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The Arkansas Court of Appeals affirmed a trial court's partial summary judgment ruling that a primary insurer owed Walmart a duty to defend certain lawsuits brought by governments and other entities seeking monetary payments for alleged budgetary costs due to the opioid epidemic. The court held that the underlying complaints potentially allege an "accident" and seek damages "because of 'bodily injury.'" The court also affirmed the denial of a quota-share insurer's motion to compel arbitration. *Ace Am. Ins. Co. v. Walmart, Inc.*, 2026 Ark. App. 476, 2026 Ark. App. LEXIS 521 (Ark. Ct. App. Oct. 7, 2026). (Click here for full article)

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Alabama Supreme Court Holds Professional Services Exclusion Bars Pharmacy Product Liability Claims And Insured's Failure To Read Policy Defeats Negligent Procurement Claim

HOLDING

The Alabama Supreme Court affirmed judgment for a general liability insurer, holding that a professional services exclusion barred coverage for claims alleging bodily injury arising out of a pharmacy's error in compounding medication, including claims pleaded under product liability theories. The court also held that the insured's failure to read policy exclusions constituted contributory negligence as a matter of law, defeating its negligent-failure-to-procure claim against its insurance agent. *OMS Pharm., Inc. v. Nationwide Prop. & Cas. Ins. Co.*, 2026 Ala. LEXIS 88 (Ala. Oct. 9, 2026).

BACKGROUND

This coverage dispute arose from a $4.75 million consent judgment against OMS Pharmacy, Inc. in favor of a customer injured after receiving improperly compounded prescription medication. The customer had sued OMS and its pharmacist owner for negligence, wantonness, product liability, liability under the Alabama "extended manufacturer's liability" doctrine, breach of warranty, and failure to warn.

OMS's general liability insurer, Nationwide Property and Casualty Insurance Company, declined to defend based on a professional services exclusion barring coverage for bodily injury "that arises out of or is a result of the rendering of, or failure to render, any professional service, treatment, advice or instruction," expressly including "service . . . in the practice of pharmacy."

OMS sued Nationwide for breach of contract and bad faith, and also asserted claims against its insurance agent for negligent and wanton failure to procure appropriate coverage. OMS alleged that the agent had been instructed to obtain coverage comparable to its prior Zurich policy, which, unlike the Nationwide policy, contained an exception to its professional services exclusion for certain pharmacological services. The injured customer intervened, seeking payment of the judgment by Nationwide. The trial court granted summary judgment to Nationwide and the agent.

DECISION

The Alabama Supreme Court affirmed.

First, the court held that the professional services exclusion unambiguously barred coverage for all claims arising from the compounding error. Although the policy does not define "professional services," the exclusion expressly excludes coverage for bodily injury arising out of "service . . . in the practice of pharmacy." The court rejected the argument that the error was merely a pharmacy technician's clerical mistake in entering a formula into a computer rather than a "professional service," observing that a pharmacist has a professional responsibility to ensure that

medication is correctly compounded and that compounding requires specialized professional skill and is subject to statutory regulation.

The court also rejected the contention that the professional services exclusion did not apply to the product liability claims because those claims concerned the sale of a defective product rather than performance of a professional service. Distinguishing decisions involving the sale or distribution of off-the-shelf products, the court emphasized that OMS had compounded the medication specifically to fill the customer's prescription. Moreover, the court found that the exclusion's "arises out of" language is broad and unambiguous, encompassing all claims for bodily injury arising from the rendering of a professional service, "regardless of the claimant's theory of recovery." Because all of the customer's claims originated in OMS's compounding error, the exclusion applied to each of them.

Second, the court held that OMS's negligent procurement claim against its insurance agent was barred by contributory negligence. Although OMS had requested that the agent procure coverage comparable to its prior Zurich policy that provided coverage for certain pharmacological services, OMS's owner acknowledged that he received the Nationwide policy but never read the exclusions. The court reasoned that reviewing the policy would have revealed that services in the practice of pharmacy are expressly excluded, putting OMS on notice that the replacement policy did not afford the same coverage as the Zurich policy. The court concluded that OMS's failure to review the Nationwide policy constituted contributory negligence as a matter of law.

COMMENTS

The decision illustrates the potentially broad reach under Alabama law of exclusions applying to injuries "arising out of" specified conduct. Such language may encompass claims based on different theories of liability where the underlying injury arises from the excluded conduct. Here, the court held that a professional services exclusion barred all claims arising from a pharmacy's compounding error, including product liability claims, regardless of whether those claims independently required proof of professional negligence. The court nevertheless distinguished claims involving the sale or distribution of off-the-shelf commercial products from those arising out of the rendering of professional services.



The decision also underscores the consequences of an insured's failure to review its policy, which the Alabama Supreme Court held defeated a negligent procurement claim as a matter of law, despite the insured purportedly having specifically requested coverage that the agent did not obtain. The ruling thus enforced the policy's written terms rather than the insured's expectations concerning the coverage it had instructed its agent to procure.

New York Appellate Division Holds That NFL Concussion Claims Are Separate "Occurrences," Precluding Excess Coverage

HOLDING

The New York Appellate Division held that each claim brought by or on behalf of a former NFL player alleging concussion-related injuries constituted "at least one separate occurrence," implicating coverage under a primary policy but not a fifth-layer excess policy. The court also held that the products-completed operations hazard aggregate limit did not apply because NFL football was not a "product." Accordingly, the excess insurer had no duty to indemnify the NFL for its concussion settlement. *Discover Prop. & Cas. Co. v. NFL*, 2026 NY Slip Op 05595, 2026 N.Y. App. Div. LEXIS 5815 (N.Y. App. Div. 1st Dep't Oct. 1, 2026).

BACKGROUND

This coverage dispute arose following the NFL's settlement of multidistrict litigation concerning concussion-related personal injury claims brought by former professional football players. The settlement created an uncapped fund to compensate players with qualifying neurodegenerative diagnoses, with maximum individual awards of $1.5 million to $5 million.

TIG Insurance Company issued the NFL primary general liability policies from 1978 through 2002, along with umbrella and excess policies, and American Guarantee and Liability Insurance Company ("AGLIC") issued an excess policy for 2001–2002. The AGLIC excess policy attaches above $51 million per occurrence and follows form to the underlying TIG primary policy. The TIG policies define "occurrence" as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." Certain TIG policies issued between 1984 and 1989 also contain "grouping" language stating that all bodily injury "arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."

The 2001–2002 TIG primary policy contains a products-completed operations hazard ("PCOH") aggregate limit. It also includes a Participants Endorsement providing coverage for bodily injury to players that is not subject to the PCOH aggregate limit.



AGLIC, the excess carrier, moved for summary judgment, arguing that each player's injury constituted a separate occurrence and that no occurrence reached $51 million. AGLIC also argued that the PCOH aggregate limit in the underlying TIG policy did not apply because NFL football was not a covered "product." This issue was significant because application of the aggregate limit could permit exhaustion of the underlying policies even if the claims were deemed to constitute multiple occurrences, which could potentially trigger AGLIC's excess coverage.

By contrast, TIG, the primary carrier, argued that all the players' injuries constituted a single occurrence arising from the NFL's concealment and misrepresentation of the risks of playing football.

The trial court concluded that the injuries arose from multiple occurrences and that NFL football constituted a "product," but denied AGLIC's motion, declining to resolve whether the PCOH aggregate limit applied.

DECISION

The Appellate Division ruled that AGLIC was entitled to summary judgment, holding that each player's claim constituted "at least one separate occurrence" and the PCOH aggregate limit did not apply. Accordingly, the court concluded that TIG's underlying policies could not be exhausted, and AGLIC had no duty to indemnify the settlement.

In determining the number of occurrences, the court applied the "unfortunate event" test established by the New York Court of Appeals in *Appalachian Ins. Co. v. Gen. Elec. Co.*, 8 N.Y.3d 162 (2007). The court explained that the analysis begins by looking to the policy's definition of "occurrence" for the "suggestion of an intent to group claims." Where the policy language does not resolve the question, the analysis turns to whether the "incidents giving rise to injury or loss" have a "close temporal and spatial relationship" and are "part of the same causal continuum, without intervening agents or factors." Here, the court concluded that the operative incidents were the players' head impacts, which occurred over decades, during approximately 10,000 games involving more than 20,000 players at approximately 90 stadiums. The court found that the impacts lacked the necessary temporal, spatial, and causal connection to constitute a single occurrence. It therefore rejected TIG's argument that the NFL's alleged concealment of the risks of head injuries in football constituted a single occurrence, emphasizing that "the cause should not be conflated with the incident" giving rise to injury.



The court also ruled that the PCOH aggregate limit under the 2001–2002 TIG primary policy did not apply. It held that claims for bodily injury to players were covered by the Participants Endorsement, which was not subject to the PCOH aggregate limit. The court further held that NFL football did not constitute a "product" under the policy's definition, which requires tangible goods or products. Accordingly, the PCOH aggregate limit did not provide a basis for exhausting the underlying TIG policies and reaching AGLIC's $51 million attachment point.

Separately, the court rejected TIG's reliance on the grouping language in its 1984–1989 policies, which states that "all bodily injury . . . arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The court reasoned that there was "nothing to suggest that the head impacts constitute exposure to the same general conditions," as they involved different players, stadiums, times, and circumstances.

The court also addressed several other issues. It rejected TIG's argument that the injuries were not accidental because head impacts are inherent in football, distinguishing the impacts from the resulting neurodegenerative diseases. The court also found that TIG had failed to establish that the players did not suffer any neurodegenerative injuries during the relevant policy periods.

COMMENTS

With respect to the "number of occurrences," this decision underscores the focus that New York's "unfortunate event" test places on the "incidents giving rise to injury." Here, the court found that arguments that there was a single common cause of all the injuries—*i.e.*, the NFL's alleged concealment of concussion risks—and the policies' continuous-or-repeated-exposure provisions did not justify a single-occurrence ruling. Instead, the court focused on the fact that the alleged incidents of head impacts took place at many different times and places to conclude that there were multiple occurrences. The number-of-occurrences inquiry is fact-intensive and warrants careful attention to the specific circumstances presented by each case.



Colorado Supreme Court Holds That Primary Insurer's Insolvency Does Not Trigger Umbrella Carrier's "Drop Down" Defense And Indemnity Obligations

HOLDING

Answering a certified question, the Colorado Supreme Court held that an umbrella/excess insurer was not required to "step into the shoes" of an insolvent primary insurer and provide first-dollar defense and indemnity coverage. The court concluded that the umbrella/excess policies' "drop down" provision, which refers to occurrences "not covered" by the underlying insurance, addresses the scope of coverage, not whether payment can be collected from the primary insurer. *A.R. Wilfley & Sons, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2026 CO 64, 2026 Colo. LEXIS 850 (Colo. Sept. 21, 2026).

BACKGROUND

A.R. Wilfley & Sons, Inc., a manufacturer of industrial pumps, has faced asbestos litigation since the 1980s. Wilfley maintained primary general liability policies with Great Northern Insurance Company, whose limits had been exhausted, and Reliance Insurance Company, which became insolvent. Federal Insurance Company issued Wilfley at least three policies providing umbrella and excess liability coverage above the primary insurance. The Reliance policies are expressly listed in the Federal policies' schedules of underlying insurance.

The Federal umbrella/excess policies provide that Federal will defend any occurrence "not covered by the underlying policies listed in the schedule of underlying insurance, or any other underlying insurance collectible by the insured, but covered by the terms and conditions of this policy." The Federal policies also require Wilfley to maintain the scheduled underlying insurance in full effect and provide that Federal's obligations remain unchanged if Wilfley fails to do so.

After exhausting the Great Northern primary policies' limits, Wilfley tendered the underlying actions to Federal under its umbrella/excess policies. Federal initially defended under a reservation of rights and later denied coverage. Wilfley filed suit against Federal, contending that, because the primary insurer's coverage was uncollectible due to its insolvency, the underlying actions were "not covered" by the primary insurance and so Federal was obligated to drop down to provide first-dollar defense and indemnity coverage. Citing the unsettled state of Colorado law, the federal district court certified the issue to the Colorado Supreme Court, which considered "whether the primary insurer's insolvency places a covered occurrence in the 'not covered' category, thereby requiring the umbrella/excess carrier to drop down and provide first-dollar indemnity and defense costs to the insured."

DECISION

The Colorado Supreme Court held that the Federal umbrella/excess policies unambiguously do not require Federal to drop down into the shoes of an insolvent primary insurer. The court explained that the primary insurer's inability to pay did not transform an otherwise covered occurrence into one that is "not covered" by the primary policy.

The court based its conclusion on the distinction the Federal policies draw between "covered" and "collectible." It observed that three provisions—the defense provision, the underlying limit provision, and the other insurance condition—make collectibility relevant only to insurance issued by *unscheduled* underlying insurers. By contrast, the Federal policies use "covered" to describe occurrences within the scope of the *scheduled* underlying insurance—including the primary policies issued by the now-insolvent Reliance. Reading "not covered" to encompass otherwise covered claims for which payment is uncollectible, the court reasoned, would render the umbrella/excess policies' references to collectibility in other provisions meaningless and erase the distinction the policies draw between scheduled and unscheduled insurers.

The court also relied on the maintenance-of-underlying-insurance condition, which requires Wilfley to maintain its scheduled primary insurance and provides that Federal's umbrella/excess obligations remain the same if Wilfley fails to do so. The court explained that Wilfley's interpretation would fundamentally alter the parties' agreed allocation of risk by effectively making Federal a guarantor of the solvency of Wilfley's primary insurers—a risk Federal neither agreed to assume nor charged a premium to cover.

COMMENTS

The court observed that it was "beating a drum many others have beat before," citing similar rulings from the Fifth, Tenth, and Eleventh Circuits. The decision reinforces the distinction between the existence of coverage and its collectibility. It also underscores the importance of closely reading the particular policy language to evaluate the parties' agreed allocation of insolvency risk.



Eighth Circuit Holds Pollution Exclusion Bars Coverage For Well Explosion Injuries, Rejecting Waiver And Prejudice Arguments

HOLDING

The Eighth Circuit, applying North Dakota law, reversed a $25 million judgment against an umbrella insurer, holding that the policy's pollution exclusion barred coverage for bodily injury claims arising from an oil and gas well explosion. The court held that the insured's failure to satisfy the written-notice condition of an exception to the exclusion precluded coverage, even though the insurer had not specifically objected to the untimely notice or demonstrated prejudice. *XTO Energy, Inc. v. Commerce & Indus. Ins. Co.*, 2026 U.S. App. LEXIS 27406 (8th Cir. Sept. 3, 2026).

BACKGROUND

This coverage dispute arose from an explosion at a North Dakota oil and gas well owned by XTO Energy, Inc. XTO retained Missouri Basin to perform services at the well under a contract requiring Missouri Basin to maintain liability insurance supporting its indemnity obligations. Missouri Basin obtained primary and umbrella policies from Berkley National Insurance and a $25 million second-layer umbrella policy from Commerce and Industry Insurance Company.

Following an explosion at the well, injured workers sued XTO and Missouri Basin. XTO defended and indemnified Missouri Basin pursuant to the parties' contract and subsequently sought coverage from Commerce for amounts paid to the injured workers.

The Commerce policy's pollution exclusion contains what the parties referred to as a "time element" exception that restores coverage if five conditions are satisfied, including that the release is reported in writing to Commerce within 21 calendar days after becoming known to the insured.

Commerce denied coverage based on the pollution exclusion and commenced a declaratory judgment action in federal district court. Although XTO conceded that it had not provided written notice within the prescribed 21-day period, the district court held that the time element exception restored coverage because Commerce had waived its untimely notice defense by failing to raise it in its denial letter. The court relied on North Dakota Century Code ("N.D.C.C.") § 26.1-32-09, which provides that delay in giving notice "is waived . . . if the insurer fails to make a prompt and specific objection." The court also held that Commerce could not rely on untimely notice as a defense without demonstrating prejudice under an earlier North Dakota Supreme Court decision, *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392 (N.D. 1981).

DECISION

The Eighth Circuit reversed, holding that the pollution exclusion barred coverage and that XTO's failure to satisfy the notice condition prevented the time element exception from applying.

The principal issue on appeal was whether the exception restored coverage notwithstanding XTO's admitted failure to provide notice within 21 days as required. The court distinguished between a late-notice defense, which Commerce had not raised, and the disputed issue in this case, which was a policy exclusion containing an exception that restored coverage if the policyholder provided timely notice and certain other conditions were satisfied. The court reasoned that, although N.D.C.C. § 26.1-32-09 requires an insurer to object promptly and specifically to a policyholder's untimely notice, it does not preclude an insurer from denying coverage on a "substantively different" ground—here, a pollution exclusion. The court rejected XTO's attempt to characterize the exclusion as a late-notice defense merely because the exception to the pollution exclusion contained a 21-day notice requirement.

The court explained that the distinction was reflected in the applicable burdens of proof. Although an insurer bears the burden of establishing that an exclusion applies, the insured bears the burden of establishing an exception to an exclusion. Commerce demonstrated that the underlying injuries fell within the pollution exclusion, but XTO could not establish the exception because it had failed to satisfy the 21-day notice condition.

The court also held that Commerce was not required to demonstrate prejudice. It distinguished the 1981 decision in *Finstad*, which imposed a prejudice requirement where the policy contained an indefinite notice provision and did not specify the consequences of noncompliance. By contrast, the 21-day notice requirement for the exception to the pollution exclusion in Commerce's policy establishes a definite notice period and specifies that failure to comply renders the exception inapplicable.

COMMENTS

This decision highlights the importance of distinguishing between a late-notice defense and a timely-notice exception to an exclusion. The court rejected the policyholder's argument that the notice requirement in the pollution exclusion effectively transformed the pollution exclusion into a late-notice defense, stating: "We cannot accept this proposed transmogrification." The distinction could be particularly significant in jurisdictions that may require insurers to demonstrate prejudice in order to prevail on a late-notice defense.



Arkansas Court Of Appeals Departs From Nationwide Trend, Holding That Opioid Suits Brought By Governments And Other Entities Potentially Allege An "Accident" And Damages Because Of "Bodily Injury"

HOLDING

The Arkansas Court of Appeals affirmed a trial court's partial summary judgment ruling that a primary insurer owed Walmart a duty to defend certain lawsuits brought by governments and other entities seeking monetary payments for alleged budgetary costs due to the opioid epidemic. The court held that the underlying complaints potentially allege an "accident" and seek damages "because of 'bodily injury.'" The court also affirmed the denial of a quota-share insurer's motion to compel arbitration. *Ace Am. Ins. Co. v. Walmart, Inc.*, 2026 Ark. App. 476, 2026 Ark. App. LEXIS 521 (Ark. Ct. App. Oct. 7, 2026).

BACKGROUND

Walmart was named as a defendant in thousands of lawsuits brought by governments and other plaintiffs seeking compensation for alleged budgetary costs due to the opioid epidemic. Walmart sued its liability insurers for coverage in Arkansas state court and sought partial summary judgment on primary insurer AIG's duty to defend. AIG opposed Walmart's motion, arguing that the underlying complaints do not allege an "occurrence," defined in its policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Certain excess insurers moved for summary judgment, arguing that opioid suits brought by governments and other entities did not seek damages for or because of "bodily injury," as required under their policies. Another insurer, QBE Insurance Corporation, filed a motion to compel arbitration, arguing that its quota-share excess policy incorporated an arbitration clause and a New York choice-of-law provision from the policies issued by a fellow quota-share insurer.

The trial court granted Walmart's motion for partial summary judgment against AIG on the duty to defend, denied the excess insurers' motion for summary judgment regarding the damages because of "bodily injury" issue, and denied QBE's motion to compel arbitration.



DECISION

The Arkansas Court of Appeals affirmed all three rulings. The court explained that, although "accident" is not defined in the AIG primary policies, Arkansas courts define "accident" as "an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." Applying that definition, the court determined that the underlying claims against Walmart alleged an "accident" because "the essence of the Opioid Lawsuit complaints is not intentional malfeasance." The court reasoned that "even if it is true that Walmart intentionally filled prescriptions and did not have proper procedures in place to recognize and report suspicious opioid prescriptions, the alleged result—a nationwide crisis in which people became addicted to and injured in other ways by heroin and fentanyl—could have been without foresight or expectation."

Turning to the excess insurers' motion, the court acknowledged that whether the opioid-related lawsuits brought by governments and other entities allege "bodily injury" covered by the policies presented "a closer question." The court noted that the underlying complaints "do not allege a specific bodily injury to a specific person at a specific time" and do not seek "reimbursement for specific patients, but instead for the general increase in costs allegedly caused by the opioid crisis." Nevertheless, the court affirmed the trial court's determination that the lawsuits seek damages "because of bodily injury," relying on policy language providing that damages because of bodily injury "include damages claimed by any person or organization for care, loss of services, loss of support or death resulting at any time from the 'bodily injury.'" The court also observed that certain policies expressly exclude coverage for "certain firearm or pollution claims brought by governments" but contain "no clear and unambiguous language excluding claims relating to governmental lawsuits for damages because of bodily injuries in contexts outside of pollution and firearms." Finally, the court distinguished two prior Arkansas Supreme Court decisions holding that suits by entities that sought to recover downstream costs did not seek damages "because of" "property damage," reasoning that, unlike those cases, the lawsuits against Walmart do not assert breach-of-contract claims.



With respect to arbitration, the court held that the QBE quota-share policies do not incorporate the New York choice-of-law provision or arbitration clause contained in a fellow quota-share insurer's policies. The court reasoned that QBE's policies incorporated only those provisions that "further limit or restrict coverage," which did not include the choice-of-law and arbitration clauses. The court added that, even if those clauses had been incorporated, Arkansas courts would not apply New York law because "[a]ny arbitration clause in an insurance contract is void" under Arkansas statutory law.

COMMENTS

The decision departs from the prevailing approach in other jurisdictions. Numerous courts, including the Delaware Supreme Court, the Ohio Supreme Court, and the Sixth Circuit, have held that the budgetary costs that governments and other entities allegedly incurred as a result of the opioid epidemic do not constitute damages "for" or "because of" "bodily injury" sufficient to trigger coverage under liability insurance policies. Other courts, including the Ninth Circuit, have held that similar opioid lawsuits do not allege an "accident." The Arkansas Court of Appeals did not address these contrary authorities.

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