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Delaware Supreme Court Finds That a Letter Threatening Litigation Was Not a Claim for Damages Under a Claims-Made Policy

Syngenta manufactured paraquat, a chemical used in herbicides that has been linked to Parkinson's disease. On January 18, 2016, a plaintiffs' toxic tort attorney, Tillery, sent Syngenta a letter proposing a way to efficiently litigate claims that would soon be filed on behalf of farmers and others exposed to paraquat. Syngenta hired a law firm who sought more information about the claimants and their injuries. But Tillery declined to provide any information beyond generalities.

In September 2017, a farmer and his wife sued Syngenta for injuries related to paraquat exposure. Syngenta notified Zurich of the suit in November 2017. About a dozen similar suits were filed against Syngenta over the next few months. Tillery did not represent the plaintiffs in the first suit but represented plaintiffs in the suits that followed.

Syngenta bought primary and excess claims-made liability policies from Zurich that began on January 1, 2017, about a year after the Tillery letter. The policies applied to "claims for damages" first made against Syngenta during the policy period.

Zurich filed a declaratory judgment action seeking a ruling that it had no duty to defend Syngenta because the paraquat claim was made in January 2016, before the policy began. The dispute boiled down to whether Tillery's January 2016 letter was a "claim for damages." If so, then

the Zurich policies would not be triggered because the paraquat claim would have been made before the Zurich policy started, and therefore not during the policy period.

The policies did not define the phrase "claim for damages." The Delaware Supreme Court found that a "claim" meant a demand or request for relief. And first among the characteristics of a "claim" is the existence of an identifiable claimant. Thus, a "claim for damages" meant a demand for monetary relief by or on behalf of an identifiable claimant.

Zurich pointed to several things to support its position that the paraquat claims were made before its polices began. This included Tillery's statement in his letter that his clients were men in their 50s and 60s disabled with Parkinson's disease, that Syngenta's counsel billed substantial amounts in 2016 for paraquat-related issues, that Tillery sent a litigation-hold letter to Syngenta, and that Syngenta told its auditors that Tillery had threatened litigation in his January 2016 letter.

But the court found nothing in Tillery's January 2016 letter that demanded monetary relief, let alone on behalf of a specific individual. The letter identified claimants only in the vaguest sense. And because Tillery was not prepared to disclose the identity of the clients or proceed to litigation, the court said that he could not have demanded monetary relief on behalf of any claimant.

Affirming the trial court's ruling, the Delaware Supreme Court held that because the January 18, 2016, letter identified no individual claimants or clarified any facts, it did not put Syngenta on notice that there was an actual person intending to file a claim for damages. The letter constituted a threat of future litigation, but that threat was too unclear or amorphous to constitute a claim for damages.

The case is *Zurich Am. Ins. Co. v. Syngenta Crop Prot. LLC*, No. 135, 2023 (Del. Feb. 26, 2024).

Michigan Supreme Court Holds That Trip and Fall at Auto Shop Is Compensable Under No-Fault Law

Plaintiff brought her car in for an oil change. A technician suggested that she replace a filter and asked plaintiff for approval. On her way to the car, plaintiff tripped and fell into a service pit. She was injured and sought personal injury protection (PIP) benefits under her auto policy.

Under Michigan's no-fault law, plaintiff could receive PIP benefits if her injury arose out of "the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." Plaintiff claimed that she was engaged in maintenance of her motor vehicle because the service technician was showing her why she needed a new filter when she fell.

But benefits were unavailable if the car was parked, unless parked in a way that would cause unreasonable risk of injury. Plaintiff contended her car was improperly positioned over the service pit because there was a gap. If her car had completely covered the pit, she would not have fallen into the service pit.

The insurer argued that PIP benefits were unavailable because plaintiff's injury did not arise out of the maintenance on her vehicle. She fell but because she was not paying attention to where she was walking. The insurer argued that the causal connection between plaintiff's injuries and the maintenance of her vehicle was no more than incidental. Plaintiff's accident would have happened whether maintenance was being performed on her vehicle or not. Also, the parked vehicle exclusion applied because the car was not parked in a way to cause an unreasonable risk of injury because plaintiff had plenty opportunity to observe any hazards around the service pit.

Michigan law interprets the term "maintenance" broadly such that the person injured does not have to be the one performing the maintenance. Both the trial court and the intermediate appellate court agreed that maintenance was being performed within the meaning

of the no-fault statute. But they disagreed on whether plaintiff's injuries arose out of the maintenance being performed on her car. The intermediate appellate court found that the maintenance was only incidental to plaintiff's injuries and did not cause her to fall into the service pit. The intermediate appellate court also found that the car was not "parked" and that her injuries did not arise out of the use of a parked car.

The Michigan Supreme Court reversed and found that plaintiff's injury arose out of the maintenance of her vehicle as a motor vehicle. The court reasoned, "[l]ike a hydraulic lift or jack, the service pit was designed to aid in the maintenance of motor vehicles by allowing access to certain parts of the vehicle and was being used for that purpose at the time of the injury." The court held that because the service pit was used to perform the maintenance on her vehicle, there was a causal relationship between plaintiff's injury and the maintenance that was more than incidental, fortuitous, or but for.

The Michigan Supreme Court also vacated that part of the intermediate court's ruling on the parked car exclusion. The court said there is no need to consider that exclusion when an injury arises from the maintenance of a motor vehicle as a motor vehicle.

The case is *Bellmore v. Friendly Oil Change, Inc.*, No. SC: 164534 (Mich. Feb. 7, 2024).

Supreme Court of Texas Finds Underlying Settlement Not Binding on Insurer

In 2009, Cobalt International Energy partnered with three Angolan companies to explore and produce oil and gas off the coast of West Africa. A few years later, the SEC began investigating Cobalt for facilitating illegal payments to Angolan government officials. Around the same time, allegations arose that Cobalt had materially misrepresented the oil content of two of its exploratory wells. Publicity over these developments caused Cobalt's stock price to plummet and

Cobalt's investors to assert federal securities-fraud claims against Cobalt and its officers and directors.

The courts consolidated the claims and appointed GAMCO – a collection of investment funds that held Cobalt shares – as the lead plaintiff representing a class of 8,800 investors claiming over $1.6 billion in losses.

Before these events occurred, Cobalt purchased multiple levels of liability insurance. The policies did not require the insurers to defend Cobalt against GAMCO's claims, but they did require the insurers to advance defense costs "for which" the policies "provide coverage." Because the insurers denied that their policies provided coverage, they refused to advance Cobalt's defense costs. Cobalt self-funded its defense and sued the insurers to recover those costs.

In 2017, after Cobalt filed for bankruptcy, Cobalt and GAMCO settled the suits. The agreement recited a "Settlement Amount" of $220 million, which the parties believed represented the largest coverage potentially available under the insurers' policies. Cobalt accepted an "obligation to satisfy" the Settlement Amount, but the parties agreed it would be "payable exclusively" from any insurance recoveries. The parties agreed that GAMCO would pursue and prosecute the insurance claims recoveries on Cobalt's behalf. A dispute arose in the coverage litigation over whether the settlement agreement bound the insurers or was otherwise admissible. The insurers lost on this basis in the lower courts and then appealed.

The Supreme Court of Texas ruled for the insurers. The court recognized that, under Texas law, a settlement between an insured and an injured party is not binding on the liability insurer if it was "rendered without a fully adversarial trial." A fully adversarial trial is one where, at the time of the underlying trial or settlement, the insured bore an actual risk of liability or had some other

"meaningful incentive" to ensure that the judgment or settlement accurately reflected the claimant's damages and thus the insured's covered liability loss.

Here, the court held, there was no such incentive. The agreement protected Cobalt against any "actual risk of liability" beyond its obligation to pay insurance benefits it might receive. Cobalt had "no stake in the outcome" of the coverage litigation "and thus no "meaningful incentive" to defend itself as to liability to GAMCO or to minimize the amount of GAMCO's damages. In fact, the settlement agreement did not fix GAMCO's damages to any amount, but merely set the amount to the most insurance proceeds that might be obtained.

Nor did it matter, the court held, whether Cobalt vigorously litigated against GAMCO's claims or entered into the settlement agreement in good faith and without improper collusion with GAMCO. With no motive for Cobalt to minimize the settlement amount, there was no "meaningful incentive" in place to ensure that the settlement amount represented a fair appraisal of the claimant's damages.

Thus, the court reversed the trial court and ruled that the settlement agreement was not binding or admissible to establish coverage or the amount of Cobalt's loss.

The case is *In re Illinois Nat'l Ins. Co.,* No. 22-0872 (Tex. Feb. 23, 2024).

Ninth Circuit Strictly Enforces Reporting Requirement Under Claims-Made Policy

Heritage bought a claims-made-and-reported insurance policy from Zurich. For the policy to apply, notice of a claim or a potential claim had to be sent in writing to Zurich's claims department at the address listed in the policy.

Heritage learned of a potential claim during the policy period and notified a Zurich underwriter by email. But it failed to timely notify the claims department at the address specified in the policy. Heritage gave notice to Zurich, just not to the right place.

Zurich declined to provide coverage, and Heritage sued.

The trial court applied a substantial compliance standard but found that Heritage failed to substantially comply with the notice requirement. Heritage appealed, claiming the trial court erred in concluding that Heritage did not substantially comply.

On appeal, the Ninth Circuit ruled that the trial court applied the wrong standard. The correct standard is strict compliance with the notice requirement. The Ninth Circuit acknowledged that the California Supreme Court has not yet decided which standard – strict compliance or substantial compliance with notice requirements – is required for a claims-made-and-reported policy. But the court predicted how the California high court would rule.

The court observed that in the context of the notice-prejudice rule, many California appellate courts have found that notice provisions in claims-made-and-reported policies directly bear on the insured risk. That is because those provisions (1) reduce the insurer's risk of monitoring payments, which is a principal purpose of such policies, and (2) operate as forfeiture clauses. The Ninth Circuit found the same analysis applied to the compliance standard.

It noted that other circuit courts have required strict compliance with notice provisions in claims-made-and-reported policies. It concluded that the California Supreme Court would likely do the same and require Heritage to strictly comply with the notice requirement.

Because Heritage did not send notice to the proper address specified in the policy, the court found that Heritage failed to strictly comply with the notice requirement.

The case is *Heritage Bank of Commerce v. Zurich Am. Ins. Co.*, No. 23-15115 (9th Cir. Feb. 27, 2024) (unpublished).

Illinois Federal Court Finds BIPA Claims Excluded

Citizens Insurance Company filed a declaratory judgment action against Mullins Food Products, Inc., and Ricardo Galan in Illinois federal court. Citizens sought a declaration that it had no duty to defend or indemnify Mullins in the underlying putative class action suit filed by Galan under the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). Mullins counterclaimed for a declaration that Citizens was obligated to defend and indemnify Mullins and breached the insurance policy by failing to do so.

After the court denied both parties' motions, Citizens moved for reconsideration on the basis of the policy's Recording and Distribution of Material or Information in Violation of Law Exclusion. The exclusion applied to "'personal and advertising injury' arising directly or indirectly out of any action or omission that violates or is alleged to violate: (1) the TCPA; (2) the CAN-SPAM Act of 2003; (3) the FCRA and FACTA; or (4) any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information."

The question was whether the broad catch-all language in paragraph 4 applied to BIPA claims.

The district court reasoned that the exclusion unambiguously included BIPA claims. The court observed that the title of the exclusion, which referred to recording of information, showed that the exclusion applied to violations of statutes that protect privacy interests. BIPA protected

privacy interests because it regulates the collection, dissemination, and disposal of one's biometric identifiers and information. And even if the catch-all provision were ambiguously broad, the court found the interpretive canon of *ejusdem generis* permitted a narrowing construction to encompass only statutes regulating privacy violations, like BIPA.

In either scenario, the court held, the exclusion applied, and Citizens owed no duty to defend or indemnify the Galan suit. The court thus awarded summary judgment to Citizens.

The case is *Citizens Ins. Co. of Am. v. Mullins Food Prods*., Case No. 22-cv-1334 (N.D. Ill. Feb. 27, 2024).

California Federal District Court Finds No Potential for Coverage for Trade Secrets Suit

Aram Logistics was in the business of delivering furniture from retail stores to customers. Diakon Logistics, Inc., an Aram competitor, sued Aram and its executives in California state court. The suit alleged that certain Aram executives, while employed by Diakon, used Diakon's trade secrets and confidential information to funnel resources and business to Aram.

Diakon's complaint asserted three causes of action: (1) misappropriation of trade secrets; (2) California's Unfair Competition Law; and (3) intentional interference with prospective economic advantage.

Aram tendered the Diakon action to United States Liability Insurance ("USLI") under the Personal and Advertising Injury coverage. The policy covered certain offenses, including injury arising out of the use of another's advertising idea in the insured's advertisement, and infringing upon another's copyright, trade dress, or slogan in an advertisement. USLI denied coverage for three reasons: (1) Diakon's causes of action were rooted in intentional conduct; (2) exclusions for

disclosure of confidential information, knowing violations, and infringement of intellectual property applied; and (3) none of the remaining allegations qualified as "personal or advertising injury."

Aram asked USLI to reconsider its coverage position. It cited deposition testimony from Diakon's president that Aram claimed, "clarified that a major factual allegation of Diakon is that Aram and its officers have taken Diakon's advertising ideas and styles and have used them in Aram's own advertising, including in its Internet websites." Aram argued that the duty to defend under California law extends beyond the specific claims stated in the complaint. And it contended that Diakon's president's deposition testimony, when considered with the allegations in the complaint, showed that Diakon's claims included the improper use of marketing materials and ideas. Aram argued that Diakon could potentially amend its complaint to assert an "advertising injury" offense.

But USLI maintained its position because the alleged injury arose out of the deliberate misuse of Diakon's confidential information, including trade secrets.

Aram then brought a declaratory judgment action in California federal court. The parties each moved for summary judgment. The court ruled for USLI.

Applying California law, the court held that each count in Diakon's complaint involved the intentional and calculated misappropriation of trade secrets or confidential information. And nowhere did the complaint mention misappropriation of advertising materials or infringement upon Diakon's copyright, trade dress, or slogan in an Aram advertisement. The court also noted that a claim for misappropriation of Diakon's advertisements could not be reconciled with the facts or causes of action asserted. An advertisement is necessarily public and not a trade secret.

Nor did it matter that Diakon's president testified at a deposition in the underlying action that Aram and its officers had taken Diakon's advertising ideas and styles and used them in Aram's own advertising. The court noted that testimony differs from allegations supporting a cause of action. California courts routinely restrict the potential for coverage standard to the nature of the lawsuit actually asserted by the third party. Aram's approach misconstrued the principle of "potential liability" under an insurance policy. USLI's duty to defend was not triggered by mere speculation that Diakon might in the future bring claims based on the president's deposition testimony. The insured may not speculate about unpled third-party claims to manufacture coverage.

The court thus ruled that the Diakon action did not create a potential for coverage. And even if it did, it found that the exclusions for disclosure of confidential information, knowing violation of the rights of another, and infringement of intellectual property applied. USLI thus had no duty to defend.

The case is *Aram Logistics v. United States Liab. Ins.,* 23-cv-01869 (S.D. Cal. Jan. 31, 2024).