Simpson Thacher

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The Eighth Circuit dismissed a malpractice suit brought by a tort victim against insurer-appointed counsel, ruling that the assignment of such claims was prohibited by South Dakota law. *Thompson v. Harrie*, 2023 U.S. App. LEXIS 2753 (8th Cir. Feb. 3, 2023). (Click here for full article)

Wisconsin Supreme Court Rules That Reckless Homicide Conviction Does Not Eliminate Possibility Of "Accident" For Insurance Coverage Purposes

The Wisconsin Supreme Court ruled that a reckless homicide conviction, which entails the actor's awareness of a risk of harm, does not necessarily preclude a finding of an "accident" for insurance coverage purposes. *Dostal v. Strand*, 2023 Wisc. LEXIS 7 (Wis. Jan. 26, 2023). (Click here for full article)

Illinois Court Rules That Filed-Rate Doctrine Does Not Preclude Excessive Premium Claims During Pandemic

HOLDING

An Illinois district court declined to dismiss claims alleging that an insurer charged excessive premiums during the COVID-19 pandemic, ruling that the filed-rate doctrine did not apply. *Thomas v. GEICO Cas. Co.*, 2023 U.S. Dist. LEXIS 19332 (N.D. Ill. Feb. 6, 2023).

BACKGROUND

In response to reduced rates of driving during the COVID-19 pandemic, GEICO implemented a "giveback" program that applied a 15% premium reduction on automobile policies. Plaintiffs alleged that this reduction was insufficient in comparison to the reduction in policyholders' risk profiles and therefore violated the Illinois Consumer Fraud and Deceptive Business Practices Act. GEICO moved to dismiss the suit based on the filed-rate doctrine, which prohibits courts from invalidating a rate that has been filed with a regulatory agency.

DECISION

Declining to apply the filed-rate doctrine, the court noted that the Illinois Department of Insurance only publishes filed rates and has no authority to set or approve automobile insurance rates. The court deemed this fact outcome determinative, rejecting GEICO's assertion that the mere filing of a rate with a state agency is sufficient to implicate the filed-rate doctrine. While the Illinois Supreme Court has not addressed this issue, an intermediate state appellate court had also concluded that the doctrine does not apply where a rate is filed, but is not subject to regulatory approval. The court distinguished a Seventh Circuit decision that applied the filed-rate doctrine to claims against a public utility, explaining that it involved application of federal law rather than state law, and that the regulatory agency in that case (the Illinois Commerce Commission) had different authority and responsibility than the Illinois Department of Insurance.

IMPLICATIONS

Last year, the Second Circuit dismissed identical claims against GEICO, ruling that the file-rate doctrine squarely applied because the premiums were approved by the New York Department of Financial Services. (*See* June 2022 Alert). In other contexts, courts have applied the filed-rate doctrine broadly to bar statutory and common law claims against both insurers and intermediaries. (*See* March 2022 Alert, November, October and January 2021 Alerts and September 2020 Alert). The *Thomas* decision sets a limit on the scope of this doctrine, at least under Illinois law, for claims based on rates that are merely published by a regulatory agency, but not subject to any review or approval by that agency. However, the court acknowledged that other courts have held that filing alone is sufficient to implicate the filed-rate doctrine.

Emphasizing Key Distinction Between Defense And Indemnity Obligations, Second Circuit Clarifies Jurisdictional Standard For Declaratory Judgment Actions

HOLDING

The Second Circuit ruled that a New York district court properly concluded that it lacked jurisdiction to rule on a declaratory judgment action regarding an insurer's duty to indemnify for lack of a justiciable case or controversy, but remanded the case so that the district court could determine whether it had jurisdiction to address whether the insurer owed a duty to defend. *Admiral Ins. Co. v. Niagara Transformer Corp.*, 2023 U.S. App. LEXIS 297 (2d Cir. Jan. 6, 2023).

BACKGROUND

Niagara purchased PCB chemicals from Monsanto for use in its manufacture of transformers. The purchase agreement provided that Niagara would defend and indemnify Monsanto against any claims arising out of the PCBs. When Monsanto was named as a defendant in suits across the country, it demanded defense and indemnity from Niagara. Although Niagara denied liability, Monsanto did not commence formal litigation against Niagara. Thereafter, Niagara notified Admiral, its insurer, of Monsanto's demands, seeking defense and indemnity in connection with any claims made by Monsanto. Admiral denied coverage and filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify. The district court granted Niagara's motion to dismiss on justiciability grounds, ruling that there was no "case or controversy" under the Declaratory Judgment Act because there was no "practical likelihood" that Niagara would incur liability. In so ruling, the district court emphasized that Monsanto had not sued Niagara or explicitly threatened to sue and that questions existed as to the enforceability of the indemnification agreement.

DECISION

The Second Circuit affirmed the district court's ruling that it lacked jurisdiction to issue a declaratory judgment as to Admiral's duty to indemnify Niagara. The court explained that because the duty to indemnify is triggered by a determination of liability; the absence of any real or threatened litigation against Niagara, in conjunction with the uncertainty as to the validity and scope of the indemnification agreement, meant there was no "practical likelihood" of a case or controversy as to Niagara's duty to indemnify Monsanto.

However, the court remanded the matter with respect to a declaration as to Admiral's duty to defend. The court explained that "the district court's jurisdiction to declare Admiral's duty to defend Niagara properly turns on the question of whether there exists a 'practical likelihood' that Monsanto *will file suit*." (emphasis in original). Further, the court noted that a third-party action against an insured is a sufficient, but not necessary, condition for jurisdiction over a Declaratory Judgment Act suit based on the duty to defend.

Importantly, the court emphasized that even if the district court concludes that it has jurisdiction to declare Admiral's duty to defend Niagara, it may nevertheless decline to exercise such jurisdiction.

IMPLICATIONS

This decision not only highlights the important distinction between an insurer's defense and indemnity obligations in the context of the justiciability analysis, but also clarifies the "considerable confusion" among district courts as to the scope of discretion in declining to exercise jurisdiction in such cases, even where jurisdiction is deemed to exist. In particular, the court reiterated the "broad discretion" of district courts to decline jurisdiction based on six enumerated considerations, at the same time noting that discretion in this context is not "unfettered."

Placement Of Barriers And Mementos At Site Of George Floyd Incident Does Not Give Rise To Business Interruption Or Civil Authority Coverage For Property Owner, Says Minnesota Court

HOLDING

A Minnesota district court dismissed a suit seeking business interruption and civil authority coverage under a property insurance policy, finding that the placement of cement barriers and mementos during periods of civil unrest did not constitute physical loss or damage to property or a prohibition on access to property. *Cup Foods Inc. v. Travelers Cas. Ins. Co. of Am.*, 2023 U.S. Dist. LEXIS 10711 (D. Minn. Jan. 23, 2023).

BACKGROUND

Following the killing of George Floyd in front of the policyholder's store, the City of Minneapolis placed cement barriers on nearby street corners. In addition, citizens placed mementos and other structures at those intersections. The policyholder sought coverage under its property policy's business interruption and civil authority provisions and thereafter sued Travelers for breach of contract.

DECISION

The court granted Travelers' motion to dismiss. The court ruled business interruption coverage was unavailable based on the absence of allegations of physical loss or damage to property. The court noted that while the objects "occupied physical space," there was no physical alteration to property because the objects could have been moved. As such, the court distinguished cases involving contamination by pesticides or asbestos fibers, explaining that those scenarios presented a physical alteration or contamination of property by a harmful substance.

Additionally, the court held that the policyholder's claim for civil authority coverage failed because there was no prohibition on access to property. The court explained that while the barriers might have restricted or hampered access to the policyholder's store, they did not altogether prohibit access. In so ruling, the court emphasized that customers were able to enter the intersections through gates or via sidewalks.

IMPLICATIONS

The wave of pandemic-related coverage litigation has shed light on the allegations necessary to substantiate business interruption and civil authority coverage claims. The *Cup Foods* decision applies those same well established principles to scenarios involving an alleged loss in revenue related to civil unrest or protest. With respect to civil authority coverage claims, this decision aligns with those issued in the wake of the September 11 terrorist attack. *See 730 Bienville Partners Ltd. v. Assurance Co. of Am.*, 67 F. App'x 248 (5th Cir. 2003) (FAA closure of airports after September 11 terrorist attacks did not "prohibit access" to policyholder's hotels even though they significantly reduced hotel capacity); *54th St. Ltd. Partners LP v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67 (N.Y. App. Div. 1st Dep't 2003) (diversion of traffic that adversely affected policyholder's restaurant was not a denial of access for purposes of civil authority coverage).

Eighth Circuit Predicts That South Dakota Supreme Court Would Prohibit Assignment Of Legal Malpractice Claims Against Insurer-Appointed Counsel

HOLDING

The Eighth Circuit dismissed a malpractice suit brought by a tort victim against insurer-appointed counsel, ruling that the assignment of such claims was prohibited by South Dakota law. *Thompson v. Harrie*, 2023 U.S. App. LEXIS 2753 (8th Cir. Feb. 3, 2023).

BACKGROUND

An automobile accident resulted in the death of Thompson. When his estate sued the other driver involved, the driver's automobile insurer appointed counsel to defend the action. The action resulted in a default judgment against the driver, based upon counsel's failure to file an answer and his inability to practice law in South Dakota. Following the entry of judgment against the driver, Thompson's estate and the driver entered into an agreement in which all of the driver's claims against its insurer and the law firm were assigned to Thompson's estate. Following the assignment, Thompson's estate brought suit and the law firm moved to dismiss. A South Dakota district court granted the motion.

DECISION

The Eighth Circuit affirmed the dismissal, predicting that the South Dakota Supreme Court would not allow the assignment of legal malpractice claims. The court cited the "strict privity rule" for legal malpractice claims and noted the prohibition on assignment of personal injury claims. The court expressly distinguished cases involving assigned claims against an insurance agent, emphasizing the heightened levels of confidence and trust implicated in the attorney-client relationship.

IMPLICATIONS

The decision sets a bright line rule prohibiting the assignment of legal malpractice claims under South Dakota law, as the court expressly rejected a "case-by-case approach" to decide the validity of such assignments. As the Eighth Circuit noted, the highest courts in several states have prohibited the assignment of legal malpractice claims. *See* October 2022 and September 2015 Alerts.

Wisconsin Supreme Court Rules That Reckless Homicide Conviction Does Not Eliminate Possibility Of "Accident" For Insurance Coverage Purposes

HOLDING

The Wisconsin Supreme Court ruled that a reckless homicide conviction, which entails the actor's awareness of a risk of harm, does not necessarily preclude a finding of an "accident" for insurance coverage purposes. *Dostal v. Strand*, 2023 Wisc. LEXIS 7 (Wis. Jan. 26, 2023).

BACKGROUND

Strand was convicted of reckless homicide following the death of his infant daughter. Thereafter, the infant's mother brought a negligence and wrongful death action against Strand. Stand tendered the suit to State Farm, which denied coverage. State Farm argued that the reckless homicide conviction, which required a finding that "Strand created an unreasonable and substantial risk of death or great bodily harm and that he was aware of that risk," precluded a finding that the events gave rise to a covered accident. Alternatively, State Farm argued that coverage was barred by an intentional acts exclusion. The trial court granted State Farm's summary judgment motion and the intermediate appellate court affirmed.

DECISION

The Wisconsin Supreme Court reversed. Addressing this matter of first impression under Wisconsin law, the court held that the criminal conviction did not have preclusive effect as to the coverage question. The court emphasized that the focus in the accident inquiry for insurance coverage purposes is not whether the actor intended his actions, but whether he intended the results. The court stated: "A person may engage in behavior that involves a calculated risk *without expecting*—no less reasonably—that an accident will occur. Such behavior, which may be reckless for criminal responsibility purposes, does not necessarily mean that the actor reasonably expected the accident to result." (emphasis in original).

Further, the court noted that the jury addressed only the issue of criminal guilt and did not make a determination as to what factual events actually occurred. Based on the disputed versions of facts in the criminal case, the jury's conviction could have been based on a series of discrete events, some of which may be deemed accidental, the court explained.

Finally, the court ruled that issues of fact existed as to whether the intentional acts exclusion applied. The exclusion barred coverage for bodily injury that is either expected or intended by the insured. The court acknowledged that while intent may be inferred where the conduct is intentional and "substantially certain to cause injury," it declined to "infer intent to injure as a matter of law merely because the insured's intentional act violated the criminal law." Because intent is not a requisite element of reckless homicide, the court concluded that the conviction does not preclude a finding that Strand's conduct was an accident under the insurance policy.

IMPLICATIONS

Courts across jurisdictions employ different standards in evaluating whether conduct is "accidental" under a governing policy and under what circumstances an intent to injure may be inferred. While the decision in *Strand* turns primarily on the specific facts presented, including the absence of a special verdict in the criminal case and the nature of the criminal charges, the decision illustrates the parameters of issue preclusion for matters relating to insurance coverage.

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