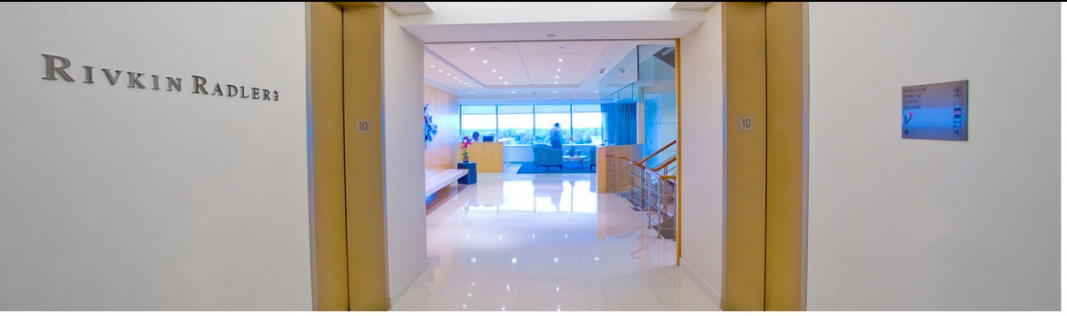

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Florida Supreme Court Finds That Consequential Damages Are Not Available in First-Party Breach of Insurance Contract Actions

The Florida Supreme Court ruled that extracontractual consequential damages are not available against an insurer in first-party breach of insurance contract actions because the amount owed is governed by the terms and conditions of the insurance policy. Extra-contractual damages, however, may be available in a separate bad faith action.

The Case

The insured, Manor House, owned nine apartment buildings that were damaged by a 2004 hurricane. Manor House sued Citizens Property Insurance Corporation in Florida state court seeking extra-contractual damages related to rental income that it claims it lost due to Citizens' alleged procrastination in adjusting and paying the Manor House claims. Citizens moved for partial summary judgment.

The trial court granted the motion regarding lost rental income, finding that "[n]othing in the insurance contract provides coverage for lost rents."

On appeal, the Fifth District reversed the partial summary judgment award to Citizens, concluding that "when an insurer breaches an insurance contract, the insured 'is entitled to recover more than the pecuniary loss involved in the balance of the payments due under the policy' in consequential damages, provided the damages 'were in contemplation of the parties at the inception of the contract.'"

The Fifth District explained that “[i]n granting summary judgment, the trial court denied Manor House the opportunity to prove whether the parties contemplated that Manor House, an apartment complex, would suffer consequential damages in the form of lost rental income if Citizens breached its contractual duties to timely adjust and pay covered damages, which in this case allegedly resulted in a significant delay in completing repairs so that units could once again be rented.”

The Fifth District further concluded that while Citizens "is immune from bad faith claims . . . the consequential damages Manor House seeks are based squarely on breach of contract claims requiring no allegation or proof that Citizens acted in bad faith." Accordingly, the Fifth District concluded that "Citizens is not statutorily immune from this aspect of Manor House's claim."

The Fifth District certified the following question to the Florida Supreme Court: Does Florida law allow an insured to recover extra-contractual damages in a first-party breach of contract action not involving a statutory bad faith cause of action?

The Decision

The Florida Supreme Court answered the certified question in the negative and vacated the Fifth District’s decision. In answering the certified question, the Florida Supreme Court concluded that extra-contractual, consequential damages are not available in a first-party breach of insurance contract action because the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the policy.

The court noted that the Fifth District’s decision was based on the faulty premise that parties can “contemplate” remedies outside the insurance policy’s express terms. The court emphasized that the parties must rely on what they actually have pursuant to the express terms and conditions of the insurance policy.

The court noted that the request for consequential damages based on Citizens' alleged failure to timely adjust the loss are more appropriately brought in a first-party bad faith action. However, the court concluded that because Citizens is a governmental entity (not a private insurance company), it was statutorily immune from first-party bad faith claims under *§ 627.351(6)(s)1., Fla. Stat.*

Therefore, the court concluded that extra-contractual damages were not recoverable against Citizens.

The case is *Citizens Prop. Ins. Corp. v. Manor House, LLC,* No. SC19-1394 (Fla. Jan. 21, 2021).

Earth Movement Exclusion Bars Coverage for Rockfall Damage, Tenth Circuit Rules

Affirming a Colorado federal district court's decision, the Tenth Circuit held that an earth movement exclusion broadly included all natural materials comprising the earth's surface and thus barred coverage for damage to the insureds' home caused by two falling boulders.

The Case

The policyholders' house was damaged when two or three large boulders dislodged from a rocky outcropping and rolled down a steep hillside. The policyholders believed that a single boulder struck the house and then split in two. Another boulder came to rest in the policyholders' yard.

The policyholders filed a claim under their homeowner's policy. The insurer retained engineering and geological firms to investigate the cause of the incident.

The engineering firm concluded that two rocks dislodged from the upper part of the mountain slope and were not influenced by meteorological conditions such as high winds or rain.

The geological firm determined that rockfall hazards existed at the policyholders' property based on evidence of numerous rockfall events scattered about the property.

Based on these conclusions, the insurer denied coverage under the earth movement exclusion. That exclusion provided that the policy does not cover "loss caused directly or indirectly by . . . earth movement," defined as:

> a. Earthquake, including land shock waves or tremors before, during or after volcanic eruption;
> b. Landslide, mudslide, or mudflow;
> c. Subsidence or sinkhole; or
> d. Any other earth movement including earth sinking, rising or shifting;
> caused by or resulting from human or animal forces or any act of nature . . . .

The policyholders sued, asserting breach of contract and bad faith. The insurer moved for summary judgment. The district court found that the earth movement exclusion applied and granted the insurer summary judgment. The policyholders appealed.

The Tenth Circuit's Decision

The Tenth Circuit affirmed.

The policyholders first asked the court to certify the coverage question to the Colorado Supreme Court, *i.e.*, whether the earth-movement exclusion bars coverage for direct physical loss caused by a rockfall. But the court declined to do so, finding that there was a reasonably clear and principled course that it could follow without having to involve the state court.

The court focused on the meaning of the term "landslide" and the catch-all clause "any other earth movement including earth sinking, rising or shifting" in the "Earth Movement" definition.

The Tenth Circuit observed that several other courts have found that earth movement exclusions barred coverage for damage caused by a rockfall. In many of these cases, courts looked

to dictionary definitions to determine the plain and ordinary meaning of the term "landslide," an approach the Tenth Circuit noted has been followed by the Colorado Supreme Court.

Some dictionaries defined "landslide" to include the movement of rock alone, but others defined it as consisting of both earth and rock. The court found that while "landslide" could be viewed as either soil, a combination of rock and soil, or two rocks falling without soil, that did not make the term ambiguous. That's because "landslide" has been defined to include all of these types of movements. The court suggested it would be unreasonable to think that damage caused by soil-only and soil-and-rock slides would not be covered, but damage caused by a rock-only slide would be. But even if a two-boulder rockfall were not a landslide, the court found that it would still come within the catch-all clause of the exclusion. The catch-all included more than just soil – it included the "sinking, rising or shifting" of rock alone.

Thus, when viewing the earth movement exclusion as a whole, the court concluded that it was "intended to be broadly inclusive of all natural materials that comprise the surface of the earth, including rocks and soil."

The case is *Sullivan v. Nationwide Affinity Ins. Co. of America*, No. 20-1063 (10th Cir. Jan. 11, 2021).

Contractor That Placed Debris on Property Under Mistaken Belief of Authority Was Not Entitled to Defense or Indemnity, Texas Appeals Court Holds

Affirming the lower court's decision, the Texas Court of Appeals held that an insurer had no duty to defend or indemnify a contractor who deposited construction debris on another's property despite believing he was authorized to do so. The court held that the property damage was not caused by an "occurrence" because the contractor intended to place the debris on the property

and the damage that followed was the natural and probable result of his actions. The court found that although the contractor was operating under a mistaken belief, he did what he set out to do, and thus, acted intentionally.

The Case

A contractor was hired by a municipality to demolish an old high school building. A friend of the contractor asked if he could take some debris to use for purposes of erosion control. The contractor and his friend placed about 40 tons of debris on the property.

The friend had lived at the home for nearly twenty years, so the contractor thought his friend owned the property. He was wrong. The friend was actually a tenant and did not have permission from the property owner to place debris there.

When the property owner discovered the debris, he sued the contractor for illegal dumping and damage to his property. The alleged damages included debris removal costs, cleanup costs, soil testing, soil analysis, environmental studies, and attorneys' fees. The property owner obtained a judgment against the contractor. A receiver was then appointed to liquidate property for the benefit of the contractor's judgment creditors.

The receiver sought recovery from the contractor's insurer. The insurer denied coverage on the basis that the contractor's actions were intentional. The receiver sued for breach of contract and bad faith. Summary judgment motions were filed, and the trial court ruled in favor of the insurer. The receiver appealed.

The Texas Court of Appeals' Decision

The receiver argued that the trial court erred because although the contractor intentionally placed the debris on the owner's property, he acted negligently due to the mistaken belief that his friend owned the property. The receiver argued that this constituted an "occurrence."

The appellate court didn't see it that way and affirmed the trial court's ruling.

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" was undefined in the policy, but the court looked to Texas Supreme Court authority stating that an injury is accidental if "from the viewpoint of the insured, [it is] not the natural and probable consequence of the action or occurrence which produced the injury; or in other words, if the injury could not reasonably be anticipated by insured, or would not ordinarily follow from the action or occurrence which caused the injury." Thus, two factors bear on whether an insured's action constitutes an accident: (1) the insured's intent; and (2) the reasonably foreseeable effect of the insured's conduct.

The court observed that the pleadings showed that the contractor intended to move the debris to the owner's property and leave it there. Because the damage to the property was the very presence of the debris on the property, the damages were a reasonably foreseeable result of the contractor's intentional conduct. Also, the damages were of the type that ordinarily flowed from that conduct.

The receiver contended that there was a contested fact issue over whether the contractor's actions constituted an "occurrence," arguing that the contractor's mistaken belief as to ownership constituted negligence. But because coverage depends on the facts and not the legal theories asserted, the court emphasized that a mere assertion of negligence is not sufficient to establish an "occurrence."

The receiver pointed to a line of cases holding that the terms "accident" and "occurrence" include damages that are unexpected, unforeseen, or undesigned as a result of an insured's intentional but negligent behavior. Under this line of cases, courts recognize that there is an

accident when the action is intentionally taken but is performed negligently and the effect is not what would have been intended or expected had the deliberate action been performed properly. The receiver argued that the damages to the owner's property were unexpected and unforeseen based on the contractor's mistaken belief that he had permission to deposit debris on the property.

The court was unpersuaded because there were no allegations that the contractor placed the debris on the property in a negligent manner. He did what he set out to do. The damage resulted from the mere presence of the debris on the property, not the contractor's negligence while placing it there. The court distinguished the receiver's line of cases because there, the insured performed the task itself negligently, thus resulting in unexpected damage. Had the insured in those cases performed properly, there would be no damage. In contrast here, the contractor performed exactly as he intended. It was not the way he performed that was the problem, it was the presence of the debris itself.

The court found a second line of cases more appropriately fit this situation. Under this second line, there is no "occurrence" when the tort is intentional, regardless of whether the effect was unintended or unexpected. The court acknowledged that whether an insured intends an injury typically presents an issue of fact. But there are situations where an individual's actions are intentional as a matter of law. When a result is the natural and probable consequence of an act or course of action, it is not produced by accidental means. This, the court noted, is an objective standard. The court found that the contractor's actions should be characterized as intentional even though he did not intend the result, *i.e.,* to damage the owner's property. The contractor's mistaken belief as to the rightful owner of the property was irrelevant. The contractor

intentionally placed the debris on the property and all of the damage naturally flowed from that act.

Based on this reasoning, the court upheld summary judgment in favor of the insurer.

The case is *Latray v. Colony Ins. Co.,* No. 07-19-00350-CV (Tex. Ct. App. Jan. 11, 2021).

Indiana Federal Court Finds That Bankruptcy Proceeding Is Not a "Suit" Under General Liability Policies

The U.S. Bankruptcy Court for the Southern District of Indiana ruled that USA Gymnastics' ("USAG") chapter 11 proceedings amid the fallout from its sexual abuse scandals were not a "suit" under the organization's insurance policies. USAG's liability insurers therefore were not obligated to pay the bankruptcy costs as part of their duty to defend.

The Case

Beginning in 2017, hundreds of former and current athletes sued USAG for sexual abuse and acts of sexual misconduct perpetrated by Larry Nassar, a USAG volunteer. USAG sought coverage from its general liability insurers, which agreed to defend under a reservation of rights.

To control the negative fallout from the sexual abuse lawsuits, the USAG filed a chapter 11 bankruptcy case. USAG incurred substantial costs in the bankruptcy and has asked their general liability insurers to pay for those costs as well as bankruptcy costs going forward as part of their defense obligation under the policies. The insurers declined.

The USAG then sought a declaration that its costs in maintaining the bankruptcy proceedings were covered defense costs under the policies. The USAG filed a motion for summary judgment against the insurers.

The Decision

The bankruptcy judge issued a ruling recommending that the district court deny USAG's motion.

Applying Indiana law, the court noted that the policies applied only to a "suit," defined as a "civil proceeding" that alleges damages for "bodily injury" to which the insurance coverage applied. The court concluded that a "suit" had to be a civil proceeding in which damages for bodily injury are alleged. In the court's view, a bankruptcy was something different.

In particular, the court noted that a civil suit seeking damages against a policyholder possesses an adversarial tenor and requires that the parties litigate the defendant's liability and the plaintiff's damages through discovery, motion practice and, if necessary, trial. Here, the bankruptcy proceeding was brought by the insured itself, and not against anyone else.

The court added that the purpose of expending defense costs is to minimize the insured's liabilities and damages, and the insurer and its policyholder have a shared interest to further that common purpose.

By contrast, the debtor in a chapter 11 reorganization is not concerned with trying to minimize or dismiss tort liabilities, but rather with obtaining a discharge and emerging as an operating entity. The court observed that the resulting bankruptcy discharge would not eliminate or lessen liability on claims against the debtor; it would merely bar collection of that debt from the debtor.

For these reasons, the court concluded that USAG's bankruptcy proceeding was not a "suit" and that the insurers should not be obligated to pay the bankruptcy costs as part of their duty to defend.

The case is *USA Gymnastics v. Ace Am. Ins. Co. (In re USA Gymnastics),* Case No. 18-9108 (Bankr. S.D. Ind. Jan. 19, 2021).

Products-Completed Operations Exclusion Bars Coverage for Bodily Injury Claim Caused by Exploding Battery Used for Vaping Device, Missouri Federal Court Rules

A federal court in Missouri held that a products-completed operations exclusion barred coverage for a bodily injury claim arising from a defective battery sold by an electronic cigarette store. The store's insurer was therefore under no duty to defend or indemnify.

The Case

The question was whether an insurance policy Scottsdale Insurance Company issued to Aqueous Vapor LLC covered injuries suffered by a patron, Adam Williams. Williams sued Aqueous Vapors in Missouri state court, alleging that he was injured when a battery he purchased from one of Aqueous Vapor's stores exploded in his pocket. Williams was away from the store when the incident happened.

Scottsdale provided commercial general liability coverage to Aqueous Vapor and any "insured" for "bodily injury" caused by an "occurrence" that takes place in the "coverage territory" during the policy period. The policy designated the coverage territory by the schedule of locations, which listed all the insured stores including the subject premises at which the battery was purchased. The policy also contained a products-completed operations exclusion for "bodily injury" occurring away from premises the insured owns or rents and arising out of "your product" or "your work."

Scottsdale denied coverage and filed a declaratory judgment action in federal court in Missouri. Scottsdale and Williams each moved for summary judgment.

The Decision

The court, applying Missouri law, held that the products-completed operations exclusion unambiguously precluded coverage. The court found that the injuries occurred away from the premises and the injuries arose out of either Aqueous Vapor's product or work.

The court rejected Williams' argument that this application of the products-completed operations exclusion would transform the policy into a premises liability policy. The court noted that products-completed operations hazard exclusions are common provisions in commercial general liability policies.

For these reasons, the court entered judgment for Scottsdale declaring that it had no duty to defend or indemnify Aqueous Vapor in the underlying suit.

The case is *Scottsdale Ins. Co. v. Aqueous Vapor, LLC,* Case No. 20-CV-00328 (W.D. Mo. Jan. 12, 2021).

Pennsylvania Federal District Court Finds That Home Heating Oil Is a Pollutant and Leak from Oil Tank Is Barred by Pollution Exclusion

Where a homeowner failed to show that an oil leak resulted from a sudden cracking of an oil tank, the Eastern District of Pennsylvania held that exclusions for corrosion and pollution barred recovery under her insurance policy for damage caused by the leak.

The Case

A homeowner noticed a persistent oil smell after having her outdoor, aboveground oil tank filled. Within a few days, she discovered that her oil tank had lost about half its contents. The tank eventually emptied, and about 250 gallons of oil migrated beneath her basement and

towards an adjoining road. An environmental contractor estimated that it would cost over $265,000 to remediate the soil and groundwater.

The homeowner filed a claim with her insurer.

The policy insured against direct physical loss, subject to exclusions for loss caused by (1) rust or other corrosion, and (2) discharge of pollutants unless the discharge is itself caused by a peril insured against. One of the listed perils was the sudden cracking of a hot water heating system. The policy defined this peril as meaning the "sudden and accidental tearing apart, cracking, burning or bulging of a steam or hot water heating system …."

After an inspection, the insurer concluded that the leak was the result of long-term corrosion of the tank. The insurer denied coverage based on the exclusions for loss caused by rust/corrosion and pollutants. The homeowner sued.

The insurer argued that the leak was not sudden and accidental, and supported its long-term corrosion theory with an expert report. The homeowner offered no expert but based her claim on the fact that the leak began shortly after her tank was filled.

The Decision

The court found that there was no direct evidence of when the leak started. But it observed that the problem persisted over several days, and during that time, the homeowner's heating system continued to operate. The homeowner, meanwhile, had submitted insufficient evidence to show a rupture or an abrupt release. Therefore, the loss did not qualify as a covered peril for the sudden failure of the heating system.

The court determined that there was no issue of fact over the cause of the tank failure and the fact that the leak was due to corrosion also implicated the "rust or other corrosion" exclusion. The homeowner failed to support her claim that the tank was improperly installed.

The court also agreed that the insurer had no obligation to pay for the cost of cleaning up the spilled oil based on the policy's pollution exclusion. The court rejected the homeowner's argument that home heating oil is not a pollutant. The court distinguished two earlier decisions decided under Pennsylvania law in which the courts found that similar exclusions did not apply to heating oil spills. In each of those cases, the insurer had not produced any expert report or other source of information to show the chemical makeup or toxicity of heating oil. In contrast, the report of the homeowner's environmental consultant revealed that soils were contaminated with several chemicals identified as pollutants by federal law and regulations. And the environmental consultant recommended extensive investigation and remediation consistent with pollutant contamination.

The court therefore granted the insurer's motion for summary judgment, dismissing the homeowner's breach of contract and bad faith claims.

The case is *Biela v. Westfield Ins. Co.,* No. 19-4383 (E.D. Pa. Jan. 19, 2021).

Rhode Island Court Finds That Former Property Owner Had Insurable Interest, But That Oil Spill Was Barred by Pollution Exclusion

A Rhode Island Superior Court judge agreed that a former property owner and its principal had an insurable interest under a policy for its alleged liability arising out of a heating oil company's mistaken delivery of oil through a disconnected fill pipe. But the insurer owed them no duty to defend, as the claim was barred by the policy's pollution exclusion.

The Case

An oil company poured hundreds of gallons of heating oil into a basement through a disconnected fill pipe. The insured, Dutchman, a limited liability company, operated a business at

the site and had an insurance policy that paid for direct physical loss of or damage to the property. Dutchman had purchased the property a few years earlier from DMV Holding Company, who was an insured under the policy. Both Dutchman and DMV had the same managing member, John Van Regenmorter.

Dutchman filed a claim with its insurer for loss of business income and continuing business operating expenses. The insurer denied coverage to DMV and Van Regenmorter under the liability portion of the policy.

Dutchman then sued the oil company, who in turn filed a third-party complaint against DMV. DMV and Van Regenmorter requested a defense from the insurer, but the insurer denied on the basis that neither had an insurable interest under the policy because they no longer owned the property. The insureds sued and the insurer moved for summary judgment.

The Decision

The court observed that the insurable interest requirement serves three primary purposes: (1) to prevent gambling through insurance policies; (2) to prevent awarding and thereby tempting the destruction of property; and (3) to confine insurance contracts to indemnity.

DMV and Van Regenmorter conceded that they no longer hold a personal interest in the property that was damaged. However, they were not seeking coverage for loss to the property, but rather, for their alleged liability, as they were being accused by the oil company of having contributed to the cause of the oil spill.

The court observed that there was a marked difference between a policy that insures against loss and one that insures against liability. The lack of an ownership interest in the property applied only to the first-party claim for damage to the property itself. But as to the third-party claim, the court noted, DMV and Van Regenmorter had an interest in limiting their own liability.

The claims against them were based on their prior interest in the building. The court therefore rejected the insurer's denial based on a lack of insurable interest.

But the court found that the insurer did not owe DMV and Van Regenmorter a defense for another reason. The claim against them was barred by the policy's pollution exclusion. The court found that there was no serious dispute that home heating oil is a pollutant, particularly when it is released from any container. Additionally, the insureds did not dispute that the third-party claim alleged property damage arising out of the discharge or release of a pollutant. The court found that the pollution exclusion plainly applied.

The insureds' argument against application of the exclusion was based on the absence of anti-concurrent language in the policy. The court found that the lack of anti-concurrent language was relevant only to the insureds' first-party property claim. It was inapplicable to the policy's liability coverage. As the pollution exclusion barred coverage for the claims asserted in the third-party complaint, the court awarded the insurer summary judgment.

The case is *Dutchman Dental LLC v. Providence Mut. Fire Ins. Co.*, No. KC-2016-1281 (R.I. Super. Ct. Jan. 19, 2021).