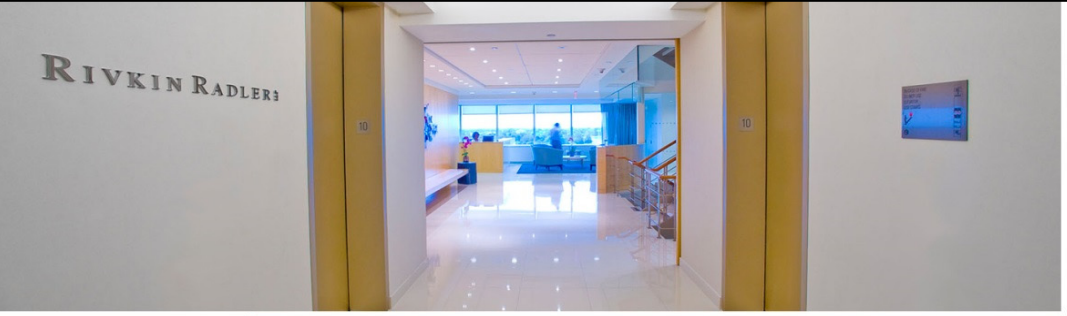

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Minnesota Supreme Court Applies "Your Work" Exclusion and Instructs How to Allocate between Covered and Uncovered Claims in *Miller-Shugart* Agreements

The Minnesota Supreme Court found that the "products-completed operations hazard" coverage in a commercial general liability policy did not cover property damage to the insured's own faulty work where the policy contained an exclusion for property damage arising out of the insured's work. It also rejected a per se rule that invalidates unallocated *Miller-Shugart* settlement agreements involving a single defendant and adopted a flexible approach that allows the district court to consider all relevant facts and circumstances in determining the reasonableness of the settlement and the allocation between covered and uncovered claims.

The Case

The insured, Lambert Commercial Construction LLC, performed renovation work on a marina. Lambert hired Roehl Construction, Inc. to perform concrete work. The marina experienced leaks, cracking of concrete floors, and other defects. The marina sued Lambert for faulty construction. Lambert tendered the claim to its commercial general liability insurer.

The insurer defended under a reservation of rights and then filed a declaratory judgment action seeking to get clear of the duty to defend. While the declaratory judgment action was pending, Lambert settled with the marina, entering into a *Miller-Shugart* agreement (a settlement between a plaintiff and an insured defendant in which the defendant, having been denied coverage for the claim, agrees that the plaintiff may enter judgment against it for a sum collectible

only from the insurance policy). The agreement specified that the settlement related to damages for Lambert's work – roof and siding of the main building at the marina – but not for Roehl's work. The marina reserved the right to pursue claims against Roehl for the concrete work.

The marina then pursued recovery from the insurer. The insurer argued that the marina's claims were not covered, and that in any event, the settlement agreement was unreasonable because it failed to allocate between covered and uncovered claims.

The district court granted partial summary judgment to the marina, finding that there was property damage to the main building caused by an "occurrence." It also found that the *Miller-Shugart* settlement was reasonable.

The court of appeals reversed, finding that the "your work" exclusion applied and that the parties were required to identify covered and noncovered claims in the *Miller-Shugart* agreement.

The marina appealed.

Minnesota Supreme Court's Decision

The Minnesota high court first found that the "your work" exclusion unambiguously applied to that portion of the work that Lambert performed to the roof and siding. The court rejected the marina's argument that coverage was available under the products-completed operations hazard, as the "your work" exclusion expressly eliminated coverage for property damage to an insured's work arising out of it or any part of it and included in the products-completed operations hazard. The Minnesota Supreme Court agreed with the majority of jurisdictions that have found there is no ambiguity between the "your work" exclusion and the products-completed operations hazard. The policy is clear that insureds are not entitled to coverage for their own faulty work.

The court also rejected the marina's argument that the products-completed operations hazard is a distinct category of coverage. Just because it had a separate liability limit, the court noted, does not mean that the products-completed operations hazard operated independently of the exclusions and conditions in the policy. The Minnesota Supreme Court affirmed that portion of the court of appeals' ruling that the property damage to Lambert's own work on the roof and siding was barred by the "your work" exclusion.

The court next addressed whether the *Miller-Shugart* settlement agreement is invalid and unenforceable as a matter of law because the agreement failed to allocate between covered and uncovered claims. While federal courts have addressed the failure to allocate a *Miller-Shugart* agreement in cases involving a single defendant, it was a case of first impression for the Minnesota Supreme Court.

The court held that the *Miller-Shugart* settlement agreement was not per se unreasonable just because it failed to allocate between covered and uncovered claims. The court said that the test for reasonableness is a flexible one, grounded in principles of equity, and that requiring allocation between covered and uncovered claims may unfairly burden the settling parties with predicting how the court in the garnishment action may resolve the coverage issues. Determining the reasonableness of an unallocated *Miller-Shugart* settlement agreement, the court instructed, involves a two-step inquiry.

First, the district court must consider the overall reasonableness of the settlement. This will discourage possible overreaching in *Miller-Shugart* settlement negotiations. The test is what a reasonably prudent person in the position of the defendant would have settled for on the merits.

Second, if the settlement is reasonable, the district court must then consider how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement.

The court noted that both inquiries are multi-factor objective tests that require consideration of any facts that bear on the issues of liability, damages, and the risks of trial. The court recognized that a post-hoc allocation of covered and uncovered claims may sometimes be difficult. But if the parties present sufficient evidence, the court said that the district court has the expertise and authority to make such determination.

The court placed the burden of proof on the marina, as the claimant/judgment creditor. The court noted that this was consistent with the general rule that the party claiming coverage under an insurance policy bears the burden of proof. Also, because the marina negotiated the settlement, it is in a better position to know how the parties valued the claim and was able to shape the record on that issue, knowing that allocation would become a crucial issue.

The court remanded the case to the court of appeals to resolve the allocation and any remaining issues.

The case is *King's Cove Marina, LLC v. Lambert Commercial Constr. LLC,* No. A19-0078 (Minn. Apr. 14, 2021).

Seventh Circuit Finds TCPA Policy Exclusion Bars Coverage For Common Law Claims Arising Out of Similar Facts

The Seventh Circuit, applying Illinois law, found that an exclusion for Telephone Consumer Protection Act (TCPA) claims applied to common law claims arising out of a class action for unsolicited fax advertisements.

The Case

Mesa Laboratories, Inc. was sued for sending unsolicited fax advertisements and common-law conversion, nuisance, and trespass to chattels for appropriation of the recipients' fax equipment, paper, ink, and toner. Mesa sought coverage from its insurer, Federal Insurance Company. Federal denied coverage based on a policy exclusion barring coverage for any claims "arising out of" out of the TCPA.

Mesa filed a lawsuit in federal court against Federal, alleging breach of contract, bad faith, and improper delay and denial of claims. Federal moved for judgment on the pleadings. The district court granted Federal's motion. Mesa appealed, arguing that the exclusion did not apply to the common law claims against it.

The Decision

The Seventh Circuit affirmed. The court held that the common-law claims of conversion, nuisance, and trespass to chattels arose out of the same underlying conduct as the statutory claims, the sending of unsolicited faxes. The court noted that the "arising out of" phrase presented a "but for" inquiry, that is, if the plaintiff would not have been injured but for the conduct that violated an enumerated law, then the exclusion applied to all claims flowing from that underlying conduct regardless of the legal theory used. In the court's view, none of the underlying claimant's injuries would have occurred but for Mesa's sending unsolicited fax advertisements, so the exclusion applied to all of Mesa's claims.

For this reason, the Seventh Court affirmed the district court's order granting Federal judgment on the pleadings.

The case is *Mesa Labs., Inc. v. Fed. Ins. Co.*, No. 20-1983 (7th Cir. Apr. 21, 2021).

Kentucky Appeals Court Applies Fortuity Doctrine, Finds Insurer Had No Duty to Defend or Indemnify Fraudulent Lease Claim

In an unpublished opinion, the Kentucky Court of Appeals reaffirmed a principle inherent in every liability insurance policy – that a policy insuring against accidents applies only to fortuitous losses.

The Case

The Atchers leased farm property to James Blakeley, who signed the lease on behalf of a partnership. The Atchers later contended that the partnership fraudulently induced the Atchers to execute the lease, and then intentionally failed to farm the property in a workmanlike manner. The Atchers contended that the purpose of the partnership's scheme was to defraud crop insurers.

The Atchers sued the partnership for unpaid rents, diminution in property value, and the costs of restoring the property to its original condition.

The partnership was insured under a farm liability insurance policy, which applied only to damages the insured became obligated to pay because of bodily injury or property damage caused by an "occurrence." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions."

The partnership filed a declaratory judgment action against its insurer seeking a determination that its insurer owed it a defense in the Atcher suit. The insurer moved for summary judgment. The trial court granted the insurer's motion on the basis that because the Atchers alleged that the partnership engaged in intentional harm, the claim did not involve an accident. The partnership appealed.

The Appellate Court's Decision

The Kentucky Court of Appeals affirmed the trial court's ruling, holding that policy language insuring against accidents applies only if the insured did not intend the result.

It based its decision on the fortuity doctrine inherent in all liability insurance policies. In assessing fortuity, the court must consider: (1) whether the insured intended the event to occur; and (2) whether the event was a chance event beyond the control of the insured.

The Atchers claimed that the partnership intentionally farmed the properties in a non-workmanlike and injurious manner. The court found that under the intent prong of the fortuity analysis, the alleged intentional harm could not constitute an accident.

And even if the partnership were negligent, as the Atchers alleged in the alternative, the court found that any such negligence would not qualify as an accident under the control prong of the fortuity analysis because the event was within the control of the partnership and did not happen by chance.

The case is *Blakeley v. Consolidated Ins. Co.,* No. 2020-CA-0018-MR (Ky. Ct. App., April 9, 2021).

Federal Court in Colorado Finds No Coverage for False Advertising Claim Involving Hawaiian Coffee

A federal court in Colorado found a commercial liability policy's "personal and advertising injury" provision did not cover claims alleging that the policyholder falsely suggested that its coffee derived from Kona coffee farms in Hawaii.

The Case

In 2019, two putative class action complaints were filed against coffee distributors, wholesalers, and retailers for damages and other relief arising out of the use of the name "Kona." The first was by coffee farmers who grow authentic Kona coffee in the Kona District of the Big Island of Hawaii. The second was on behalf of consumers of coffee products labeled as "Kona."

One of the defendants was, BCC Assets, LLC d/b/a Boyer's Coffee Company, Inc. The suit alleged that only coffee grown on farms located within the Kona District can be truthfully marketed, labeled, and sold as Kona coffee. Boyer's was one of several manufacturers and sellers of Kona coffee named as defendants in the Kona class actions.

Boyer's tendered the claim to its insurer. The policies provided coverage for advertising injury, other than personal injury, that disparages a person's or organization's goods, products or services or infringed on a "slogan."

The insurer filed an action in federal court in Colorado seeking a declaration that it had no obligation under its policies to defend or indemnify Boyer's in the underlying actions. The parties cross-moved for summary judgment. The insurer argued that the class actions did not allege the elements of disparagement because there were no derogatory statements or misrepresentations about the Kona plaintiffs or their products. The insurer also asserted that Boyer's use of the term "Kona" did not disparage farmers that grow, or consumers that purchased, "Kona" coffee. Nor did it make derogatory comparisons of any kind or infringe on any Kona farmer "slogans."

The Decision

The court granted the insurer's motion. The court stated that "[a] review of the elements of a claim for disparagement and the Policies' language shows this claim requires the

disparagement to be directed at Kona farmers' goods or products." But, the court observed, Boyer's publication of "Kona" coffee did not disparage Kona farmers or Kona consumers.

The court also held that the claim did not fall within the policy's coverage for infringement of "slogans." The court stated that the underlying complaints did not allege that Boyers used the word "Kona" as a slogan. Rather, the Kona farmers sought to protect the use of "Kona" as the source identifier – the Kona District – of their coffee.

For these reasons, the court granted the insurer's motion for summary judgment.

The case is *Travelers Indem. Co. of Am. v. Luna Gourmet Coffee & Tea Co. LLC*, No. 19-CV-02039 (D. Colo. Apr. 7, 2021).

Federal Court in Georgia Rules That Pollution Exclusion Bars Coverage for Dust Claim

A federal court in Georgia held that a total pollution exclusion barred coverage for a bodily injury claim against a construction company arising out of a dust release.

The Case

In 2013, Joel Edgar Love Jr., an individual with end-stage emphysema, suffered breathing problems and was hospitalized after construction work outside his apartment produced clouds of dust that accumulated in his unit. The construction work allegedly continued even after Love complained to the workers about the dust and its effect on his health. Love then sued the building owner, the contractor, and later the construction company, in state court.

The construction company was insured by Defendant FCCI Insurance Company ("FCCI"), but FCCI denied coverage based on the policy's "Total Pollution Exclusion." Love passed away before

the state court suit concluded; however, his estate continued the suit which ultimately settled. As a part of the settlement, the estate was assigned the construction company's insurance rights.

The estate's administrator then sued FCCI for the proceeds of the insurance policy and for breach of contract for failure to defend and indemnify. FCCI moved for summary judgment based on the policy's total pollution exclusion. The estate argued that the total pollution exclusion was ambiguous, that its application violated public policy, and that there was a question of fact as to the "but for" causation element outlined in the exclusion.

The Decision

The court granted FCCI's motion. Applying Georgia law, the court held that a layman reading the policy would conclude that the pollution exclusion applied to dust. The court noted that a cloud of dust, even absent toxicity or other impurities, is a substance that was an "irritant" and a "contaminant" to Love and his respiratory system.

The court also rejected the estate's public policy argument. The court noted that dust is inescapably and unambiguously a "pollutant," *i.e.*, an "irritant or contaminant" under the circumstances where plaintiff has alleged that the dust, whether due to its accumulation or otherwise, had caused Love's medical problems.

Lastly, the court rejected the estate's argument that the dust release was not a "but for" cause of Love's injuries because the injuries were caused by negligent construction work. The court reasoned that the alleged negligence would not have produced the resulting breathing problems and hospital stay in the absence of the release of the dust, and, therefore, "Love's injury without question flows from the release of the dust and its effect on his lungs." On this basis, the court concluded that there was no question of fact on causation precluding summary judgment.

The case is *Lang v. Fcci Ins. Co*., 19-cv-3902-AT (N.D. Ga. Mar. 30, 2021).

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