United States Court of Appeals
For the Eighth Circuit

No. 24-3101

XTO Energy, Inc.,

Third Party Plaintiff - Appellee,

v.

Commerce and Industry Insurance Company,

Third Party Defendant - Appellant.

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: May 13, 2026
Filed: September 3, 2026

Before COLLOTON, Chief Judge, SHEPHERD and KOBES, Circuit Judges.

COLLOTON, Chief Judge.

After an explosion at an oil and gas well, XTO Energy, Inc., the owner and lease operator of the well, sought insurance coverage for compensation it paid to persons injured in the explosion. Relevant to this appeal, XTO demanded coverage under a second-layer umbrella policy that Commerce and Industry Insurance Company provided to XTO's contractor, Missouri Basin. Commerce denied XTO's coverage demand based on a "pollution exclusion," but the district court granted summary judgment for XTO on the ground that an exception to the pollution exclusion restored coverage. Commerce appeals, and we reverse.

I.

XTO was the owner and lease operator of the Ryan 14X-09E oil and gas well, located near Watford City, North Dakota. XTO retained a contractor, Missouri Basin, to perform "company man" services at the well. The contractor agreement contained a "knock-for-knock" provision under which XTO agreed to indemnify Missouri Basin against claims brought by XTO's employees and subcontractors, and Missouri Basin agreed to indemnify XTO against claims brought by Missouri Basin's employees and subcontractors.

The agreement also required Missouri Basin to secure and maintain commercial general liability insurance to support its indemnity obligation. Missouri Basin secured the required insurance coverage from Berkley National Insurance and Commerce and Industry Insurance. Berkley provided two policies: a commercial general liability policy with a $1 million per occurrence limit and $2 million aggregate limit and an umbrella policy with a $25 million per occurrence limit. Commerce provided a second-layer umbrella coverage policy to Missouri Basin with a $25 million limit.

The Commerce policy contained a pollution exclusion that excluded from coverage any claim arising out of the "release or escape of Pollutants anywhere at any time." The pollution exclusion also contained what the parties call a "time element exception" that would render the exclusion inapplicable if five conditions were satisfied: 1) the damage was "abrupt and neither expected nor intended" by the insured; 2) the incident "commenced on a demonstrable, specific date during the Policy Period"; 3) the damage became known to the insured within seven calendar days; 4) the damage was reported to Commerce "within (21) calendar days of becoming known to the Insured"; and 5) the insured expended reasonable efforts to mitigate the damage caused by the pollution.

On June 18, 2016, an explosion and fire occurred at the Ryan Well. A contractor working on behalf of XTO was killed, and several workers suffered severe burns and injuries. The victims of the explosion filed two lawsuits in the District of North Dakota against XTO, Missouri Basin, and other defendants. XTO performed its contractual obligation to defend and indemnify Missouri Basin in the lawsuits.

This litigation commenced in 2018 when Berkley sought a declaration that it owed no indemnity obligation to XTO or Missouri River for the claims made in the underlying lawsuits, because a pollution exclusion in the Berkley policy precluded coverage. XTO filed counterclaims against Berkley and a third-party complaint against Commerce, seeking coverage under the aforementioned insurance policies.

In May 2021, the district court granted partial summary judgment in favor of XTO and against Commerce and Berkley. The court determined that XTO's insurance demand fell within the scope of the pollution exclusion, but that the time element exception restored coverage to XTO. The court acknowledged that XTO had not satisfied the notice condition of the exception, because "XTO admits notice was not given within 21 days of the incident." Despite XTO's failure to satisfy the notice condition, the court concluded that Commerce had waived the right to disclaim coverage.

The court found that Commerce's denial of coverage letter "made no mention of a lack of timely notice," and that Commerce "raised the late notice for the first time during the discovery process." The court reasoned that under North Dakota law, an insurer waives the right to deny a claim for lack of notice "if the insurer fails to make a prompt and specific objection" to the lack of notice. N.D.C.C. § 26.1-32-09. The court also concluded that under *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392, 395-98 (N.D. 1981), the failure to provide timely notice of an insurance claim results in forfeiture of coverage only if the insurer can demonstrate that it was prejudiced. The court concluded that "Commerce has failed to demonstrate prejudice and has waived its ability to avoid coverage based upon a lack of timely notice," so the time element exception rendered the pollution exclusion inapplicable and restored coverage to XTO. Berkley then settled with XTO.

XTO moved for summary judgment against Commerce on the breach of contract claim. The court ultimately ordered Commerce to pay XTO $25 million for breach of the insurance contract, plus pre-judgment interest and attorney's fees and costs. Commerce appeals, and we review the grant of summary judgment *de novo*. *Avenoso v. Reliance Standard Life Ins. Co.*, 19 F.4th 1020, 1024 (8th Cir. 2021).

II.

It is undisputed that North Dakota law governs the interpretation of the Commerce insurance policy. Under North Dakota law, the interpretation of an insurance policy is a question of law. *Ziegelmann v. TMG Life Ins. Co.*, 607 N.W.2d 898, 899 (N.D. 2000). We interpret the insurance agreement "to give effect to the mutual intention of the parties as it existed at the time of contracting." *Id*. at 900. "We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction." *Id*. We resolve ambiguities in favor of the insured, but "we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." *Id*.

The Commerce policy pollution exclusion excludes from coverage:

> Any Bodily Injury, Property Damage or Personal Injury and Advertising Injury arising out of the actual, alleged or threatened discharge,

> dispersal, seepage, migration, release or escape of Pollutants anywhere at any time.

XTO contends that the pollution exclusion does not bar its insurance demand, because the exclusion does not apply to claims involving personal injuries. But the plain language of the provision excludes from coverage claims involving bodily injuries and personal injuries caused by the release of pollutants. The plaintiffs in the underlying litigation suffered injuries when oil and gas from the Ryan Well caught fire and exploded. Oil and gas are "pollutants" as defined in the policy, and it is undisputed that the underlying plaintiffs suffered bodily injuries when these pollutants were released and ignited. Thus, XTO sought coverage for bodily injuries arising out of the release or escape of pollutants, so the plain language of the pollution exclusion unambiguously excludes XTO's demand from coverage. The pollution exclusion therefore applies to XTO's claim.

The primary issue on appeal is whether the time element exception to the pollution exclusion restored coverage to XTO. The text of the exception states that the pollution exclusion:

> will not apply to Bodily Injury or Property Damage arising out of any discharge, dispersal, seepage, migration, release or escape of Pollutants that meets all of the following conditions:
>
> i. It was abrupt and neither expected nor intended by the Insured…
>
> ii. It commenced on a demonstrable, specific date during the Policy Period;
>
> iii. Its commencement became known to the Insured within (7) calendar days;
>
> iv. Its commencement was reported in writing to us within (21) calendar days of becoming known to the Insured; and

> v. Reasonable effort was expended by the Insured to terminate the discharge, dispersal, seepage, migration, release, or escape of Pollutants as soon as conditions permitted.

Commerce contends that XTO failed to satisfy condition (iv), so the exception does not apply. XTO admits that it did not provide written notice within twenty-one days of the incident, but argues that the district court correctly concluded that Commerce waived the right to rely on the pollution exclusion under North Dakota Century Code § 26.1-32-09.

The statute provides:

> Delay in the presentation to an insurer of notice or proof of loss is waived if the delay is caused by any act of the insurer, or if the insurer fails to make a prompt and specific objection.

N.D.C.C. § 26.1-32-09. XTO contends that Commerce failed promptly and specifically to object to XTO's untimely notice, so Commerce waived reliance on XTO's failure to satisfy the notice condition of the time element exception.

Section 26.1-32-09 provides for the waiver of "[d]elay in the presentation to an insurer of notice or proof of loss" if an insurer fails to make a prompt and specific objection to the late notice. The statute precludes an insurer from asserting a late notice defense without first making a specific objection to the late notice. As we understand the statute, however, it does not preclude an insurer from denying coverage based on a substantively different defense. *See Dietz Int'l Pub. Adjusters of Cal., Inc. v. Evanston Ins. Co.*, 515 F. App'x 680, 681 (9th Cir. 2013) (per curiam). Section 26.1-32-09 is therefore inapplicable, because Commerce denied coverage based on the pollution exclusion.

XTO contends that the notice requirement in the time element exception makes the pollution exclusion functionally a late notice defense. We cannot accept this proposed transmogrification. The notice requirement established a condition for invoking the time element exception to the pollution exclusion, and XTO failed to satisfy this condition. As such, the pollution exclusion applied because XTO did not properly invoke an exception. Commerce's denial of coverage was thus based on the pollution exclusion, not on XTO's failure to give timely notice.

The burdens of proof illustrate this point. In North Dakota, the "insurer has the burden to prove the applicability of a policy exclusion," but the insured "carries the burden to prove the applicability of an exception to the exclusion in order to benefit from coverage." *Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 847 F.3d 594, 601 (8th Cir. 2017) (internal quotations omitted). Thus, when an insurer seeks to deny coverage based on a late notice defense, the insurer has the burden of proving that the insured failed to satisfy the notice provision, and the insurer must promptly and specifically object to the late notice to satisfy § 26.1-32-09.

The pollution exclusion operates differently. The burden to prove the applicability of the pollution exclusion was allocated to Commerce, and the insurer carried its burden by showing that XTO's claim involved bodily injuries caused by the release of pollutants. XTO bore the burden to prove the applicability of the time element exception, and was thus required to show that it satisfied the notice condition. XTO failed to make a timely report, and Commerce was within its contractual rights to deny coverage based on the pollution exclusion. Because Commerce denied coverage under the pollution exclusion, Commerce had no obligation under § 26.1-32-09 to object to XTO's failure to satisfy the notice condition of the time element exception. Commerce thus did not waive the right to deny coverage under the pollution exclusion.

XTO contends that even if Commerce did not waive the right to deny coverage under the pollution exclusion, coverage must be restored because Commerce cannot show prejudice from XTO's failure to satisfy the notice condition. XTO argues that two decisions from the North Dakota Supreme Court support this notion: *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392 (N.D. 1981), and *Hasper v. Center Mutual Insurance Co.*, 723 N.W.2d 409 (N.D. 2006).

We have considered these decisions, but conclude that they are inapposite. First, *Finstad* involved the interpretation of an insurance agreement with an indefinite notice requirement that did not specify the consequences for failure to provide timely notice. 301 N.W.2d at 394. The North Dakota Supreme Court reasoned that because the policy "d[id] not expressly provide for a forfeiture or any other consequence upon failure to give such notice within the time period specified in the policy," the insurer was required to demonstrate prejudice to avoid liability. *Id.* at 398. In the Commerce policy, however, the consequences for failure to satisfy the notice condition are clear: the exception to the pollution exclusion does not apply if the release of pollutants is not reported to Commerce within twenty-one days after the release is known to the insured.

XTO contends that *Finstad* nevertheless establishes a "general requirement" that an insurer must demonstrate prejudice to deny coverage for untimely notice. XTO reads *Finstad* too broadly. The *Finstad* court relied on *Cooper v. Government Employees Insurance Co.*, 237 A.2d 870 (N.J. 1968), a New Jersey Supreme Court decision holding that coverage under an insurance policy that required notice of an accident "as soon as practicable" was not forfeited without "both a breach of the notice provision and a likelihood of appreciable prejudice." *Id*. at 871, 874. The North Dakota Supreme Court reasoned that the "rationale expressed by the New Jersey court [was] well-reasoned and is equally applicable to a group accident insurance policy such as the one involved in the instant case." *Finstad*, 301 N.W.2d at 397. The policy in *Finstad* required notice within twenty days "or as soon thereafter as is reasonably possible." *Id.* at 395.

After quoting *Cooper*, the North Dakota court continued:

> To determine the consequence of a failure to provide a timely notice of claim . . ., we must look to the terms of the insurance policy itself and construe those terms in accord with the principles of law regarding the interpretation of insurance contracts. It is well-established in North Dakota that, because an insurance policy is a contract of adhesion, any ambiguity or reasonable doubt as to its meaning is to be strictly construed against the insurer and in favor of the insured.

Id. at 398. The court then held that:

> the policy does not expressly provide for a forfeiture or any other consequence upon failure to give such notice within the time period specified in the policy. In accord with the rationale expressed by the New Jersey Supreme Court in *Cooper*, *supra, and in accord with the foregoing principles of interpretation*, we conclude that failure to provide a timely notice of claim . . . as required by the insurance policy will result in forfeiture of benefits . . . only if [the insurer] can demonstrate that such failure resulted in a likelihood of appreciable prejudice.

Id. (emphasis added).

Thus, the *Finstad* court required an insurer to demonstrate prejudice before denying coverage based on both the New Jersey Supreme Court's rationale in *Cooper* and the well-established principle of North Dakota law that ambiguities are strictly construed against the insurer. The ambiguity of the insurance policy in *Finstad* limits the scope of the court's holding. There, the policy notice period was indefinite, and the policy did not expressly provide for forfeiture of coverage upon failure to give timely notice. *Id.* at 394. The policy in *Cooper* was ambiguous for the same reasons. 237 A.2d at 871.

The *Finstad* court also explained that the New Jersey court's reasoning was applicable only "to a group accident insurance policy *such as the one involved in the instant case*." 301 N.W.2d at 397 (emphasis added). This language, coupled with the court's reference to the principle of interpretation regarding ambiguities in contracts, suggests that the holding was limited to a case where the insurance agreement contained an indefinite notice period that did not expressly provide for forfeiture of coverage upon failure to give timely notice.

In other words, *Finstad* does not establish a general requirement that an insurer must demonstrate prejudice to deny coverage when an insured fails to provide timely notice. XTO's proposed reading would insert an unwritten prejudice requirement into every insurance contract with a notice provision or a coverage exclusion with a time element exception. That approach would run counter to the tenet of North Dakota contract law that courts "will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage." *Ziegelmann*, 607 N.W.2d at 900.

Unlike in *Finstad*, there is no ambiguity in the Commerce policy to resolve in favor of the insured. The policy sets a definite notice period, and the consequences for failure to make a timely report are clear: the exception to the pollution exclusion does not apply if the release of pollutants is not reported within twenty-one days. The plain terms of the pollution exclusion did not require Commerce to demonstrate prejudice based on XTO's lack of notice, and we do not understand *Finstad* to mean that the court should alter the unambiguous terms of the Commerce policy.

XTO's reliance on *Hasper* is likewise unavailing. *Hasper* involved an uninsured motorist statute that expressly required prejudice, so whether the insurer was required to show prejudice was not contested. 723 N.W.2d at 412-13. *Hasper* thus lends no support to the proposition that an insurer must demonstrate prejudice to raise a late notice defense when the agreement unambiguously excludes coverage.

For these reasons, we conclude that the district court erred in restoring coverage to XTO based on a determination that Commerce failed to show prejudice. Commerce demonstrated that the pollution exclusion applied to XTO's claim, and XTO's noncompliance with the time element exception to the exclusion prevented the exception from taking effect. Therefore, XTO's claim is excluded from coverage under the pollution exclusion.

III.

Alternatively, XTO contends that it is entitled to coverage under exceptions in the Berkley policy pollution exclusion that were incorporated into Commerce's policy through a "follow form" provision. Commerce counters that its policy does not incorporate the Berkley policy exceptions, because the policies conflict and cannot be harmonized.

The phrase "follow form" refers to the practice, common in second-layer umbrella policies like the Commerce policy, in which the second-layer coverage "follows" the substantive terms of the primary policy. *See Insituform Techs., Inc. v. Am. Home Assurance Co.*, 566 F.3d 274, 278 (1st Cir. 2009). Typically, follow form policies are brief, and they incorporate most, if not all, of the primary policy terms. But second-layer policies do not follow the primary coverage when the policies conflict. *Id.* at 278-79.

The Commerce follow form provision provides that:

> Coverage under this policy will follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance, subject to the Policy Period, Limits of Insurance, premium and all other terms, definitions,

> conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by Scheduled Underlying Insurance.

The Berkley policy pollution exclusion contains a "hostile fire" exception and an "additional insured" exception. The Commerce policy pollution exclusion is different; it contains a single exception with five necessary conditions that must be triggered for the exception to take effect, and it does not contain a "hostile fire" exception or an "additional insured" exception. By its terms, the Commerce follow form provision provides that the Commerce policy generally follows the Berkley policy, but the Commerce policy remains "subject to" its own "terms, definitions, conditions, and exclusions." Thus, where the Commerce policy conflicts with the Berkley policy, the terms of the Commerce policy control. The Commerce and Berkley pollution exclusions employ completely different exceptions and terms. Because the policies conflict, the Commerce follow form provision does not incorporate the additional exceptions in the Berkley policy. *Insituform Techs.*, 566 F.3d at 278. Accordingly, the additional exceptions in the Berkley policy do not restore coverage to XTO.

* * *

We conclude that the personal injuries underlying XTO's claim are not covered under the Commerce policy, because the pollution exclusion provides that the insurance does not apply. Accordingly, we reverse the decision of the district court and vacate the award of damages, interest, attorney's fees, and costs.

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