpose. Rather, N.F. Painting hired its own counsel, Lopez. That's because N.F. Painting's

owner, Flores, didn't think Moreno's claim would be covered by the Sentinel policy. N.F. Painting stated this in its responses to Moreno's discovery requests about available insurance.

Moreno then entered into a $1.6 million consent judgment with N.F. Painting and sued Sentinel as a third-party beneficiary to the liability insurance contract.

A Texas federal district court determined that Sentinel's duty to defend N.F. Painting was never triggered because N.F. Painting never requested a defense or sought coverage. Moreno appealed.

The Decision

The Fifth Circuit affirmed.

Applying Texas law, the court noted that an insurer's duty to defend is not triggered unless the insured requests a defense. Thus, if a duty to defend isn't triggered, the insurer can't breach the policy if it doesn't defend. Even though the insurer might have had knowledge and an opportunity to defend, the court found that an insurer doesn't have to interject itself into a proceeding on its insured's behalf.

The court next found that Sentinel didn't have to show prejudice because the issue was *lack* of notice, not *late* notice. But even if a showing of prejudice were required, Sentinel could make that showing. The court found that Sentinel's inability to control N.F. Painting's defense against the claim and N.F. Painting's agreement to entry of judgment against it (with no notice to Sentinel) constituted prejudice as a matter of law.

For these reasons, the court affirmed the district court's judgment dismissing Moreno's claims against Sentinel.

The case is *Moreno v. Sentinel Ins. Co.*, No. 20-20621 (5th Cir. June 2, 2022).

Ninth Circuit Finds That Known Loss Doctrine and Impaired Property Exclusion Bar Property Association's Claim Over Roof Damage

A liability insurer didn't have to defend a property association in a tenant's suit over a roof that remained in disrepair, forcing the tenant to permanently close its swimming pool. The Ninth Circuit held that the claim constituted a known loss and was otherwise barred by the impaired property exclusion.

The Case

The insured, Monterey Property Associates Anaheim, LLC, was sued by LA Fitness, one of its tenants, because it didn't repair a roof above LA Fitness's swimming pool as required by the lease. LA Fitness had to close its pool.

Monterey tendered the suit to its commercial liability insurer for defense and indemnity. The insurer declined, citing an exclusion for property damage to property the insured owns or rents and because Monterey knew about the roof damage before it purchased the policy. Monterey then sued the insurer for breach of contract and bad faith, and sought declaratory relief. The insurer prevailed before the federal district court and Monterey appealed.

The Ninth Circuit's Decision

The Ninth Circuit affirmed summary judgment for the insurer.

First, it found that LA Fitness's claim was merely a continuation of roof damage that Monterey knew about before its insurance policy began. Under the policy, property damage is not covered if the insured knew that all or part of the damage had already occurred before the policy period. If the insured knew of property damage before the policy period, the policy provides that "any continuation, change or resumption of such . . . 'property damage' during or after the policy period will be deemed to have been known prior to the policy period."

Monterey did not dispute that it knew about the roof damage over the pool before the policy started. But it argued that the pool closure was not a continuation of the roof damage. The pool closure was a different type of loss, to a different type of property, at a different time.
The court disagreed. The only reason why the pool had to close was because of the damage to the roof above it. Thus, the court held that the pool closure was excluded from coverage as a known loss.

Second, the court found that the exclusion for impaired property also applied. The policy excluded damage to "property that has not been physically injured, arising out of . . . [a] delay or failure by [the insured] or anyone acting on [the insured's] behalf to perform a contract or agreement in accordance with its terms." As Monterey did not dispute that the pool was closed due to its delay in performing its duties under the lease, the court held that the impaired property exclusion applied.

Finally, the court upheld dismissal of Monterey's bad faith claim. Applying California law, the court found if there is no potential for coverage, and thus no duty to defend, there can be no action for breach of the implied covenant of good faith and fair dealing.

The case is *Monterey Prop. Assocs. Anaheim, LLC v. Travelers Prop. Cas. Co. of Am.,* No. 21-55541 (9th Cir. June 8, 2022).

Ohio Appellate Court Applies Criminal Acts Exclusion

An Ohio intermediate appellate court held that an intentional or criminal acts exclusion barred coverage for a claim involving the insured's conviction for felony assault.

The Case

Doughman was doing construction work in Inabnitt's home. The two got into a dispute, resulting in Doughman being thrown down a flight of stairs and suffering serious injuries. Inabnitt was convicted of felonious assault in Ohio criminal court. Doughman and his wife then filed a civil suit against Inabnitt, alleging causes of action for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, punitive damages, negligence, and loss of consortium.

At the time of incident, Inabnitt maintained a homeowner's policy with Allstate. The policy excluded coverage for "bodily injury … intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." This policy went on to say that the exclusion applies even if such bodily injury or property damage is of a different kind or degree than intended or reasonably expected.

Allstate filed a declaratory judgment action in Ohio state court. The trial court denied in part Allstate's motion for summary judgment, finding a genuine dispute over Inabnitt's intent to injure. Allstate appealed.

The Decision

The court of appeals reversed, finding that the trial court improperly focused only on Inabnitt's intentional act. The court emphasized that the exclusion was not limited to intentional acts but applied to criminal acts as well. Thus, given Inabnitt's criminal conviction, the relevant inquiry was whether Inabnitt reasonably expected Doughman's injury would result from his criminal act.

The felonious assault conviction included a "knowingly" element. Under Ohio law, the mental state of knowingly meant that Inabnitt was aware that his criminal conduct would

"probably cause a certain result," i.e., serious physical injury to Doughman, or would "probably be of a certain nature," i.e., seriously injurious. Thus, based on the definition of "knowingly," along with Inabnitt's conviction for felonious assault, the court held that reasonable minds could only conclude that Inabnitt "reasonably expected" Doughman would sustain bodily injury as a result of his criminal acts on the stairway. This was true, the court added, even if Doughman's injuries were ultimately more serious than Inabnitt reasonably expected because the exclusion applied even if "such bodily injury … is of a different kind or degree than intended or reasonably expected."

The court acknowledged that Doughman's complaint included a count for negligence, but found that the intentional or criminal acts exclusion still applied because "the crux of their claim concerns the conduct that led to Inabnitt's charge and conviction for felonious assault." Put differently, the court found that the only reasonable interpretation of the complaint is that Doughman sought damages for Inabnitt's criminal behavior during the incident. Repackaging the claim as negligence did not create a triable issue of fact because the Doughmans' based their complaint on the same facts on which Inabnitt was convicted – throwing Doughman down a flight of stairs. So the allegations of the complaint, even when construed most favorably to Inabnitt, did not give rise to the possibility of coverage.

Thus, the court held that Allstate did not have a duty to defend or indemnify Inabnitt for the underlying action.

The case is *Allstate Vehicle & Prop. Ins. Co. v. Inabnitt,* No. CA2021-10-094 (Ohio Ct. App. June 21, 2022).

Illinois Appellate Court Declines to Apply Professional Services or Business Pursuits Exclusion

An Illinois appellate court declined to apply either a professional services or business pursuits exclusion to plumbing work performed by a non-plumber for no charge, finding the work was neither predominantly mental nor intellectual.

The Case

John F. Smith was replacing a shower valve at Quigley's residence. Smith was a carpenter, not a plumber. Smith did not receive any type of compensation to replace the shower valve. Rather, Smith was doing the plumbing work as a favor to Quigley.

While Smith was using the torch to heat the fittings, the fiberglass insulation behind the bathroom wall caught fire. That fire spread upward to the neighboring unit. The Condominium Association received recovery through its master carrier policy with Allstate. Allstate then filed a subrogation claim against Smith.

At the time of the incident, Smith had a homeowner's policy with Stonegate Insurance Company, which included liability coverage. The policy contained exclusions for work arising out professional services and business pursuits. Stonegate filed a complaint for a declaratory judgment against Smith in Illinois state court, asking the court to find that the damages paid by Allstate were excluded from Smith's Stonegate policy. The trial court found that the Stonegate homeowner's policy covered the damages and Stonegate appealed.

The Decision

The appellate court affirmed the trial court's ruling. The court noted that, although the term "professional services" was not defined in the policy, under the relevant case law, to qualify as a professional service, the service must be mainly of an intellectual or mental nature. The court

held that heating pipes with a torch was neither predominantly mental nor intellectual and thus not a “professional service.”

The court also held that the business pursuits exclusion didn’t apply. When Smith was replacing the shower valve, he had been a carpenter (not a plumber) for over 30 years and had never been compensated for plumbing work. To hold that such conduct constitutes a “business pursuit,” the court stated, would be “absurd.”

The court also rejected Stonegate’s argument that it was never the intent for the homeowner’s policy to cover liability outside of Smith’s own residence, finding that the policy contained no such exclusion. Had Stonegate intended to include an exception for an insured's negligence at another homeowner’s property, the court held, it could have done so in writing. In this regard, the court rejected Stonegate’s citation to Smith’s deposition testimony that it would be “nuts” for him to assume that his homeowner’s policy would extend to damages resulting from the work he performed at the Quigley residence. The court noted that such testimony cannot supersede the plain terms of the policy.

The court affirmed summary judgment for Allstate.

The case is *Stonegate Ins. Co. v. Smith*, No. 1-21-0931 (Ill. App. Ct. 1st Dist. June 22, 2022).

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