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Supreme Judicial Court of Massachusetts Holds That "Surface Water" Does Not Unambiguously Include Rooftop Rainwater

A hospital's facilities were damaged when rainwater that had accumulated on the roof after a severe thunderstorm infiltrated the building's interior. The hospital submitted a claim to its property insurers. A dispute arose over whether the policy's lower sublimit for flood damage applied.

The policies defined "Flood" as "[a] general and temporary condition of partial or complete inundation of normally dry land areas or structure(s) caused by: … the unusual and rapid accumulation or runoff of *surface waters*, waves, tides, tidal waves, tsunami, the release of water, the rising, overflowing or breaking of boundaries of nature or man-made bodies of water." (Emphasis added).

There was no dispute that water damage to the hospital's basement was due to surface water. The issue was whether damage to the upper floors was caused by surface water.

The policyholder argued that the "Flood" definition described waters generally understood to exist on the surface of the earth. The insurers argued that the plain meaning of "surface waters" is waters naturally accumulating on surfaces, not just waters accumulating on the surface of the earth.

A federal district court sided with the insurers. On appeal, the First Circuit certified a question to the Massachusetts Supreme Judicial Court.

The Massachusetts high court acknowledged that the insurance policies themselves did not say whether surface water includes accumulated rainwater on a roof and found that both the policyholder's and insurers' interpretations of "Flood" were plausible. The court was aware of the difficulty in distinguishing between rain from the same storm pooling on the ground and ponding on a roof, because in both situations, an unusual and rapid natural accumulation of rainwater is inundating a structure.

The court surveyed the caselaw and found courts were divided on the issue nationwide, even sometimes within appellate districts, with no clear majority position. Finding two reasonable interpretations of "surface water," the court concluded that the policies were ambiguous on whether rooftop rainwater is surface water. The court found this was confirmed by the inconsistent caselaw, which the court said flowed naturally from the ambiguity.

Because the policy was ambiguous in this context, the Massachusetts Supreme Judicial Court construed the ambiguity in the policyholder's favor. The court suggested that the insurers could have defined "surface water" in the policy to clear up any ambiguity but did not do so. But the court clarified that it was not construing the term against the insurers merely because the term was undefined.

The case is *Zurich Am. Ins. Co. v. Medical Properties Trust, Inc.*, No. SJC-13535 (Mass. July 23, 2024).

Kentucky Appeals Court Holds that Pollution Exclusion Bars Coverage for Leak from Underground Storage Tank Owned by Gas Station

An underground storage tank below a gas station leaked gasoline onto a neighboring property. The station owner had a commercial general liability policy with Erie Insurance Exchange. The policy had an exclusion for pollution for bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of "Pollutants." "Pollutants" meant "any solid, liquid, gaseous or thermal irritant or contaminant" and gave a list of examples, not including gasoline.

Erie brought a declaratory judgment action in Kentucky state court for a ruling that it had no duty to indemnify or defend the gas station owner in a suit by the neighboring landowner. Erie cited the pollution exclusion. The trial court held that the policy's pollution exclusion was inapplicable. Erie appealed.

The Court of Appeals of Kentucky reversed. The court stated that whether a pollution exclusion is ambiguous cannot be viewed abstractly but in relation to the injury at issue. The key question is whether the purported pollutant results in contamination, negative health, or environmental effects. The court held

that while gasoline may be a useful and valuable product when securely contained, it should be considered a pollutant when it leaks into the ground and contaminates soil and water.

It did not matter, the court added, that gasoline was not specifically listed in the policy's Pollutants definition. In the court's view, it would be both impractical and inefficient for an insurer to specifically identify every potential pollutant it sought to exclude.

The court also rejected the argument that because the insured was in the gasoline business, it could reasonably expect that gasoline-related incidents would be covered. The court held that the reasonable expectations doctrine is not judged by an insured's subjective beliefs, but how a layman would understand the policy terms. No reasonable person, the court emphasized, would expect the exclusion not to apply to gasoline that leaked out of an underground storage tank and damaged neighboring property.

For these reasons, the court held that the trial court erred in holding that the pollution exclusion did not bar coverage.

The case is *Erie Ins. Exch. v. Shri Bramani, LLC*, No. 2023-CA-0169-MR (Ky. Ct. App. July 19, 2024).

Arizona Federal Court Holds Damage to Foundation of Building Not Fortuitous

Industrial Park Center, LLC owned a commercial property in Tempe, Arizona. Industrial Park leased a section of the building to Star Fisheries, a wholesale distributor of seafood. As part of its business practices, Star Fisheries regularly hosed down its concrete floors with water and also maintained walk-in freezers at temperatures below zero degrees Fahrenheit. Multiple inspectors later found that the building's foundation had been compromised by moisture into the soil and recommended repairs.

Defendant Great North American Insurance Company insured Industrial Park Center through an all-risk business insurance policy. Great North American denied coverage. Industrial Park sued in Arizona federal court for breach of contract.

The district court granted summary judgment to Great North American. Applying Arizona law, the court found that Industrial Park failed to prove that the loss was fortuitous. The court concluded the Star

Fisheries' continued practice of washing down the concrete slab and its use of sub-zero freezers would almost certainly continue to introduce moisture into the soil and eventually affect the building's infrastructure. Under these circumstances, the loss was reasonably foreseeable and almost certain to occur.

The court said its conclusion was reinforced by the fact that, since 2014, the lease with Star Fisheries included a clause making clear that Star Fisheries would be responsible for future damage as a result of Star Fisheries' occupancy. This amendment reaffirmed Industrial Park's understanding that the water damage was reasonably foreseeable.

The court thus granted Great North American's motion.

The case is *Indus. Park. Ct. LL v. Great N. Ins.,* 22-cv-01196 (D. Ariz July 26, 2024).

California Federal Court Again Rules That Insurers Have No Duty to Defend Opioid Distributor Because Suits Did Not Allege an Occurrence

McKesson Corporation, a distributor of pharmaceuticals, was accused of deliberately flooding the market with opioids. McKesson sought a defense from its commercial general liability insurers. The insurers filed a declaratory judgment action to get clear of any duty to defend because the suits did not allege bodily injury caused by an "occurrence." The district court granted the insurers' partial summary judgment motion under two policies, and earlier this year the Ninth Circuit affirmed.

McKesson took another crack at it under five policies with a slightly different "occurrence" definition. The two policies involved in the earlier motion defined "occurrence" as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." These policies had an "expected or intended" qualifier in an exclusion rather than in the definition of "occurrence."

In comparison, the five policies on the current motion defined "occurrence" as: "an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage *neither expected nor intended from the standpoint of the Insured*."

McKesson argued that this additional language meant that the insured's subjective intent was relevant and that an "occurrence" exists as long as the insurer cannot establish that the insured intended or knew that injury would result from its actions.

But the court found that the additional language did not change the outcome because under California law, the controlling issue is whether the claimant was injured as a result of an "accident." An "accident" does not include deliberate conduct even if the insured did not intend the injury that resulted.

The words "neither expected nor intended from the standpoint of the Insured" modify only the terms "injury" and "damage." They have no effect on whether there is an accident and do not remove the requirement that any injury or damage must be accidentally caused. These words merely explain that expected or intended injuries are not "accidents" as defined in the policy.

McKesson next argued that the suits alleged a potentially covered occurrence because diversion of the opioids McKesson distributed was an unforeseen, intervening cause of the injuries. The court disagreed, finding that the suits alleged that McKesson's intentional over supply of opioids facilitated the opioid epidemic. And it has been obvious for decades that an opioid distributor's failure to maintain effective controls against diversion would harm the general welfare because Congress classified opioids as substances with a high potential for abuse.

The court found that the suits alleged exclusively intentional conduct by McKesson and that the Ninth Circuit has already ruled that there was no unforeseen intervening cause of the alleged injuries. Addiction, overdoses, and death were the expected outcome of McKesson's alleged scheme to increase opioid sales.

The court denied McKesson's motion for partial summary judgment and found that the insurer had no duty to defend.

The case is *AIU Ins. Co. v. McKesson Corp.*, No. 20-cv-07469-JSC (N.D. Cal. July 30, 2024).

Maritime Policy Void Because of Insured's Breach of Warranty over Fire Suppression Equipment, Even Though Loss Was Not Fire-Related

Raiders Retreat Realty Co. owned a yacht that ran aground and sustained damage. Raiders' maritime insurer denied the claim and litigation ensued.

Raiders had maritime coverage with Great Lakes Insurance (GLI) for many years. As part of its 2016-17 renewal, a third party surveyed the yacht's condition and evaluated the fire fighting and safety gear. The survey noted that the fire suppression system and hand-held fire extinguishers were out of date; they needed an annual maintenance check with a service and date tag. The survey also recommended that fire extinguishers be purchased and stored onboard.

After the survey, Raiders submitted a letter to GLI certifying that all recommendations in the survey had been complied with. GLI renewed the coverage in that year and in following years. The policy's general conditions and warranties stated that if the vessel is fitted with fire extinguishing equipment, then it is warranted that such equipment is properly installed and maintained in good working order, including certification and tagging.

In 2019, the yacht ran aground and was damaged. No fire occurred and no fire suppression equipment was used. After Raiders filed a claim, GLI investigated and discovered that the yacht's fire extinguishing equipment had not been inspected or recertified. Tags showed the last inspections were in 2014. GLI denied the claim because Raiders violated the express warranty concerning fire extinguishing equipment and Raiders' compliance letter contained a material misrepresentation.

Raiders contended that it purchased more fire extinguishers as the survey recommended and that the fire extinguishers were fully functional. Raiders said that recertification and tagging of its suppression system would have been infeasible because the system was obsolete.

GLI filed a declaratory judgment action in federal court in Pennsylvania seeking to void the policy based on Raiders' breach of warranty and misrepresentation. Raiders' counterclaimed for breach of contract. Both parties moved for summary judgment.

The court explained that in all areas of insurance other than maritime insurance, an insured's breach of warranty defeats recovery only if the breach materially increases the risk of loss, damage, or injury within coverage. But the rule is different under maritime insurance contracts. Warranties under maritime insurance are strictly complied with, even if collateral to the primary risk. That's because it is difficult for marine insurers to assess their risk and must rely on the representations and warranties made by insureds regarding their vessels' condition and usage.

The court did not agree that the fire suppression system was "obsolete," or at least, that certification and tagging was impossible. And even if so, a breach of an express warranty in a marine policy may still void coverage where compliance is impossible.

It was undisputed that two of the fire extinguishers and the yacht's fire suppression system had last been certified and tagged in May 2014 and that those certifications expired in May 2015. The court held that because Raiders breached an express warranty by failing to certify and tag its fire extinguishing equipment, the maritime policy was void.

The case is *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, No. 19-4466 (E.D. Pa. July 15, 2024).

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