

January 2021 Fourth Circuit Tort and Insurance Cases of Interest

Related Professionals

Marcus A. Manos
803.253.8275
mmanos@maynardnexsen.com

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Periodically, Nexsen Pruet member Marc Manos, a member of the SC Bar Torts and Insurance Practice Section Council, sheds light on a few recent cases from the Fourth Circuit Court of Appeals, focused in the areas of tort & insurance law.

Below are the tort and insurance cases of interest selected for January 2021.

Knight v. Boehringer Ingelheim Pharm., Inc.

No. 19-1696 (4th Jan. 6, 2021) (Published) FEDERAL PREEMPTION OF STATE TORT CLAIMS—DRUG LABELING Plaintiffs decedent suffered injury from internal bleeding while taking Pradaxa, a medication which inhibits blood clotting in order to protect from strokes. As a matter of federal law, the Medication Guide warnings for patients cannot be changed unilaterally by the manufacture. 21 C.F.R. § 314.70(b). However, the manufacturer can strengthen a warning or add a new warning to the physician's label (the warning label that goes to the prescribing physician to be discussed with patients) for a drug when it has newly acquired information of a causal association between the drug and a risk of harm. 21 C.F.R. § 314.70(c)(6)(iii). The jury returned a verdict for plaintiffs totaling \$1,250,000 for fraud in the warning label. The trial court found that certain information in continuing study of older data constituted "newly acquired information" and refused to grant the pharmaceutical defendant's motion for judgement as a matter of law. Preemption is a matter of law for the court, and the Fourth Circuit conducted a de novo review. "Newly acquired information" must reveal risks of a different type or a risk with greater severity or frequency than what was described in the approval application filed with the FDA. The Fourth Circuit found that the information acquired from further study of the data simply added to knowledge of risks, severity and frequency already know to the FDA

and, therefore the defendant could not unilaterally change the Physician's Label. REVERSED.

Dean v. Jones

18-7227 (4th Cir. Jan. 4, 2021) (Published) EIGHTH AMENDMENT EXCESSIVE FORCE Prisoner Dean sued two correctional officers and others for use of excessive force. Dean alleged two incidents happening on the same day. In one instance, after head butting an officer, Dean alleged he had been cuffed, was lying on the ground, and no longer resisting when an officer sprayed pepper spray in his face. Then, while being escorted from that area to the nurse's office, Dean head butted another officer. After the second head butt, Dean alleged officers forced him into a closet out of range of the prison video cameras (that only took video, no sound), knocked him on the ground and beat and kicked him. The district court granted summary judgment determining that the officers acted in good faith in order to protect themselves. The Fourth Circuit held that excessive force cases like these involve a determination of intent — if the officers in good faith intended only to defend themselves they cannot be liable, but if they acted to punish a prisoner physically after the fact, then they are liable for his injuries. The evidence created an issue of fact as to whether or not the officers were acting to punish. REVERSED AND REMANDED.

Modern Auto. Network, LLC v. Eastern All. Ins. Co.

19-2134 (4th Cir. Jan. 19, 2021) (Unpublished). Insured sued insurer for breach of contract (including breach of the duty of good faith and fair dealing), negligence and violation of the N.C. Unfair and Deceptive Trade Practices Act (UDTPA). The district court granted summary judgment. The Fourth Circuit affirmed. Insured based the contract on an allegation the insurer owed it a duty to negotiate a release and resignation agreement with the employees. The contract contained a "duty to defend" clause than did not mention a duty to negotiate a release and resignation. The claim contradicted the clear language of the contract. Therefore, summary judgment affirmed. Insured based the good faith claim on the insurer placing its own interests ahead of the insured's interests in the settlements. Based on controlling North Carolina law, the Fourth Circuit affirmed that no claim would lie as long as the insurer settled within policy limits and evidence showed the insurer at least considered the insured's interest, the insurer may consider its own interests as well as a matter of law. The policy gave the insurer sole authority to settle. The negligence claims did not survive the application of the economic loss rule. The exception relied on—willful injury to or conversion of property—could not be supported on the facts developed. Finally, the UDTPA claim failed because the record contained no evidence of a "routine failure to communicate" (a statutory unfair or deceptive practice in insurance) or that the consideration of the insurer's own interests in settling a claim could support liability. AFFIRMED.

RXD Media, LLC v. IP Application Dev. LLC

19-1461 (4th Cir. Jan. 21, 2021) (Published) TRADEMARK, UNFAIR COMPETITION RXD sued Apple and IP Application claiming to be the senior user of the mark IPAD. The district court entered summary judgment against RXD's claims and in favor of Apple on its counterclaims. The Fourth Circuit affirmed finding that RXD prior use of IPAD was in an unrelated field and unsuccessful so it had stopped being used in commerce for a

period of time. RXD attempted to revive IPAD for cloud storage services after Apple's extensive use and marketing of the iPad product. The Court found iPad (short form of internet notepad) a descriptive mark that gained secondary meaning and thus was protectable under Apple's registrations with the USPTO. Permanent injunction against RXD affirmed.

Goodman v. Diggs

18-7315 (4th Cir. Jan. 28, 2021) (Published) PRISONER CIVIL RIGHTS, 8TH AMENDMENT District Court granted summary judgment to all Defendants on claims under 42 U.S.C. 2983 and common law torts. Goodman, a disabled prisoner with spinal injuries that prevent him from walking without a cane and sometimes has to use a wheelchair, was transported from Chesapeake Correctional to Virginia Beach Correctional for a hearing. Hearings ran late and he had to spend the night at Virginia Beach where he alleged he was thrown on the floor, his head split open above his left eye, officers knelt on him and hit him, all unprovoked. The officers claimed Goodman was uncooperative and injured himself. The facility nurse confirmed his injuries. Videotape of the incident was "routinely overwritten" and not available. The Fourth Circuit reversed. In the course of the case, Goodman filed a Complaint and a First Amended Complaint that were verified under oath. The Second Amended Complaint was not verified. The district court erred by not considering the facts in the first two complaints as affidavits and those created disputed material facts. Further, the district court erred by not resolving Goodman's discovery issues raised by motions that Defendants document and data productions were deficient. Reversed and remanded for discovery proceedings and further proceedings consistent with opinion.