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malicious injury question in the bankruptcy proceeding was not identical to the willful and malicious injury question in the initial tort action. Combs claimed that the bankruptcy court should have employed a clear and convincing evidence standard and that the employment of this standard would render the questions dissimilar because the court in the initial jury trial employed a preponderance of the evidence standard. The Fourth Circuit rejected this argument, holding that the proper standard of review with respect to section 523 bankruptcy issues is the preponderance of the evidence standard.

The Fourth Circuit went on to find that Combs and Richardson already had litigated the issue of whether Combs willfully and maliciously had injured Richardson and that the litigation of this issue was necessary to the initial tort judgment. The Fourth Circuit, consequently, decided that the bankruptcy court and the district court properly precluded relitigation of the issue of whether Combs willfully and maliciously had injured Richardson because Combs and Richardson already had litigated the issue and litigation of the issue was necessary to the initial tort judgment against Combs.

Thus, the Fourth Circuit held in *Combs* that a bankruptcy court may preclude a judgment debtor from relitigating the issue of whether the debtor willfully and maliciously injured a judgment creditor if the issue already has been actually and necessarily litigated. The Fourth Circuit cautioned, however, that this rule will require a bankruptcy court to review the full transcript of the prior action in most cases before the bankruptcy court can decide that an issue was actually and necessarily litigated in that prior action.

INSURANCE

In *Evans v. United Life & Accident Insurance Co.*, 871 F.2d 466 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether the district court erroneously admitted into evidence a copy of an insurance application that the insurance company failed to attach to the policy when issued, as then required by Virginia Code section 38.1-393 (repealed 1986). In *Evans* the plaintiff's decedent (Dr. Evans) applied for a life insurance policy through an agent of Volunteer State Life Insurance Company (Volunteer), a wholly-owned subsidiary of Chubb LifeAmerica (Chubb). The application provided that Volunteer would prorate death benefits if an applicant misrepresented the applicant's age or sex on the application. The application contained no specific provisions for other misrepresentations, but did state that "any false statements or misrepresentations may result in the loss of coverage under the policy."

The insurance agent explained Volunteer's misrepresentation policy to Dr. Evans and Mrs. Evans, the plaintiff, telling the Evans that Volunteer also prorated death benefits if an applicant misrepresented the applicant's status as a smoker. After hearing this explanation, Dr. Evans falsely stated that he had not used tobacco in the past year. Within a year of the application date, Dr. Evans died after falling down a flight of stairs. Prior

to Dr. Evans's death, Volunteer did not learn that Dr. Evans had misrepresented himself as a nonsmoker on his life insurance application.

Volunteer had approved Dr. Evans's application on October 1, 1985. The Volunteer agent then requested United States Life & Accident Insurance Company (United), another wholly-owned subsidiary of Chubb, to review Dr. Evans's application. Relying on the Volunteer application, United approved the issuance of a $500,000 life insurance policy on Dr. Evans's life on October 21, 1985. The policy named Mrs. Evans the beneficiary. Chubb, the underwriter of the insurance policies, viewed the Volunteer policy as the primary policy and the United policy as an alternate policy that would take effect only if Dr. Evans relinquished the Volunteer policy. Dr. Evans did surrender the Volunteer policy and selected the United policy.

After Mrs. Evans filed a claim for death benefits under the policy, United learned that Dr. Evans had stated falsely that he was a nonsmoker. United, therefore, denied Mrs. Evans's claim for death benefits, stating that Dr. Evans's false statement was a material misrepresentation that voided the life insurance policy. Mrs. Evans then sued United to recover the $500,000 in death benefits. The United States District Court for the Eastern District of Virginia adopted the jury's advisory verdict that stated that Dr. Evans misrepresented his status as a nonsmoker on the application and that United relied on this misrepresentation. The jury found that Dr. Evans knew of United's policy regarding smokers' misrepresentations. The jury concluded, however, that Dr. Evans's misrepresentation would not result in United denying benefits to Mrs. Evans, the beneficiary, but rather would result in United prorating the death benefits to an amount United would have owed to a beneficiary of a smoker's policy. The court, consequently, awarded Mrs. Evans a $339,014 judgment, plus interest.

United appealed from the trial court's denial of United's motions to alter the judgment, for a judgment notwithstanding the verdict, or for a new trial. United argued on appeal that the evidence was insufficient to sustain the verdict. Mrs. Evans cross-appealed, arguing that the district court erroneously admitted the insurance application into evidence in light of section 38.1-393 of the Code of Virginia, which permits an insurer to rely on an insured's statements only if the statements are written and attached to the issued policy.

The Fourth Circuit first construed section 38.1-393 of the Code of Virginia to require an insurer to attach the information to the policy that the insurer relied on in issuing the policy when the policy takes effect. The court reasoned that, because United did not attach the application to the policy when issued, the application was inadmissible as evidence of Dr. Evans's misrepresentation. By eliminating the application as evidence of Dr. Evans's misrepresentation to United, the court denied United its defense of material misrepresentation by Dr. Evans.

The Fourth Circuit further rejected United's argument that United "issued" the policy on the date of delivery, January 3, 1986. United argued that January 3 was the relevant date because the Evans received copies of the United application on that date. If United had established January 3 as

the issue date, United would have been able to rely on the application as evidence of Dr. Evans' material misrepresentation. The Fourth Circuit, instead, found that the policy itself stated the issue date, "Date of Issue—November 10, 1985." After analyzing Virginia case law, the court determined that Virginia distinguishes a policy's issue date from its delivery date. The Fourth Circuit reasoned that the purpose of section 38.1-393 was to require an insurer to indicate on a policy the statements on which the insurer relied in deciding to issue the policy. The court further found that a policy binds an insurer when the insurer issues the policy, regardless of whether the insured receives the policy on the issue date.

The Fourth Circuit held that, because United failed to attach Dr. Evans's application to the policy when issued, the district court erroneously admitted the application as evidence of Dr. Evans's misrepresentation. The court reasoned that United, without evidence of Dr. Evans's misrepresentation, had to pay the full death benefit under the policy, $500,000, to the plaintiff. Accordingly, the Fourth Circuit reversed the decision of the district court, which awarded only prorated death benefits, and remanded the case for entry of a judgment of $500,000 in favor of the plaintiff.

In *Insurance Co. of North America v. United States Gypsum Co.*, 870 F.2d 148 (4th Cir. 1989), the Fourth Circuit considered whether the jury erred in finding the Insurance Company of North America (INA) liable under an all-risk policy for damages of $24.8 million that United States Gypsum Company (USG) sustained in a massive earth subsidence. USG's loss resulted from an earth subsidence beneath USG's gypsum plant in Plasterco, Virginia. USG built the plant atop abandoned gypsum mines. At the time USG built the plant, USG knew that the gypsum mines had subsided on numerous occasions. On November 4, 1984, a major subsidence resulted in a twenty-one acre collapse. The resulting caveholes severed water lines, flooded the mines, and caused the gypsum plant, a public highway, and adjoining railroad tracks to sink. The extensive damage forced USG to abandon the gypsum plant.

When INA refused to pay insurance benefits to USG, USG filed an action in the United States District Court for the Western District of Virginia. INA argued before the district court that USG's all-risk insurance policy covered only fortuitous losses, not losses that the insured knew were likely to occur. INA further argued that USG's subsidence was a "loss in progress" that the INA policy did not cover. The district court found that there was no certainty of future subsidence when INA issued its policy. Therefore, the court held that the resulting damage was fortuitous and INA was liable under USG's all-risk policy. INA appealed to the United States Court of Appeals for the Fourth Circuit on several grounds.

First, INA argued that the jury erred in finding the damage fortuitous. To resolve the argument, the Fourth Circuit initially determined that a "fortuitous event" is an event that, so far as the parties are aware, is dependent on chance. INA contended that the event was not fortuitous because, prior to the accident, USG was aware of the certainty of future

subsidence at the gypsum facility. The Fourth Circuit rejected INA's argument, however, stating that knowledge that subsidence is likely to occur is not knowledge that subsidence will occur during the policy period or in a particular location. Moreover, the Fourth Circuit noted that a certainty of subsidence is not a certainty of damage. The court remarked that at any mining site subsidence will occur at some point, yet loss is not certain to occur as a result of the subsidence. Thus, the court commented that if the certainty of subsidence meant a loss was not fortuitous, coverage for subsidence damage never could be available. However, the court noted that INA's underwriting manuals negated that conclusion by listing subsidence as one of the all-risk perils that might cause severe loss.

Similarly, the court reasoned that prior subsidence at the plant could not be a loss in progress because no damage in progress had occurred before INA issued the policy. While USG knew of subsidence prior to the issuance of the INA policy, subsidence had not damaged any of the Plasterco facilities, nor was any evidence of an immediate threat of subsidence loss in existence. Nevertheless, INA asserted that USG had an affirmative duty to disclose to the insurer information regarding subsidence at the Plasterco plant and that the district court erred by failing to instruct the jury on USG's affirmative duty to disclose knowledge of past subsidence. The court determined that Virginia law only requires an insured to disclose such matters as the insurer may inquire about, unless some condition of the policy states otherwise. The INA policy provided that coverage would be void if USG willfully concealed or misrepresented material facts or committed fraud. The jury, however, found that USG was not guilty of any misconduct. The Fourth Circuit reasoned that to hold that USG had an affirmative duty to disclose information regarding subsidence would place the burden of underwriting decisions on the insured and not the insurer. The court concluded that INA assumed a risk without conducting the proper investigation, and consequently, INA must suffer the damages.

Next, INA challenged an opening statement of USG's counsel, the admission of an *ex parte* statement, and the jury's measure of damages. However, the court rejected all of the appellant's other challenges. The court found USG's opening statement to be improper but not prejudicial. The court explained that asking jurors to place themselves in the position of a party to a suit is improper but does not constitute reversible error absent prejudice. The court also found that the trial court properly admitted the *ex parte* statement. The admission was proper, the court reasoned, because INA had ample opportunity to cross-examine the speaker during depositions. Finally, the court ruled that the evidence at trial fully supported the jury's damages award as reasonable under the circumstances. As the Fourth Circuit rejected all of INA's contentions, it affirmed the judgment of the district court.

In *Allstate Insurance Co. v. American Hardware Mutual Insurance Co.*, 865 F.2d 592 (4th Cir. 1989), the Fourth Circuit considered the interaction and effect of excess liability clauses in two insurance policies. In *Allstate*

the plaintiff, Allstate Insurance Company (Allstate), and the defendant, American Hardware Insurance Company (American Hardware), insured Chrysler Corporation and Greenbrier Motor Company, which leased automobiles from Chrysler. On March 25, 1981, an automobile that Greenbrier had leased from Chrysler was involved in a single vehicle accident resulting in serious injuries to an infant. The infant and his parents sought $2,200,000 in damages from Chrysler Corporation, Greenbrier Motor Company, the driver of the vehicle, and another individual. Allstate alleged that coverage under an excess liability insurance policy that its predecessor issued did not become effective until the insured had exhausted its primary coverage under the American Hardware policy.

According to the Fourth Circuit, three insurance policies provided coverage at the time of the accident. The court found that a policy Continental Insurance Company had issued provided primary coverage up to $500,000. All parties agreed that the plaintiff's claim must exhaust the limits of the primary policy before the other two policies would become effective. Next, the court concluded that the $10,000,000 Allstate policy was an umbrella policy that served only as excess insurance for all other policies that Chrysler held. According to the court, the Allstate policy expressly stated that the insured must exhaust all other insurance coverage before Allstate becomes liable under its policy. Finally, the court noted that the third policy, issued by American Hardware, insured Greenbrier Motor Company for $500,000. The court explained that the American Hardware policy provided primary coverage for garage operations, including the use of automobiles. However, the court noted that the policy excluded primary coverage in accidents involving a vehicle the insured did not own. Consequently, the court found that American Hardware's policy provided only excess coverage of nonowned vehicles. Thus, the court concluded that both the Allstate and American Hardware policies provided excess coverage in the accident.

The United States District Court for the Northern District of West Virginia had found that the excess clauses in both the Allstate and American Hardware policies were mutually repugnant and must be disregarded in interpreting the policies. The court ordered the insurers to apportion the loss on a "policy limit method." Allstate appealed, arguing that the Allstate policy was an umbrella policy which did not require payment until all other policies were exhausted.

To resolve the issue, the Fourth Circuit followed the rule that a majority of the circuits have adopted. Under this rule, an umbrella policy does not provide coverage until the insured exhausts all primary policies with excess clauses. The court noted that the Fifth Circuit had analyzed the policy language in a similar case. The Fifth Circuit determined that the intent of the issuer of the umbrella policy was to assume only secondary liability in all cases. The Fifth Circuit found that the issuer of the umbrella policy strictly conditioned its liability on the exhaustion of all other policies.

Applying the Fifth Circuit reasoning, the Fourth Circuit held that the Allstate policy was a classic umbrella policy, providing only excess coverage and never providing primary coverage. The court found that the American