Recent Court Decisions

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Accident Policy Without Explicit Disease Exclusion Ruled Too Ambiguous to Exclude Coverage for Infection Resulting From Fall in Combination With Pre-Existing Diabetes and Cardiovascular Disease

Pelkey v. General Electric Capital Assurance Company, 804 A.2d 385 (Supreme Judicial Court of Maine—August 21, 2002)

Jack Dean Pelkey had a history of diabetes and severe peripheral vascular leg disease. He also had accident insurance from General Electric Capital Assurance. When he fell and injured his left knee in April 1998, resulting in an incurable infection and amputation of the lower portion of the leg, it raised the coverage question of whether his injury was a covered "accident" or rather the result of other factors, placing the incident outside the scope of the accident coverage.

GE undoubtedly thought it had written a pretty tight definition of injury in the policy and could thus avoid coverage when Pelkey was willing to stipulate that his prior medical problems were "substantial contributing factors to his development of infection, septic arthritis, and osteomyelitis, and the eventual amputation." 804 A. 2d at 387. The parties even stipulated that the fall would not have resulted in amputation but for the contribution of the pre-existing disease and vascular problems. The GE policy at issue provided that coverage for accidental injury and defined "injury" as bodily injury that:

> (1) is caused by an accident that occurs while the policy is in force as to the Insured Person; (2) results directly in loss insured by the Policy; (3) creates a loss due, *directly and independently* of *all* other causes, to such accidental injury; and (4) occurs in the manner and under the circumstances described in the Descriptions of Hazards which apply.

804 A.2d at 386 (emphasis added).

However, the policy did not have a specific exclusion for pre-existing diseases or conditions. Rather, the insurer sought to exclude these in situations where they played a contributing role in the damage caused by an accident such as a fall.

A split (4-3) Supreme Judicial Court of Maine found the definition and its attendant exclusionary language insufficiently clear to defeat Pelkey's claim for coverage. According to the Court majority, the policy language was sufficiently ambiguous to provide Pelkey with the benefit of the general rule that ambiguities in an insurance policy (like any other contract) are construed against the drafter (usually the insurer) and in favor of the nondrafting party (usually the policyholder). The dissenters concluded that the policy language was sufficiently clear even though it did not specifically excluded disease-related or pre-existing condition–driven injury from coverage. According to the dissent, the parties' stipulations "place Pelkey's circumstances squarely outside the language of the contract that permits recovery only when the loss is due, 'directly and independently of other causes' to the accidental injury." 804 A.2d at 390-91.

The Maine Court majority, however, did not restrict its inquiry purely to the text of the policy but considered the history of Maine law on this issue. Maine has historically enforced pre-existing condition or disease clauses since at least 1937, when the Court decided *Bouchard v. Prudential Ins. Co. of America*, 135 Me. 238, 194 A. 405 (1937). Thus, reasoned the majority, if an accident insurer did not want to cover injury resulting from a combination of incident and prior condition or disease, the path for the insurer was clear: Put a specific pre-existing condition clause in the policy. Having failed to do so, reasoned the majority, GE was creating an ambiguity as to whether pre-existing condition–related damage was excluded despite the rather strong "independent result" language that GE did use in its definition of accidental injury.

The *Pelkey* majority was also influenced by concerns over whether an accident policy might turn into illusory coverage.

> Today more than ever, we recognize that losses resulting from individual events frequently have several or many causes. If we interpret the "directly and independently of all other causes" language of the policy to exclude coverage for any loss contributed to, in some way, by a pre-existing condition, or any cause other than the accident, then an accidental injury policy such as the General Electric policy would cover little. It would provide almost no coverage for losses to consumers who may believe, erroneously, that when they are buying an accidental loss policy, they are getting coverage for losses caused by accidents. General Electric's interpretation would render its own exclusions for being under the influence of alcohol, drugs, or sedatives, unnecessary surplusage.

804 A. 2d at 389.

In effect, the *Pelkey* majority was also applying public policy considerations and reasonable expectations analysis to the dispute, tacitly finding that Pelkey could have a reasonable expectation of coverage from an injury due to a fall even though the injury would not have been nearly so serious but for his diabetes and circulation problems. In addition, insurers in Maine arguably now are also judged by whether they should have reasonably expected or anticipated that they need targeted pre-existing condition language if they are to get the benefit of the *Bouchard v. Prudential* rule.

The *Pelkey* case thus provides a cautionary tale for insurers drafting policy language. To effectively exclude injury contributed to by prior disease or problems, insurers may be unable to rely on general "independent cause" language and need more detailed pre-existing condition language, as is now the case in Maine.

Tenant Is Implied Coinsured With Policyholder Landlord: Absent Express Agreement Providing for Subrogation Claim Against Tenant, Landlord's Insurer May Not Sue Tenant in Subrogation Over Tenant-Caused Damage to Apartment

North River Insurance Co. v. Snyder, 804 A.2d 399, 2002 Me. 164 (Supreme Judicial Court of Maine—August 27, 2002)

The Supreme Judicial Court of Maine also dealt another loss to insurers, but probably not an unexpected or controversial defeat (as one might consider *Pelkey v. General Electric Assurance*, above). In *North River v. Snyder*, the Court followed the emerging majority rule that tenants are implied coinsureds for purposes of subrogation doctrine, meaning that a landlord's insurer cannot ordinarily pursue subrogation relief and compensation against a tortfeasing tenant that caused injury to the insured property.

Denzil and Candice Snyder leased an apartment at the Cortland Apartment Complex in South Portland, Maine, in 1998. They purchased a homeowner's policy with a $300,000 liability limit. The apartment complex was owned by Cortland Associates and insured by North River. The Snyders were not listed as named insureds on the landlord's North River policy. In addition to being a tenant, Candice Snyder worked as a leasing agent for Cortland Associates in return for reduced rent.

In 1999, a fire at the apartment complex caused significant damage. North River provided indemnity to its policyholder Cortland Associates (approximately $230,000) and then brought a subrogation action against the Snyders, alleging that the fire was caused by the careless smoking of the Snyders' babysitter, an allegation denied by the Snyders. North River brought its subrogation action in the federal district court for Maine. The federal judge certified to the Maine high court the following question:

> May a residential tenant be liable in subrogation to the insurer of a landlord for damage paid as a result of fire, absent an express agreement to the contrary in a written lease?

See 804 R.2d at 400. Certification is a legal process in which a federal court faced with a question of state law essentially "asks" the state's highest court to provide guidance to the federal court as to the applicable state law. It is not typically done, but is usually reserved for cases where the federal court cannot find sufficiently clear precedent under the applicable state law. The federal court in this case specifically found that no clear precedents existed in Maine on this issue even though it thought that Maine would probably find tenants to be implied coinsureds, which it did as discussed below. Not every state supreme court will accept a certified question. Maine, however, has both a statute (4 Maine Rev. Stat. Ann. § 57) and a rule of procedure (M. R. Appellate Proc. 25(a)) that permit the state high court to accept and answer certified questions from

federal courts as to the meaning of state law so long as no undecided factual issues exist that might affect the answer to the legal question. Two Justices dissented on this point, believing that it was premature for the Court to answer the certified question.

The Maine Court answered the question as follows:

> No, a residential tenant may not be held liable in subrogation to the insurer of the landlord for damage paid as a result of a fire, absent an agreement to the contrary—that is, absent an express agreement in the written lease that the tenant is liable in subrogation for fire damage to the apartment complex.

804 A.2d at 400.

The *Snyder* Court's answer to the certified question follows a modern movement generally traced to the case of *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975), in which the Oklahoma Court of Appeals found tenants to be implied coinsureds under a landlord's policy. The rationale of what has come to be called the "Sutton Rule" by some is that a tenant is something like a permissive user of an automobile and thus becomes an implied coinsured at least for the purposes of subrogation, although the tenant does not become an implied insured for purposes of other coverage matters. For example, the landlord's insurance will not provide coverage if the tenant negligently injures a dinner guest through food poisoning. However, in the instant case, Candice Snyder may well have been an insured for other purposes under the landlord's policy if her conduct as a leasing agent gave rise to a claim against her or Cortland Associates.

The *Sutton* approach has since been embraced by a number of jurisdictions, with other courts sometimes expressing a different rationale for the implied coinsured decision. *See, e.g., DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819, 823 (2002) (applying implied coinsured approach to a commercial tenant as well as an residential tenant on the grounds that allowing subrogation in such circumstances is inefficient and wasteful because it would counsel each tenant to insure not only its own property but that of the entire building or complex occupied by the tenant), and *GNS P'ship v. Fullmer*, 873 P.2d 1157, 1162 (Utah Ct. App. 1994) (adopting a similar economic efficiency rationale).

In addition, courts following the *Sutton* approach may limit it to only residential tenants, reasoning that different considerations auger in favor of allowing commercial tenants to be sued if their actions cause injury to the landlord's property. *See, e.g., Seaco Insurance Co. v. Barbosa*, 435 Mass. 772, 761 N.E.2d 946, 950 (2002).

The Maine Court in *Snyder* was specifically asked about a residential tenant and needed only to answer that question. The Court left open the issue of whether a landlord in Maine may have subrogation against a commercial tenant. Because of the different considerations in such cases and the force of nearby Massachusetts precedent, it is quite possible that Maine will not embrace the *Sutton* rule for commercial tenants. But, as the *Snyder* case demonstrates, the *Sutton* approach appears to be the modern, dominant approach for residential tenants.

"Commission of a Felony" Enforceable to Deny Claim for Accidental Death Benefits Resulting From Drunken Driving

McDaniel v. Sierra Health and Life Insurance Co., 53 P.3d 904 (Nevada Supreme Court—September 18, 2002)

An accident insurer fared considerably better in Nevada than did General Electric Assurance in the *Pelkey* case discussed above. David Dawson bought an accidental death benefit policy from Sierra Health and Life. Driving while intoxicated, Dawson "failed to negotiate a left turn, allowing his vehicle to drift right, causing it to strike a guardrail and flip over, thereby killing himself and injuring [Lyndale] McDaniel, his passenger." 53 P.3d at 905 (footnote omitted). McDaniel, who was also the named beneficiary of Dawson's accidental death policy, sued when Sierra Health refused to pay, citing the following exclusion:

> loss that is directly or indirectly a result of one of the following is not a Covered Loss even though it was caused by an accidental bodily injury. . . (6) An attempt to commit, or committing, an assault or felony by the insured.

53 P.3d at 906.

California law applied to the characterization of Dawson's actions, since the accident took place in California. Under California law, driving while intoxicated is considered a felony if it proximately causes bodily injury to another. Consequently, Dawson's drunken driving was a felony. *See* 53 P.3d at 905, n. 1. The same result would obtain under Nevada criminal law. *See* 93 P.3d at 907.

McDaniel argued that the exclusion was ambiguous as applied to Dawson's death, since it was not established that Dawson intended to commit a felony or even intended to become intoxicated. The Nevada Supreme Court was not persuaded. It found the exclusionary language sufficiently clear that it would not accord McDaniel the benefit of the ambiguity rule, construing doubtful language against the insurer that drafted the policy at issue. *See* 53 P.3d at 906.

The *McDaniel* Court distinguished *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857 (Utah 1988), which found for the claimant, because the exclusionary language in that case involved only intentional conduct, not criminal conduct. In addition, the Nevada Supreme Court observed that attitudes toward drunken driving had changed during the 15 years since that decision.

Although the Utah Supreme Court may have been correct that incidents involving drunken driving were commonly regarded as accidents in 1988, when it decided *LDS Hospital*, courts today do not accept that conclusion. Drunken driving is now widely recognized as criminal conduct that is too reckless to be characterized as an "accident." *See* 53 P.3d at 907.

Although the Nevada Supreme Court's assessment of the evolution of social mores is undoubtedly correct, it arguably gave short shrift to a fundamental axiom of insurance: Exclusions are generally construed strictly against the insurer. Thus, even if an exclusion is not textually ambiguous on its face, it may not be sufficient to defeat coverage that otherwise would obtain. Reading the language technically and

incorporating the applicable criminal law, drunken driving causing injury is a felony, and death while "committing" a felony is excluded. But does the type of exclusion in this policy (set forth above) really adequately apprise a policyholder that if he or she drives drunk, then he or she has no accidental death insurance? The Nevada Supreme Court never asked this question, which would have made *McDaniel* a closer case.

The Nevada Supreme Court, in fact, went beyond merely minimizing the contract canons regarding policy exclusions. The *McDaniel* Court stated that it was adopting the view, which it saw as the majority approach, that a felony exclusion in a policy is applicable "when the loss is remotely connected to *any* aspect of the insured's felonious conduct." *See* 53 P.3d at 907 (emphasis in original; footnote omitted). Although this sort of broad approach to construing a felony exclusion may be apt where the felony also negates the fortuity element of insurance or represents an obvious crime for which no reasonable policyholder should expect coverage, it seems too broad an approach for crimes such as drunken driving. For example, a broad approach to the felony exclusion makes sense if the policyholder is "accidentally" killed while robbing a bank and shot by the police. Does it make the same amount of sense as applied to death by drunken driving?

In addition, of course, the insurer could have quite easily drafted the policy with a specific drunken driving exclusion. If a case such as *McDaniel* had been before the Maine Supreme Judicial Court, which decided *Pelkey v. General Electric*, one can imagine the possibility of a different result. This suggests that, notwithstanding cases such as *McDaniel v. Sierra Health and Life*, accident insurers would be wise to include such specific exclusionary language. But *McDaniel* and other cases are part of a growing trend toward enforcing crime-related exclusions in policies.

POLICYHOLDER MAY RECEIVE COVERAGE DESPITE LOST LIABILITY POLICIES SO LONG AS OTHER PROOF IS SUFFICIENT TO DEMONSTRATE EXISTENCE OF INSURANCE

Dart Industries, Inc., v. Commercial Union Insurance Co., 52 P.3d 79 (California Supreme Court—August 19, 2002)

Long-tail liability claims have driven a good deal of the development of insurance law during the past quarter-century. One recurring issue with such claims is the matter of proving entitlement to insurance. Recently, the California Supreme Court faced this issue in connection with claims against a policyholder that had once manufactured diethylstilbestrol (DES), a synthetic estrogen widely used from the 1940s through the 1960s as an antimiscarriage drug. Today, we know that DES has been alleged to have resulted in birth defects in the children of those mothers, and these children, now adult women, have sued DES manufacturers alleging that the drug caused precancerous and cancerous vaginal and cervical lesions as well as other damage to their reproductive organs, resulting in infertility or miscarriage.

Suits of this nature were brought against Dart Industries, which is the successor to Rexall Drug Company, which manufactured DES from the 1940s until the late 1960s. Plaintiffs suing Dart had mothers who had taken DES during this period, when Rexall/Dart was insured by Commercial Union (1946-1951), Liberty Mutual (1951-1966), and Continental (1967-1981). Thus, there was at least exposure to DES during the relevant time period and allegations of actual injury to trigger coverage as well.

Dart requested a defense of the suits but was rebuffed by these insurers, in part because neither Dart nor the insurers had retained any copies of the policies.

Dart eventually settled with Liberty Mutual and Continental, leaving its claims against Commercial Union. Dart contended that production of the actual policies was not required so long as Dart could otherwise prove the existence and contents of the policies. The trial court agreed, but the California intermediate appellate court disagreed, finding that the policyholder must introduce into evidence the exact policy language if there was to be recovery. The California Supreme Court reversed, essentially agreeing with Dart's evidentiary arguments.

Under both California common law and statute (California Evidence Code §§ 1521, 1523), the content of a document is to be proved by introduction of the original document itself into evidence. If the original is unavailable through no fault of the proffering party, the court may accept a copy. Photocopies are usually considered "duplicate originals" under both state and federal evidence law and are treated as an original for purposes of admissibility. Where neither original nor copy is available, the contents of the document may be proven by other evidence, including the testimony of witnesses who saw the document, drafted the document, negotiated the agreement, or otherwise have some sound basis for knowledge as to what the document provided. *See Folsom's Executors v. Scott*, 6 Cal. 460, 461 (1856); *Clendenin v. Benson*, 117 Cal. App. 674, 4 P.2d 616 (1931); and *Rogers v. Prudential Ins. Co.*, 218 Cal. App.3d 1132, 267 Cal. Rptr. 499 (1990) (all setting forth this general approach).

In *Dart*, the California Supreme Court determined that in applying this approach to lost insurance policies, the burden of production and persuasion is on the policyholder to establish that the "occurrence forming the basis of its claim is within the basic scope of insurance coverage." *See* 52 P.3d at 87, quoting *Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1188, 959 P.2d 1213, 77 Cal. Rptr. 2d 537 (1998). After the policyholder has made this showing, there is coverage unless the insurer can shoulder the burden of production and persuasion to demonstrate that the claim is excluded under the policy. In particular,

> the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the particular coverage that the insured claims. . .. In turn, the insurer has the burden of proving the substance of any policy provision "essential to the. . . defense" [all of which] will be case specific.

52 P.3d at 88 (footnote omitted). Added the Court:

> Although it is a truism that we look to the language of a contract to ascertain its meaning, it is equally true that when a contract has been lost in good faith, and the actual language is unavailable, the law does not require proof of such language.

52 P.3d at 89.

Applied to the Dart-Commercial Union dispute, the Court found adequate proof by Dart that it had been insured under a commercial general liability policy covering the

period of 1946-1951, during which some of the mothers of the plaintiffs claiming injury had ingested DES. Because the policy was manuscripted and not drawn on a standardized form, Dart was unable to point to a specimen policy upon which its policy was modeled. Nonetheless, the Supreme Court found that Dart had produced enough evidence to sufficiently establish that Commercial Union had agreed to provide occurrence-based coverage with a duty to defend and a set policy limit per occurrence. On this basis, Dart was able to prove entitlement to defense by Commercial Union in connection with the DES claims.

Dart's proof consisted of testimony by the broker involved in procuring the policy as well as evidence that the insurer had defended and paid settlements in connection with two separate product liability claims brought against Rexall during the 1950s based on injuries alleged to have occurred during the 1946-1951 policy period. In addition, correspondence referred to the policy and its coverage terms, retrospective premium adjustments, and other aspects of policy administration. *See* 52 P.3d at 90-92.

Commercial Union also attempted to argue that if coverage was found, other insurance clauses in the policy worked to reduce or even eliminate coverage. The Supreme Court found that the insurer was unable to specifically establish the existence and type of other insurance clauses in the policy and therefore rejected Commercial Union's request for coverage adjustment based on another insurance clause. *See* 52 P.3d at 93. In addition, the Court suggested (and perhaps even held) that other insurance clauses are not necessarily applicable to long-tail injuries across many years and policy periods. Although such clauses may be relevant to allocating the respective responsibilities among insurers, they are not available in a long-tail, multiyear, consecutively triggered policy situation. Quoting prior precedent, the *Dart* Court stated that in the multiyear context, each triggered insurer is liable to the policyholder up to the limits of the relevant policy. *See* 52 P.3d at 93. *See also Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 686, 913 P.2d 878, 42 Cal. Rptr.2d 324 (1995) and *Armstrong World Industries, Inc., v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996).