ARE EXCLUSIONS FOR CONTAMINANTS ENFORCEABLE AGAINST COVID-RELATED CLAIMS AGAINST A TENNESSEE HEALTH CARE PROVIDER?

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Corporate health care providers – owners of hospitals and medical facilities, hospital management companies, long-term care providers and individual medical facilities -- had a wild 2020. Spending on health care took a deep dive in the second, third and fourth quarters, but increased in the first quarter of 2021 due in part to an infusion of revenue from administering vaccines. Fortunately, many health care companies have benefited from government programs like U.S. Department of Health & Human Services grants, loans under the Medicare Accelerated and Advance Payment and Paycheck Protection Programs, and the American Rescue Plan providing funds for rural health care providers. From a revenue perspective, 2021 is off to a good start.

But COVID has made caring for patients a risky business to be in, and liability claims have skyrocketed in direct proportion to the number of hospitalizations and deaths associated with the virus. Patients, already separated from family members during lockdown and not allowed visitors while housed in a facility, experienced increased anxiety and worse outcomes last year, leading to an increase in professional liability claims when COVID struck.

Health care facilities buy professional liability insurance policies to protect against this kind of claim, so top end revenue earned at the front end of patient care is not lost on the back end in standard of care-related litigation. Providers justifiably expect their carriers to step up in times of heightened professional liability risk, like the current pandemic. They assume that when they pay their premiums to shift this risk off their balance sheets and onto the balance sheet of an insurance company, it will stay there.

The first wave of liability claims arising from care provided during the pandemic began in the latter part of 2020. Ordinarily, when novel circumstances propel an unexpected series of claims, it is the outliers in the insurance marketplace – companies lacking the experience to underwrite and adjust claims for such circumstances – that tend to take aggressive and unreasonable coverage positions and withdraw from writing the line of business at the first sign of trouble. Insurance companies that hold themselves out as leaders in the field of assessing health care liability risks tend to take the longer view, paying more attention to customer service in order to maintain relationships with insureds and weathering storms as they come and go. In the current environment however, experienced and inexperienced carriers alike are finding ways to deny professional liability claims and non-renewing or reducing their exposure on risks they used to compete for.

In the coverage disputes and litigation provoked by these insurers as they try to claw back their underwriting losses through claim denials, a battleground issue has emerged: Exclusions eliminating coverage for contaminants defined to includes viruses.

In the face of claims in which the patient contracts COVID, carriers are citing their Pollution Exclusions and Organic Pathogen Exclusions to avoid coverage. Most policies contain some form of a Pollution Exclusion. Under common iterations of the exclusion, a "pollutant" is defined as a "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." While some courts have broadly interpreted "contaminants" as generally encompassing any microbes,[1] other courts analyzing the exclusionary language in context – taking into account terms such as "disperse" and "discharge" – have construed the exclusion as generally limited to "events commonly thought of as pollution, *i.e.*, environmental pollution."[2] These cases give insureds solid support for resisting coverage denials for claims involving COVID based on the Pollution Exclusion.

Insurers also point to Organic Pathogens Exclusions in their efforts to avoid coverage where COVID has anything to do with the chain of events leading to injury or death from COVID. Because this exclusion often contains express references to microorganisms such as viruses, insurance companies often aggressively push this exclusion as definitively shutting the door on coverage of COVID claims.[3]

A closer look at typical forms of the exclusion, however, suggests this may not be a proper application. The language of these exclusions often echo that of the Pollution Exclusion – applying in the context of the "exposure to or the manifestation, release, dispersal, seepage, migration, discharge, appearance, presence, reproduction or growth" of "organic pathogens," defined as "organic irritants or contaminants" such as viruses, mold, fungi or bacteria.[4] Moreover, the Organic Pathogen Exclusion often contains no reference to bodily injury, and excludes costs to "test for, monitor, clean-up, remediate, remove, contain, treat, detoxify, neutralize, rehabilitate" the effects of organic pathogens – suggesting that the exclusion is along the lines of a Pollution Exclusion than it is to a Communicable Disease Exclusion. Policyholders therefore may have a reasonable argument that certain Organic Pathogens Exclusions – depending on how they are written – do not apply to viruses that transmit communicable diseases such as COVID.

But Tennessee-based policyholders have a useful weapon in the arsenal available to fight the Organic Pathogen Exclusion: the Concurrent Causation Rule. In this state, even to the extent these exclusions may encompass the SARS-CoV-2 virus that causes COVID, a COVID-related lawsuit against a care provider is not automatically excluded by an Organic Pathogen or Communicable Disease Exclusion.

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[1] // *First Specialty Ins. Corp. v. GRS Mgmt. Assocs.*, 2009 U.S. Dist. LEXIS 72708, *13-14 (S.D. Fla. Aug. 17, 2009).

[2] // *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 651-52; *see also Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 806 (Ala. 2002).

[3]// Organic Pathogens are often defined as "any organic irritant or contaminant, including but not limited to mold, fungus, bacteria, virus, or their by-products such as mycotoxins, mildew or biogenic aerosol." Many exclusions, but not all, have exceptions for liability resulting from vaccines containing live virus.

[4] // Some policies dispense with Organic Pathogens Exclusions altogether, and add viruses to the list of "irritants or contaminants" subject to the Pollution Exclusion.

General liability and professional liability policies generally promise to cover the policyholder's liability for negligent conduct. Many Communicable Disease and Organic Pathogens Exclusions purport to preclude coverage for claims "arising out of" exposure to, presence of or transmission of a virus, depending on how the exclusion is worded. Many courts construe "arising out of" broadly to mean "flowing from" or "having its origin in."[5]

But exclusions that purport to preclude coverage for claims "arising out of" viruses create a tension with the promised coverage. Which takes priority: Conduct that the policy expressly promises to cover, or conditions that the policy expressly purports to exclude from coverage? Addressing this conflict, a number of states have held that an insurer is not relieved from coverage the plaintiff's injuries did not result, even in part, from a risk for which it provided coverage and collected a premium. These courts hold that, where a policy expressly insures the policyholder's negligent conduct, "arising out of" exclusions do not defeat coverage unless the policyholder's negligence ***precedes*** the excluded condition.[6] While many of these authorities generally have focused on application of assault exclusions, the logic of this rule – often called the Concurrent Causation Rule – arguably extends to similarly-worded Communicable Disease and Organic Pathogens Exclusions as well.

Tennessee has clearly adopted the Concurrent Causation Rule. In *Almany v. Nationwide Ins. Co.*, 1987 WL 4745 (Tenn. Ct. App. 1987), a girl was injured by the insured's negligence while disposing of a fuel-soaked rag used during efforts to pour gas into the fuel tank of her car, by lighting the rag on fire. The Fireman's Fund policy excluded bodily injury "arising out of the ownership, maintenance, use, loading or unloading of . . . a motor vehicle owned or operated by, or rented or leased by any insured." Finding this exclusion inapplicable, the court cited *Travelers Insurance Co. v. Aetna Casualty and Surety Co.*, 491 S.W.2d 363, 365-366 (Tenn. 1973) where the Tennessee Supreme Court held that the term "arising out of" in an exclusion[7] was ambiguous, because it could apply to injuries proximately caused by a covered loss, or to injuries simply causally connected with the covered loss. *Almany*, *supra*, 1987 WL 4745, at *7-8. Construing this ambiguity against the insurer, the Tennessee Supreme Court in *Travelers* held

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[5] // *Western World Ins. v. Country Place Adolescent Residential Treatment Center*, 211 F.3d 125, 126 (5th Cir. 2000); *Continental Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080-81 (9th Cir. 1985) ("arising from," when used in an insurance policy, need only have an "incidental relationship" to the excluded injury for the policy's exclusion to apply); *Tuscarora Wayne Mut. Ins. Co. v. Kadlubosky*, 889 A.2d 557, 563 (Pa. Super. 2005) ("construed strictly against the insurer, 'arising out of' [in a policy] means causally connected with, not proximately caused by"); *Metropolitan Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co.*, 793 N.E.2d 1252, 1255 (Mass. App. Ct. 2003) (holding that the phrase "arising out of," when used in insurance contracts is "not to be construed narrowly but ... read expansively," and means " 'originating from, growing out of, flowing from, incident to or having connection with'"); *Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 774 (2008).

[6] // *Jorgensen v. Auto–Owners Ins. Co.*, 360 N.W.2d 397, 401 (Minn. App. 1985); *State Farm Mut. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 97; *Ostwald v. Hartford Ins. Co.*, 2020 U.S. Dist. LEXIS 34827, *9 (W.D. Wash. 2020); *but see, e.g., Winnacunnet Coop. Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 84 F.3d 32, 33-38 (1st Cir. 1996); *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 88 N.Y.2d 347, 350 (1996); *Lloyds of London v. Fat Cat Bar & Grill*, No. Civ.A.01–30015–MAP, 2002 WL 823762, at *3-4 (D. Mass. 2002).

[7] // The opinion describes the operative language being interpreted as an exclusion, but it is unclear whether the court was construing a coverage grant or an exclusion.

that the exclusion did not apply to those injuries that were proximately caused – what it described as "the efficient and predominating cause" -- by the covered loss. *Id.*

Citing this case and the California Supreme Court decision in *State Farm Mutual Auto. Ins. Co. v. Partridge*, *supra*, 10 Cal.3d at 105, the *Almany* court found that "[t]he maintenance or use of the Almany automobile was not the predominating or sole proximate cause of Ms. Blackwell's injuries." Rather, it was "Ms. Almany's act of lighting the gasoline-soaked towel also caused the injury . . . [and] [t]hus, the exclusion in Fireman's Fund's homeowners policy does not excuse it from liability in this case." *Almany*, *supra*, 1987 WL 4745, at *8. *Almany* has been followed in other Tennessee decisions. *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 887-88 (Tenn. 1991) ("where a nonexcluded cause is a substantial factor in producing the damage or injury, even though an excluded cause may have contributed in some form to the ultimate result and, standing alone, would have properly invoked the exclusion contained in the policy," then an exclusion applicable to any loss "arising out of" the excluded cause will not be enforced.); *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 493 (Tenn. Ct. App. 1999); *Allstate Ins. Co. v. Grimes*, 2004 WL 2533826, at *4 (Tenn. Ct. App. 2004).

In states like Tennessee that recognize the Concurrent Causation Rule, its application in connection with a claim having to do with COVID will be very fact-specific. For example, assume that an insured hospital is sued by a patient who contracted COVID while receiving inpatient treatment for cancer. The patient alleges that she contracted COVID because the treating nurses failed to wear a mask, resulting in the transmission of the virus from a nurse to the patient. The insurance company denies coverage under the Organic Pathogens Exclusion – which under the policy applies to claims "arising out of" the "presence of" viruses – on grounds that the virus that causes COVID comes within that exclusion. Whether or not the exclusion actually encompasses the virus, the exclusion arguably does not apply under the Concurrent Causation Rule if the "presence of" the virus at the hospital preceded the hospital's negligence that resulted in the actual transmission of the virus to the patient. Even if the negligence itself resulted in further exposure to the virus, arguably the exclusion does not apply merely because the negligence "enhances" a condition that existed prior to the covered negligence.[8]

In states like Tennessee that have adopted the Concurrent Causation Rule, applying these exclusions in injury and death claims where COVID is somewhere in the chain of causation is a fact-specific exercise. A reference to COVID in the patient file or on a death certificate should not end the inquiry. If the patient suffered from other conditions that preceded COVID in the chain of causation leading to injury or death, courts in states that disallow exclusions where a covered cause and an excluded cause contribute to the loss should preserve coverage for this kind of claim.

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[8]// *See Ostwald v. Hartford Ins. Co. of the Midwest*, 2020 WL 978441, at *2 (W.D. Wash. 2020) and cases cited therein, holding that under an exclusion for bodily injury arising from an excluded cause, the exclusion applies the insured causes the injury by behaving negligently before the act giving rise to liability, such as a failure to stop the sexual abuse of a victim. But if the insured "enhances" the injury by behaving negligently after the abuse, then the injury would not "arise out of" the abuse and would be covered. *See Homesite Ins. Co. of the Midwest v. Walker*, 2019 WL 4034690, at *3 (W.D. Wash. 2019).

As government aid for COVID-related losses runs out and regular operations at health care facilities are restored, professional liability claims will survive. Tennessee insureds should get the benefit of the Concurrent Causation Rule where COVID is just one link in the causation chain, and a covered cause of loss – like negligent patient care – is considered "the efficient and predominating cause" of the patient's injuries or death.