APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

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LOUISIANA

"Torch Down Roofing" Operations Exclusion Bars Coverage for Fire Based Upon Technical Meaning of Undefined Term

In *Certain Underwriters at Lloyd's of London v. Duxworth Roofing & Sheetmetal, Inc.* 2023 La. App. LEXIS 1194 (La. Ct. App. July 16, 2023) L.G.O. Properties, LLC ("LGO") hired Duxworth Roofing & Sheetmetal, Inc. ("Duxworth") to perform roofing work on a building in New Orleans. Duxworth's work included the use of hot tools and a process called "torch down roofing" to repair a leak in the roof. On December 9, 2016, a day when Duxworth was working on the roof, the building was damaged by a fire. *Id.* at 1-2.

Certain Underwriters at Lloyd's of London ("Lloyd's"), LGO's property insurer, paid for repairs and thereafter filed suit against Duxworth to recover damages. It alleged that Duxworth negligently used hot torches to perform roofing work on the building that caused the December 2016 fire. Duxworth answered the complaint and filed a third-party action against its CGL insurer, James River Insurance Company ("James River"). *Id.* at 2.

James River moved for summary judgment, arguing any damages sought were excluded under the policy by the following exclusion:

> **r. Any and All Torch Down Roofing Operations**
>
> This insurance does not apply to "bodily injury" or "property damage" arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others. ("Torch Down Roofing Exclusion")

Specifically, James River argued Duxworth informed fire investigators that torches and hot tools were used to repair the roof of the building. Following the completion of the deposition of Duxworth (during which he conceded torches and hot tools were used on the roof) and a review of a fire investigator's affidavit, the trial court granted James River's motion. Duxworth appealed. *Id.* at 2-5.

As it had at the trial level, Duxworth argued (1) the Torch Down Roofing Exclusion was ambiguous; and (2) because the exact cause of the fire was undetermined, James River had an obligation to defend. James River countered by noting that even if the exact cause of the fire was undetermined, the fire "arose out of" the use of hot tools and torches and was clearly excluded. *Id*. at 8-9.

In affirming the trial court's ruling, the court of appeal first addressed the lack of ambiguity in relation to the exclusion:

> Although the phrases "arising out of" and "Torch Down Roofing" are not defined within the CGL policy, this fact alone does not make the Torch Down Roofing Exclusion ambiguous. Rather, this Court must give words and phrases their general meaning …
>
> Given the plain, ordinary, and generally prevailing meaning of the words "arising out of," it is clear that Lloyd's of London's claims against Duxworth arise out of and are derived from the property damage caused by the fire that occurred during the time Duxworth was performing ongoing torch down roofing installation.
>
> …
>
> Further, we find Duxworth's contention that the James River's CGL policy fails to define "Torch Down Roofing" unpersuasive. Mr. Duxworth's deposition explains that the method Duxworth used to repair the Tulane Building's roof included the use of hot tools to "torch down white cap on top of the existing torch down." Although the Torch Down Roofing Exclusion does not define the term "Torch Down Roofing Operations" it is undisputed that hot tools and torches were used on the date of the December 2016 fire. *See Doer v. Mobil Oil Corp.*, 2000-0947, p. 5 (La. 12/19/00) 774 So.2d 119, 224 (When analyzing a policy provision, words, often being terms of art, must be given their technical meaning.) A plain reading of the CGL policy between James River and Duxworth provides that the damages caused by the use of hot tools to perform roofing repairs, triggers the Torch Down Roofing Exclusion, and precludes coverage. *Duxworth*, supra at 11-12.

The *Duxworth* decision offers a common-sense approach to policy interpretation in the face of an avalanche of "bad facts" for the insured. Setting aside the insured's admission it was using hot tools and torches on the roof at the time of the fire, the court correctly noted that not every word or phrase in a policy needs to be separately defined. "Torch Down Roofing" was plainly understood to be a technical term within the industry and squarely applied to the claim for damages.

NEW JERSEY

Designated Premises Endorsement Bars Coverage for Claims Related to Undisclosed Property Owned by Insured

In *State-Comm, LLC v. Axis Insurance Company*, 2023 N.J. Super. LEXIS 1159 (N.J. App. July 12, 2023), State-Comm, LLC ("State-Comm") owned two adjacent properties in Perth Amboy, New Jersey. The Commerce Street property had two residential apartments. The State Street property was comprised of four residential units and three commercial units. *Id*. at 1.

In 2017, State-Comm purchased premises liability insurance from the London Market for the Commerce Street property. Through a different agent, State-Comm purchased

property and general liability insurance for the State Street property from Axis Insurance Company ("Axis"). The only property mentioned anywhere in the Axis policy is the State Street property. *Id*. at 2.

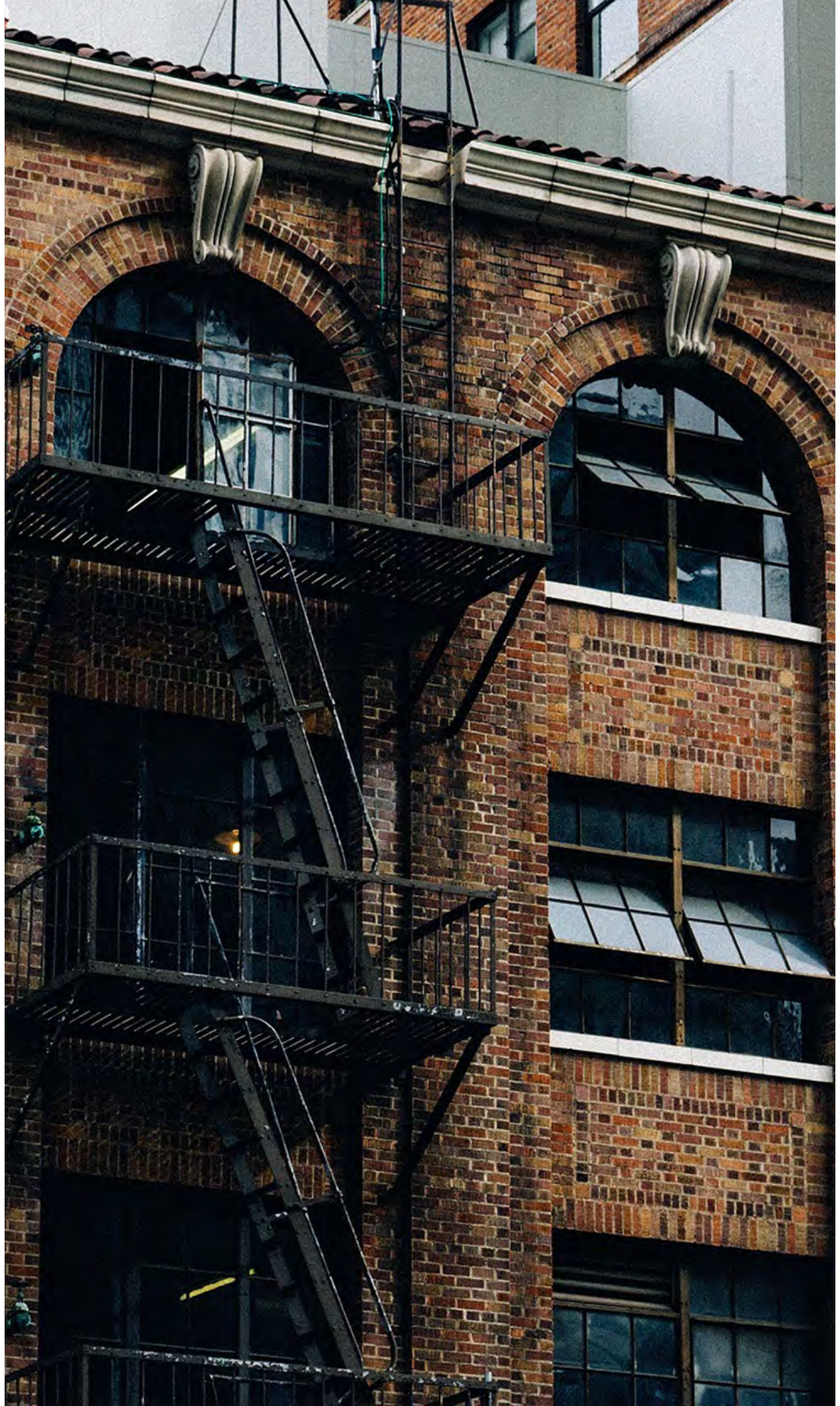
More specifically, the Axis policy included a "Designated Premises Limitation" endorsement that "limits insurance to the designated premises and business/operations associated with the designated premises." It further stated that it only provided coverage for injury or damage "arising out of only … the ownership, maintenance, or use of the designated premises or any property located on the premises." Finally, the endorsement contained language identifying the Designated Premises as "As Per Location Of Premises Supplemental Declarations." The Supplemental Declarations identified only the State Street property. *Id*. at 3-4.

During the policy period, a fire occurred at the Commerce Street property that killed two tenants and injured several others. Various claims were asserted against State-Comm for negligence that were resolved by the full limits of the London policy ($1.5 million). As part of the settlement, State-Comm assigned plaintiffs any rights it might have under the Axis policy. Thereafter, it filed a declaratory judgment action against Axis seeking coverage for the Commerce Street victims' claims. *Id*. at 5.

Axis moved for summary judgment on the grounds that no coverage was owed for liability arising from the Commerce Street property and it was entitled to rescind the policy based upon misrepresentations in the application. The court granted the motion, finding (1) the Designated Premises Limitation endorsement limited coverage to the State Street Property; and (2) Axis had proven equitable fraud and grounds for rescission based upon material misrepresentations made in State-Comm's insurance application. State-Comm appealed. *Id*. at 5-6.

State-Comm contended (1) the provisions within the Axis policy were ambiguous; and (2) State-Comm had a "reasonable expectation" that the Commerce Street location was covered under the policy. State-Comm also argued the Axis declarations did not expressly limit coverage to the State Street property and the "Premises Supplemental Declarations" were not part of the liability policy. *Id*. at 6.

In affirming the trial court's ruling, the appellate court found no ambiguity in the Axis policy:



State-Comm's policy with Axis is neither unclear nor ambiguous. The Designated Premises Limitation endorsement identifies the "Description/Location of Subject Premises" by reference to the Premises Supplemental Declarations. State-Comm asserts there is no such supplemental declarations page, and one has to go on a "scavenger hunt" to find the supplemental declarations relied upon by Axis. It also contends the supplemental declarations relied on by Axis applies to the commercial property portion of the policy as opposed to the CGL. We are unpersuaded.

The supplemental declarations page cited by Axis is not buried in some obscure section of the policy. Rather, it is located two pages after the Designated Premises Limitation specifically referencing the supplemental declarations. Moreover, that it may be contained in the commercial property portion of the policy is not significant as it is a single policy. Furthermore, the supplemental declarations section at issue is specifically referenced by the Designated Premises portion of the policy as the location where the designated properties are identified. Lastly, the supplemental declarations page only identifies the State Street property, consistent with the earlier portions of the policy. *Id*. at 8-9.

In rejecting State-Comm's reasonable expectations argument, the court appeared exasperated with the view that coverage could be owed for a risk that was undisclosed:

> It would not be reasonable for an insured to expect there to be coverage for an undisclosed property under the facts of this case. Not only does the policy fail to reference the Commerce Street property, but when (owner) met her insurance

agent, she only disclosed ownership of the State Street property. Similarly, in the risk questionnaire, she made no mention of the Commerce Street property, but instead listed one building—the State Street property. State-Comm would have no reasonable expectation for coverage under these circumstances. In short, the provisions of the policy do not create a genuine ambiguity and are not so confusing that the average policyholder cannot make out the boundaries of coverage.

Given there was no disclosure of the Commerce Street property, there was no way for Axis to have known there was another property for which it could potentially be responsible. What if State-Comm owned twenty other undisclosed properties? State-Comm is not entitled to coverage for an unidentified operation at an undisclosed building. Axis should not be left to speculate about the properties a party may own or business it runs. This would require Axis to be responsible for properties for which it did not have an opportunity to assess the associated risks or adjust the corresponding premiums. *Id.* at 10-11 (citations omitted)

Because State-Comm was not entitled to coverage under the Axis policy, the appellate court did not feel it necessary to address the trial court's ruling on fraud and rescission. On balance, the *State-Comm* decision was obvious and has the feel of a "Hail Mary" attempt at coverage where the facts and law were clearly stacked against the insured.

WASHINGTON

Additional Insured Coverage Not Available Where Subcontract Did Not Specifically Require Such Coverage for Completed Operations

In *American Hallmark Ins. Co. of Tex. v. Beck*, a general contractor, G.M. Northrup ("GMN") was hired to perform construction work at an O'Reilly Auto Parts store in Belair, Washington. Black Hills Excavating, Inc. ("Black Hills") was hired by GMN to perform excavating work at the project. The construction work was performed in 2013. *Id.* at 2.

In 2019, a pressurized backflow erupted from a toilet and caused various property damage. Thereafter, the owners of the store sued GMN alleging negligence in its failure to design, install or property identify the location of the sewer line near the property. GMN tendered the lawsuit for defense and indemnity to American Hallmark Insurance Company of Texas ("Hallmark"), Black Hills' general liability insurer at the time of the accident. GMN's tender was based upon its position that it qualified as an additional insured under Hallmark's policy. *Id.* at 2-3.

Hallmark's policy included an "Artisans Advantage Enhanced Coverage Endorsement," through which an insured includes:

> any person or organization (referred to as an Additional Insured) whom you are required to add as an Additional Insured on this policy under:
>
> a. a written contract or agreement; and
>
> b. where a certificate of insurance showing the person or organization as

additional insured has been issued; and

c. when the written contract or agreement and certificate of insurance are currently in effect or becoming in effect prior to the [injury event].

The policy also included a "Blanket Additional Insured Endorsement," which included as an insured:

> any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured for completed operations. *Id*. at 3-4.

GMN's tender to Hallmark included a copy of a October 1, 2012, subcontractor agreement between GMN and Black Hills for demolition, excavation and the installation of sewer lines. The agreement included the following relevant provision:

> E. INSURANCE: Subcontractor agrees to provide a Certificate of Insurance with [GMN] as "Additional Insured" on a primary and non-contributory basis. *Id*. at 4.

Hallmark filed a declaratory judgment action and moved for summary judgment on the grounds that GMN did not qualify as an additional insured under its Policy because (1) the injury occurred after the construction work was completed; and (2) GMN was not added as an additional insured for "completed operations." GMN argued that (a) the agreement did not limit the additional insured requirement to ongoing operations (and thus necessarily included completed operations); and (b) the Blanket Additional Insured Endorsement was ambiguous in that it could be "reasonably read" to mean that the subcontract providing additional insured status did not need to use the word "completed operations." *Id*. at 7-8.

In granting summary judgment to Hallmark, the district court could not ignore the clear language included within the insurance contract:

> The Court agrees with Hallmark. The *Pardee* decision hinged on the insurer's failure to use language expressly excluding completed operations coverage from the additional insured endorsement at issue. The Hallmark Policy language here is clear and unambiguous. G.M.'s interpretation requires the Court to delete words from the Blanket Additional Insured Completed Operations Endorsement. The subcontractor agreement does not mention completed operations coverage, or anything to that effect. *Pardee and Hartford* would suggest that it need not mention such for G.M. to qualify as an additional insured for completed operations. These cases help the Court interpret the subcontractor agreement, but not the Policy. This Policy has two separate endorsements, one dealing with ongoing and one with completed operations, and the latter explicitly requires an "agreement in writing …
>
> [to] be added as an additional insured for completed operations." Because G.M. cannot point to such in the record, it is not an additional insured and Hallmark does not have a duty to defend or to indemnify for the claims in the Underlying Suit. *Id*. at 8-9 (citing *Pardee Const. Co. v. Ins. Co. of the West*, 92 Cal. Rptr. 2d 443 (Cal. Ct. App. 2000; *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 189 P.3d 195, 202 (Wash. Ct. App. 2008).

The *Beck* decision is not a close call based upon the language required by the endorsement as compared to that included within the relevant subcontract. GMN was never explicitly promised additional insured coverage for completed operations as required by the policy. The greater lesson here is that any party seeking additional insured status for ongoing and completed operations needs to be very careful in making sure their subcontracts *and* subcontractor insurance policies (when read together) fulfill that promise.

Federal Appellate Cases

3RD CIRCUIT

"Failure to Perform Contract" Was Not an "Occurrence" Despite Damage to Wells From Which Insured Was Hired to Extract Natural Gas

In *American Home Assurance Company v. Superior Well Services, Inc.*, 2023 U.S. App. LEXIS 18974 (3rd. Cir. July 25, 2023), Superior Well Services, Inc. ("Superior") was hired by U.S. Energy Development Corporation ("USE") to perform hydraulic fracking services to extract natural gas from wells owned by USE. Two years into the contract, USE advised Superior that it believed Superior had damaged some of its wells during the fracking process. Superior notified its general liability insurer, American Home Assurance Company ("American Home"), of the potential claim. *Id*. at 2.

American Home thereafter agreed to defend Superior, while reserving its right to deny coverage. USE ultimately filed suit against Superior in New York, within which it alleged Superior had damaged 97 of its wells. The case proceeded to trial, at which the jury was asked to consider only whether Superior had breached its agreement with USE "to render services in a reasonably careful and professional manner." The trial court instructed the jury that if it found "Superior breached the contract by failing to perform services with reasonable care, skill and diligence" and "USE suffered damages as a result," it should find for USE on the breach of contract claim. *Id*. at 2-3.

Ultimately, the jury found against Superior on the breach of contract claim and determined Superior had damaged 53 of 97 wells. The jury's verdict form specified Superior "fail[ed] to perform its contract with [USE] in a workmanlike manner" and that this "failure" was a "substantial factor in causing damage to the USE wells[.]" The amount awarded was $6.16 million, increased to $13.18 million based upon statutory interest. *Id*. at 3.

Prior to the verdict, American Home filed a declaratory judgment action in district court seeking a ruling that it owed no indemnity to Superior for any damages that were awarded to USE. Each of the policies issued by American Home (four in total) provided coverage for "property damage" arising out of an "occurrence." "Property damage" was defined as both "physical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." An "occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy did not define the term "accident," and included an exclusion for all damage to "personal property in the care, custody or control of the insured." *Id*. at 3-4.

Superior had also purchased an "underground resources and equipment coverage" endorsement ("UREC Endorsement") that amended its CGL policies to provide coverage against additional risks associated with well-servicing operations. Specifically, the endorsement "added" coverage "with respect to 'property damage' included within the 'underground resources and equipment hazard' arising out of the operations performed by [Superior] or on [Superior's] behalf." The UREC endorsement defined "underground resources and equipment hazard" as "property damage" to any of the following:

a. Oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water;

b. Any well, hole, formation, strata or area in or through which exploration for or production of any substance is carried on;

c. Any casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well or hole beneath the surface of any body of water.

Id. at 4-5.

American Home argued "property damage" caused by a "failure to perform" a contract "in workman like manner" (i.e. breach of contract) was not an "occurrence" under a general liability policy. USE, which had intervened in the coverage action, counter-claimed for an order declaring American Home was obligated to pay the judgment based upon a plain reading of the UREC Endorsement. The district court ruled in favor of Superior (and USE) in finding (1) the policy's "occurrence" definition was "irrelevant" because of the UREC Endorsement; and (2) the UREC Endorsement covered Superior's fracking operations regardless of whether its liability was caused by its own failure to perform the contract "in a workmanlike manner." American Home appealed. *Id*. at 6-7.

The 3rd Circuit court began its analysis by examining whether damage to USE's wells was caused by an "occurrence." Noting that the key term in the definition of an "accident" is "unexpected," the court concluded no "occurrence" was present in a claim for faulty workmanship:

Although the District Court in this case indicated that "faulty workmanship" might be different from a failure to perform a contract "in a workmanlike manner," the Supreme Court of Pennsylvania's holding in *Kvaerner*—and our application of *Kvaerner* in *Sapa*, were premised on the logic that poor workmanship is too "foreseeable to be considered an accident," rather than on labels or special words. The phrases "faulty workmanship" and "failure to perform in a workmanlike manner" are equivalent in this respect. And, under Pennsylvania law, faulty workmanship, such as rendering a substandard service or causing damage by use of an unsuitable product, as was the case here, does not constitute an "occurrence" when an insurance policy defines an "occurrence" as an "accident." *Id*. at 9-10 (citing *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 891 (Pa. 2006); *Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co.*, 939 F.3d 243, 246 (3rd. Cir. 2019)).

In reversing the District Court's decision that the UREC Endorsement alone governed coverage, the 3rd Circuit court concluded all policy provisions needed to be read together. More specifically, the court determined that whatever coverage was provided by the UREC Endorsement still needed to be accompanied by an "occurrence:"

> [W]e conclude that the policy and endorsement are best read together as retaining the requirement … [a]lthough it is true that the language of the endorsement would supersede that of an underlying policy if the two were in conflict, that is not the case here.
>
> First, the underlying policy excluded coverage for damage to "[p]ersonal property in the care, custody or control of the insured." Therefore, absent the UREC endorsement, damage to personal property used in connection with servicing the wells and within Superior's care, custody or control would have been excluded from the policy. The endorsement, however, reinstates that coverage by providing that the "exclusion does not apply to any 'property damage' included within the 'underground resources and equipment hazard.'" The endorsement defines "underground resources and equipment hazard" to include "property damage" to oil and gas wells and "[a]ny casing, pipe, bit, tool, pump or other drilling or well servicing machinery or equipment located beneath the surface of the earth in any such well." Notably, to trigger coverage, the endorsement expressly requires "property damage," which, under the underlying policy, is covered only if it is "caused by an 'occurrence.'" The endorsement then, instead of conflicting with the terms of the underlying policy, incorporates the "occurrence" requirement by way of the "property damage" requirement.
>
> Second, there are other places in the endorsement that either cross-reference the underlying policy or expressly use the term "occurrence." The endorsement's Provision A creates a new aggregate limit for coverage and states that the new limit "is the most we will pay under Coverage A [of the underlying agreement] for the sum of damages because of all 'property damage' included with the 'underground resources and equipment hazard' and arising out of operations in connection with any one well." Next, Provision A provides that it is "subject to [Paragraph] 5" of Section III of the underlying policy, and Paragraph 5 of the underlying policy establishes policy limits that are "the most [American Home] will pay … because of all 'bodily injury' and 'property damage' arising out of any one 'occurrence.'" And Provision D of the endorsement imposes certain duties on the insured "[u]pon the 'occurrence'" of certain types of damages. The endorsement's cross-reference to the underling policy and use of the term "occurrence" therefore suggest that the endorsement incorporates, rather than eliminates, the "occurrence" requirement.
>
> Third and finally, no provision in the endorsement implicitly, let alone expressly, repudiates the "occurrence" requirement. As a matter of structure, it makes sense that the UREC Endorsement would amend but not eliminate key terms in the underlying policy, because only the latter functions as an independent insurance agreement that promises to "pay those sums that the insured becomes legally obligated to pay as damages." *Superior Well*, supra at 10-13.

In ultimately finding that the damage caused by Superior's failure to perform the contract "in a workmanlike manner" was not an "occurrence,"

the court did not need to reach the issue of whether the insurance claim involved 53 separate occurrences or one occurrence. *Id*. at 13.

The *Superior Well* decision presents a convergence between (1) Pennsylvania authority clearly holding that "faulty workmanship" is never an "occurrence;" and (2) terms and conditions that plainly required the UREC Endorsement to be read in concert with the rest of the CGL policy. Whether the endorsement was intended to "work around" Pennsylvania's strict "occurrence" requirement is unknown, but the decision appears correct under Pennsylvania law. That said, the outcome would likely have been different in many other jurisdictions.

5TH CIRCUIT

Federal Court Finds Duty to Indemnify May Exist in the Absence of a Duty to Defend

In *Liberty Mutual Fire Ins. Co. v. Copart of Conn., Inc.*, 2023 U.S. App. LEXIS 19674 (5th Cir. July 31, 2023), Copart of Connecticut, Inc. ("Copart") owned over 300 acres of land upon which it operated a machine salvage junkyard in South Carolina. A creek originating on Copart's property ran through and/or fed wetlands on several neighbors' property. *Id*. at 1-2.

In 2016, eight neighboring property owners ("plaintiffs") filed a lawsuit against Copart in South Carolina alleging pollution-related damages. Specifically, they alleged that in 2013, Copart cleared trees and other vegetation on approximately 30 acres of land and filled that parcel with wrecked/salvaged machinery. Plaintiffs alleged that many wrecked or salvaged vehicles stored on this parcel leaked gasoline, oil, hydraulic fluids, antifreeze and other hazardous fluids/materials into the soil. *Id*. at 2-3.

Plaintiffs alleged that Copart altered the normal course of stormwater runoff from is property. During periods of significant rainfall, plaintiffs alleged that water, soil, sediment, hazardous materials and chemicals were washed from Copart's property onto the plaintiffs' property. Plaintiffs also alleged that "scientific testing" revealed elevated levels of heavy metals and other hazardous substances. Plaintiffs asserted theories of negligence, trespass, nuisance, and various violations of state and federal environmental statutes. *Id*. at 3.

Copart was insured under general liability policies issued by Liberty Mutual Fire Insurance Company ("Liberty") and umbrella policies issued by Liberty Insurance Corporation ("LIC") for the relevant period. Upon receipt of the underlying suit, Liberty agreed to defend Copart pursuant to a reservation of rights. Liberty then filed a declaratory judgment action in Texas seeking a ruling that it had no duty to defend or indemnify Copart and that it had the right to withdraw from the defense at any time. *Id*. at. 3-6.

Liberty moved for summary judgment on the basis that all claims brought against Copart were barred by the pollution exclusion within each of its policies. Each exclusion stated that coverage would not apply to bodily injury or property damage which would "not have occurred, in whole or in part, but for the actual, alleged, or threatened discharge, dispersal, seepage migration, release or escape of 'pollutants' at any time." The policies defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id*. at 4-5.

Copart contended Liberty had a duty

to defend the entire lawsuit if it included a single claim that could potentially trigger coverage. Specifically, Copart asserted the underlying complaint included allegations that "water" and other natural substances ran from its property and damaged the plaintiffs' property, which by themselves could not be considered "pollutants" subject to the exclusion. Nonetheless, the district court granted summary judgment to Liberty and LIC, finding that the pollution exclusion was unambiguous and it was "clear" the plaintiffs alleged damage was caused, at least in part, by pollutants. The court found that because there was no duty to defend under the Liberty policies, it "follows that it has no duty to indemnify." Copart appealed. *Id*. at 7.

The 5th Circuit court began by evaluating the district court's decision on the duty to defend. Copart (again) sought to parse the allegations in the complaint by alleging some damage was caused by "naturally occurring materials in the stormwater" and thus not subject to the pollution exclusion. The court rejected Copart's argument, finding that this interpretation ignored the scope of the pollution exclusion and the overall complaint:

> [T]his argument rests on the faulty premise that we have already rejected. It does not matter if these "indigenous" substances are not pollutants under the policy because, as explained, the complaint alleges harm by stormwater laden with both non-pollutants and pollutants. And the pollution exclusion covers harms caused "in whole or part" by pollutants. Copart cites no allegations of harm by these "indigenous" substances alone.
>
> And again, Copart transgresses the limits of the duty-to-defend inquiry when it asserts that, as a matter of fact, the cloudy water on the Livingston Plaintiffs' properties "could have been caused by the discharge and movement of these natural, indigenous substances." It is the allegations in the pleadings, not hypothetical facts, that dictate our analysis. ...
>
> The context (of a Water Trespass Allegation) instructs that the "water, sediment, and other matter" referred to in paragraph 118 is the same pollutant-laden stormwater that is the subject of the rest of the trespass allegation. Indeed, this polluted stormwater is discussed

> throughout the complaint; paragraph 118 simply uses language that is less precise than other parts of the complaint. And although Copart urges us to resolve all doubts about this allegation in its favor, given the context and the inferences it yields, "the facts alleged" in this one phrase, in this one paragraph, do not create that degree of doubt which compels resolution of the issue for the insured. *Id.* at 16-18 (citations omitted).

Upon concluding the umbrella policies could not have a separate duty to defend, the court examined the issue of whether Liberty could have a duty to indemnify. The court began its review by noting that (1) the district court disposed of the duty to indemnify in "a single sentence"; and (2) Texas law recognizes that the duty to defend and indemnify are "distinct and separate duties." It proceeded to reverse the district court on indemnity by finding such a duty can exist where the possibility exists that evidence at trial could prove damage covered by the insurance policy:

> The district court granted summary judgment for Liberty on its duty to indemnify while the Underlying Suit remained pending. In this regard, summary judgment was premature. Moreover, the district court found no duty to indemnify solely because it had found that Liberty had no duty to defend. In this sense, summary judgment was based on a "faulty assumption" and was incorrect. "[T]he facts adduced at trial might differ from the allegations, and thus, a duty to indemnify could be shown notwithstanding the absence of a duty to defend." *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d 248, 254 (5th Cir. 2011). ...
>
> The duty to defend is negated here because the Livingston Plaintiffs only allege damage caused, either in whole or in part, by pollutants. But evidence arising from or related to the Underlying Suit may reveal that non-pollutants caused the plaintiffs' damage. Indeed, it is here that Copart's theories regarding the factual cause of the Livingston Plaintiffs' injuries—not germane to the duty-to-defend—come to hold water.
>
> If, for example, relevant evidence shows that the plaintiffs' "cloudy water" was caused only by sand and sediment, the pollution exclusion may not apply. If this were so, Liberty may be obligated to indemnify Copart. *Copart*, supra at 27-28 (further citations omitted).

While the 5th Circuit decision in *Copart* adheres to the legal distinction between the duty to defend and the duty to indemnify in Texas, one is left to wonder how often it will come up and/or be practically applied. It would be rare to expect a trial would produce a covered claim where there was no duty to defend. In this case, would a jury actually find no damage was caused by pollution despite the overwhelming allegations tying pollution to the stormwater itself?

11TH CIRCUIT

Federal Court Predicts Georgia Will Not Allow Insurers to Recoup Defense Costs Absent Provision in Policy Allowing for Such a Recovery

In *Continental Cas. Co. v. Winder Labs.*, LLC, 2023 U.S. App. LEXIS 17852 (11th Cir. July 13, 2023), Winder Laboratories, Inc. ("Winder") was a generic pharmaceutical manufacturer. In 2015, it purchased a primary general liability insurance policy from Valley Forge Insurance Company ("VFI") and an umbrella insurance policy from Continental Casualty Company ("Continental"). The policies were materially identical and required the insurers to "defend the insured[s] against any 'suit'" seeking damages for "personal and advertising injury." *Id.* at 3.

"Personal and advertising injury" was defined to include an injury "arising out of" either "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services" or "the use of another's advertising idea in [the insured's] 'advertisement.'" The policies also included a "failure to conform" exclusion, which barred coverage for injuries "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the insured's] 'advertisement.'" Neither policy included a reimbursement provision allowing the insurers to recoup defense costs. *Id.* at 3-4.

In January 2016, another pharmaceutical company (Concordia) sued Winder asserting various claims under the Lanham Act and Georgia law. The Fourth Amended Complaint became the operative complaint after various dismissals and the crux of the lawsuit was that

Winder "falsely or misleadingly" advertised that two of their products were generic equivalents to a Concordia product. Winder tendered the lawsuit to its insurers for defense. *Id*. at 4.

On February 18, 2016, the insurers jointly sent Winder a letter agreeing to provide a defense subject to a "fairly standard" reservation of rights. Importantly, the letter also included a provision that stated "Valley Forge specifically reserves its right to seek reimbursement of defense costs incurred on [the insured's] behalf for all claims which are not potentially covered by the VFI policy." Winder's manager signed and returned an "Acknowledgment of Defense under a Reservation of Rights" that accompanied the letter while noting the insureds elected to retain independent counsel to represent them subject to Valley Forge's reservation of rights. *Id*. at 4-5.

During the pendency of the underlying action, the insurers filed a declaratory judgment action seeking a ruling that they (1) had no duty to defend or indemnify Winder for the underlying claims; and (2) were entitled to reimbursement of defense costs under their reservation of rights. The district court granted the insurer's motion that no defense or indemnity was owed under the "failure to conform" exclusion, but denied any right of reimbursement given there was no provision mandating a recovery within the insurance policies. The insurers stopped paying for the insured's defense, and both parties appealed. *Id*. at 6-7.

Initially, the appellate court affirmed the district court's ruling that no duty to defend was owed the insureds. While Winder argued that allegations it copied "label inserts" amounted to a covered offense (i.e. "the use of another's advertising idea in its advertisement"), the court found that the foundation of Concordia's claims was false and misleading representations about its products:

> Concordia's contributory false advertising claim clearly rested on Winder's false and misleading representations—not its label copying. Accordingly, we conclude that the allegations in the complaint do not arise out of a "personal and advertising injury" stemming from the "use of another's advertising idea"—i.e. Concordia's labels—that would have required the insurers to defend Concordia's Fourth Amended Complaint.
>
> In fact, Concordia's count-specific allegation that Winder made "false and misleading" representations and statements about its products by "marketing products as 'generics' that are comparable to and/or substitutable for [Concordia's] DONNATAL" is a textbook example of an inquiry "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [Winder's] 'advertisement.'" Thus, contrary to the insureds' argument, Concordia's allegation that Winder marketed its products as comparable to Concordia's brand name drug when it was not in fact equivalent falls squarely with the "failure to conform" exclusion of the insurance policy. *Id*. at 12-13. (citations omitted)

The insurers thereafter sought to reverse the district court's decision that they had no right of reimbursement. Initially, they asserted the reservation of rights letter—acknowledged and signed by the insured—represented a new binding "contract" that allowed for such a recovery. The 11th Circuit found this argument "easy to reject," where no consideration for such a promise was ever received by Winder:

> To constitute a valid contract, there must be parties able to contract, a *consideration moving to the contract*, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate. O.C.G. A. §13-3-1...
>
> For the insurers implicit and explicit contract arguments, the issue of consideration is dispositive. The insurers argue that there was adequate consideration stemming from the reservation of rights letter in two ways: (1) the insureds were provided a defense; and (2) the insureds were able to choose their defense counsel. We hold that because

the parties' contracts already required the insurers to defend the insureds against certain third-party lawsuits, there is *no new* consideration for the reimbursement provision in the reservations of rights letters and thus *no new* contract under Georgia law.

The insurers' first argument is easy to reject. The underlying contract required the insurers to defend the insureds against certain third-party lawsuits. The reservation of rights letters also provided for such defense. That is, the letters were the quintessential "promise to perform a preexisting contractual obligation" that "does not constitute consideration for a new agreement."

The insurers' second argument is colorable—but still inadequate. The underlying contract did not contemplate which party would select legal counsel for the promised defense, but the reservation of rights letters gave the insureds the ability to either (a) chose their legal representation; or (b) have it chosen for them by the insurers... Either way, however, the insurers were legally obligated to provide a defense. In other words, because the insurers did not have the explicit right to choose counsel for the insureds under the original contract, the insurers did not give anything up to reach the new arrangement wherein the insureds have the option of selecting their own counsel. As such, there is no consideration under Georgia law. *Id*. at 20-22 citing *Glisson v. Global Sec. Servs., LLC*, 653 S.E.2d 85, 87 (Ga. Ct. App. 2007).

Alternatively, the insurers contended the insureds were "unjustly enriched" because they retained the benefit of a defense to which they knew they weren't owed. The court forcefully rejected this argument where (1) the insurers chose to provide Winder a defense; (2) the insureds were arguably owed a defense until the district court decided they were not; and (3) "[s]imply put, there is nothing 'unjust' about requiring the insurers to fulfill their contractual obligations and imposing such a requirement would not confer a 'windfall' on the insureds." *Winder Labs, supra* at 22-23.

The *Winder Labs* decision is consequential, in that it (1) clearly sides with the insured on the issue of reimbursement; and (2) predicts the Georgia Supreme Court would reject reimbursement absent a provision within the policy reserving that right. It is significant that an insured's (signed) "acknowledgment" of the reservation of rights was deemed unimportant, implicitly recognizing that the insured often has no practical choice but to accept a defense subject to a reservation of rights.

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