New Jersey Supreme Court Finds That Self-Insurance Through a Joint Insurance Fund Is Not "Other Insurance"

The city of Long Branch was sued after a sand tunnel collapsed on a young boy. The city settled the suit, but there was a dispute over who had the primary payment obligation: a public entity joint insurance fund (JIF) or the city's commercial general liability insurer.

As a member of the JIF, Long Branch was entitled to receive $10 million in liability coverage per occurrence. The fund was only available to Long Branch after it exhausted any other insurance or self-insurance available to it. Long Branch also had a $10 million CGL policy that was excess over "other insurance."

The dispute came down to whether the protection afforded by the JIF was "insurance" for purposes of applying the "other insurance" clause in the CGL policy. If so, then the CGL policy would be excess. If not, the CGL policy would be primary.

The New Jersey Supreme Court found that self-insurance protection through JIF memberships is not "other insurance" and that the CGL policy was primary. Looking to the JIF's enabling statute (N.J.S.A. 40A:10-36), the court concluded that the JIF was not authorized to act as an insurance company and was not regulated as such. JIF's could not insure members. Instead, they allow members to self-insure, thereby spreading risk and reducing insurance costs. Thus, the court held that the fund was self-insurance, not insurance.

The court explained that risk-pooling arrangements, such as JIFs, are different from typical insurance contracts in which an authorized insurer assumes the risk in exchange for a premium. JIF members retain the risk typically assumed by carriers. Public entities do not purchase insurance from JIFs; instead, they join JIFs, manage risk, and optimize taxpayer dollars by self-insuring or reducing coverage costs.

The court also emphasized that the fund did not provide insurance in any traditional sense. Unlike licensed and regulated insurance companies – whose primary business is to assume risk in consideration of the payment of a premium – JIF members retain significant risk by paying claims from member assessments. Self-insurance, the court explained, was not the same as traditional insurance.

The JIF specified that its obligations are excess over insurance or self-insurance. The CGL policy, in contrast, stated only that its coverage was excess over any "other insurance." Because the CGL policy did not encompass self-insurance, the court held that the CGL policy was primary to the JIF.

The case is *Statewide Ins. Fund v. Star Ins. Co.,* No. A-62 September Term 2021, 086440 (N.J. Feb. 16, 2023).

Connecticut Supreme Court Confirms that Contra Proferentem Does Not Apply to Fact Determinations

Two insurance companies sought a judgment declaring that they were not obligated to cover a business owner under a homeowners and umbrella insurance policy for damages awarded in a tort action.

The policyholder owned a construction company and maintained an office in his home. The tort action stemmed from an incident that occurred when a masked intruder armed with a gun demanded that an employee open the insured's safe. When she refused, the intruder bound, gagged, and blindfolded her, and threatened to harm her and her family if she did not open the safe. The employee was held against her will for about 45 minutes when the policyholder returned and was attacked by the intruder.

It turned out that the intruder was a longtime friend of the policyholder who needed money to cover his debts and who was upset with the policyholder for other reasons. The two reached some sort of amicable resolution, but they prevented the employee from leaving until they gained assurance that she would not call the police.

The police were eventually notified, and the policyholder was charged with kidnapping and witness tampering. The employee later filed a civil tort action against the policyholder for false imprisonment and negligent infliction of emotional distress.

The insurers defended the policyholder in the tort action but reserved their rights to contest liability coverage. The jury returned a verdict for the claimant on the false imprisonment claim.

In the declaratory judgment action, the insurers argued, among other things, that their policies did not cover the policyholder's liability for the tort action because coverage was barred under the business pursuits exclusion. The trial court concluded that the insurers had satisfied their burden by a preponderance of the evidence.

On appeal, the policyholder argued that the trial court should have construed the business pursuits exclusion in the insured's favor unless it had "a high degree of certainty that the policy language clearly and unambiguously excludes the claim." Essentially, the policyholder was pushing

for contra proferentem, an interpretive presumption that requires ambiguities to be construed against the insurer as drafter of the policy.

The Connecticut Supreme Court disagreed and affirmed the trial court's ruling. The court found that there was no need for the trial court to apply the "high degree of certainty" standard or other principles of insurance contract interpretation. Contra proferentem, the court explained, applies only when construing the language in a policy; it does not apply when a trial court considers, as a factual matter, whether a party has met its burden of establishing that a policy exclusion unambiguously applies. The court noted, however, the unusual procedural posture of the case, as it was on remand after the Connecticut Supreme Court had already interpreted the business pursuits exclusion and specified the factual situations where that exclusion would unambiguously apply.

The case is *Nationwide Mut. Ins. Co. v. Pasiak*, SC 20617 (Conn. Feb 21, 2023).

Florida Supreme Court Rules That Appraiser Paid on Contingency Could Not Be Considered "Disinterested"

An insured's home was damaged by Hurricane Irma in September 2017. The insured filed a claim with State Farm Florida Insurance Company and invoked his policy's appraisal provision. The provision required each party to select a "disinterested" appraiser, who would then jointly select a third appraiser. The three appraisers would assess the claim.

The insured appointed his public adjuster as his appraiser. The adjuster was to be paid on a contingency basis. State Farm objected that this person was not "disinterested" because he had a pecuniary interest in claim's outcome. State Farm filed a petition in the trial court to compel the insured to enter appraisal with a disinterested appraiser. The trial court denied the petition, but

the intermediate appellate court reversed, entering judgment for State Farm. The case was certified to the Florida Supreme Court based on a split in the intermediate appellate courts.

The Florida Supreme Court affirmed the intermediate appellate court's reversal in favor of State Farm. The court held that nothing in the policy or the Florida insurance code suggested that the word "disinterested" should be given anything other than its ordinary meaning. The court consulted dictionaries which defined "disinterested" as "free from bias, prejudice, or partiality" and "not having a pecuniary interest in the matter."

The court rejected the insured's attempt to equate "disinterested" with "independent." The court reasoned that "independent" generally means not subject to the control of another, not free of any pecuniary interest.

Put simply, the court concluded, the more the insured collected, the more his proposed appraiser collected. With his economic interests aligned with the insured, the court held, the proposed appraiser could not be "disinterested" in the matter.

The case is *Parrish v. State Farm Fla. Ins. Co.,* No. SC21-172 (Fla. Feb 9, 2023).

Section 533's Implied Willful Acts Exclusion Bars Coverage for FEHA Retaliation Claim against County, Ninth Circuit Rules

The County of Sacramento Sheriff's Department was found liable for retaliation claims brought under California's Fair Employment Housing Act (FEHA).

California has a statute that bars insurance coverage for willful wrongs. Under California Insurance Code § 533, "[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." Section 533 is an implied exclusionary clause that is read into all insurance policies.

In seeking coverage from its insurer, the County argued that § 533 did not apply because it was merely vicariously liable for the willful acts of its employees. The court disagreed, finding the County's argument was not supported in either law or fact.

The County was the ultimate employer of all County workers. The County acknowledged that it was the proper defendant in the underlying action rather than the Sheriff's Department because the Sheriff's Department was simply a department within the County structure. As FEHA imposes direct liability on both public and private employers, there was no legal basis for the County's position that it was merely vicariously liable.

Nor was there any factual support. The jury was not instructed on vicarious liability nor did the verdict form reflect that the County was vicariously liable for the retaliatory conduct.

Thus, the County's insurance claim was barred under § 533. The court added that if the County believes it should be exempt under § 533 as a public employer, it should take it up with the state legislature.

The case is *County of Sacramento v. Everest Ins. Co.,* No. 22-15250 (9th Cir. Feb 13, 2023). Note: This decision is unpublished and is not precedent except as provided by Ninth Circuit Rule 36-3.

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