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2017 • Vol. 1

Ninth Circuit Creates Bad Law For Excess Insurers

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Ninth Circuit Creates Bad Law For Excess Insurers—At Least In California

by ***Melinda S. Kollross, Don R. Sampen*** *and* ***Lisa A. Hausten***

Introduction

On March 21, 2017, the United States Court of Appeals for the Ninth Circuit issued its decision in *Teleflex Medical Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 851 F.3d 976 (9th Cir. 3/21/17), holding that under existing California law, an excess insurance carrier has certain duties where a proposed settlement demand exceeds a defending primary insurer's limits and has been approved by the insured and the primary insurer. Those duties arose from a 1991 California Court of Appeal's decision entitled *Diamond Heights Homeowners Ass'n v. National American Ins. Co.*, 227 Cal. App. 3d 563 (1991). In that case, the California Court of Appeals ruled that an excess liability insurer has three options when presented with a proposed settlement of a covered claim that has met the approval of the insured and the primary insurer. The excess insurer must (1) approve the proposed settlement, (2) reject it and take over the defense, or (3) reject it, decline to take over the defense and face a potential lawsuit by the insured seeking contribution towards the settlement. Under *Diamond Heights*, the insured is entitled to reimbursement if the excess insurer was given a reasonable opportunity to evaluate the proposed settlement and the settlement was reasonable and not the product of collusion.

In *Teleflex*, the Ninth Circuit held that the excess carrier, National Union, violated its *Diamond Heights* duties and thus the insured was entitled to have the settlement it worked out with the claimant funded by the excess carrier in a bad faith action brought by the insured against National Union.

Facts

The insured had two general liability insurance policies covering claims that it disparaged other companies. The first was a primary policy with a $1 million limit issued by CNA and the next was an excess policy issued by National Union with a $14 million limit.

The insured sued a competitor for patent infringement. The competitor filed a trade disparagement and false advertising counterclaim against the insured. CNA agreed to defend the insured on the counterclaims. According to the Ninth Circuit, National Union did not dispute that the counterclaims were covered by its insurance policy.

The trial court granted summary judgment in favor of the competitor on the insured's patent claims and denied the insured summary judgment on the counterclaims. The insured appealed the decision on the patent claims and that decision was reversed by the Federal Circuit.

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The insured and its competitor then held a mediation; National Union did not attend but CNA did. National Union was updated each day. The insured and its competitor then reached a conditional settlement agreement under which the competitor would pay the insured $8.75 million for the patent claims while the insured would pay its competitor $4.75 million for the disparagement claims. The settlement was conditioned on the insured's ability to obtain approval and funding from CNA and National Union.

Although CNA committed its full $1 million, National Union was reluctant to recognize that the competitor's counterclaims could invade its coverage layer. After receiving various analyses provided by the insured, National Union declined to consent to the proposed settlement without offering to take up the defense. The insured requested that National Union take up the defense if it chose to reject the settlement and the insured stated that absent a prompt response the insured would finalize the settlement. The insured thereafter finalized the settlement and notified National Union. National Union subsequently advised that it would assume the defense of the underlying suit if the insured could "undo" the settlement. The insured responded that the executed settlement could not be undone.

Following execution of the settlement, the insured sued National Union for breach of contract and bad faith. Following a jury trial, the jury unanimously found for the insured on both the breach of contract and bad faith claims but decided not to award punitive damages. The District Court entered judgment on the insured's claims for a total amount of $6,080,568.43, representing $3,750,000 in contract damages; $1,216,508.99 in attorney's fees, expert fees and costs; and prejudgment interest of $1,113,987.44.

Analysis

According to the Ninth Circuit, National Union's leading argument on appeal required the Ninth Circuit to decide whether the District Court erred in applying the rule announced by the California Court of Appeals in *Diamond Heights*. National Union relied upon its policy provisions which contained a "no voluntary payments" provision, making the insured liable for any voluntary payments it made without National Union's consent and a "no action" clause, stating in relevant part that "[T]here will be no right of action against us under this insurance unless . . . [t]he amount you owe has been determined without consent or by actual trial and final judgment." The Ninth Circuit rejected the view that those policy provisions protected National Union in this case from the *Diamond Heights* ruling, stating in pertinent part:

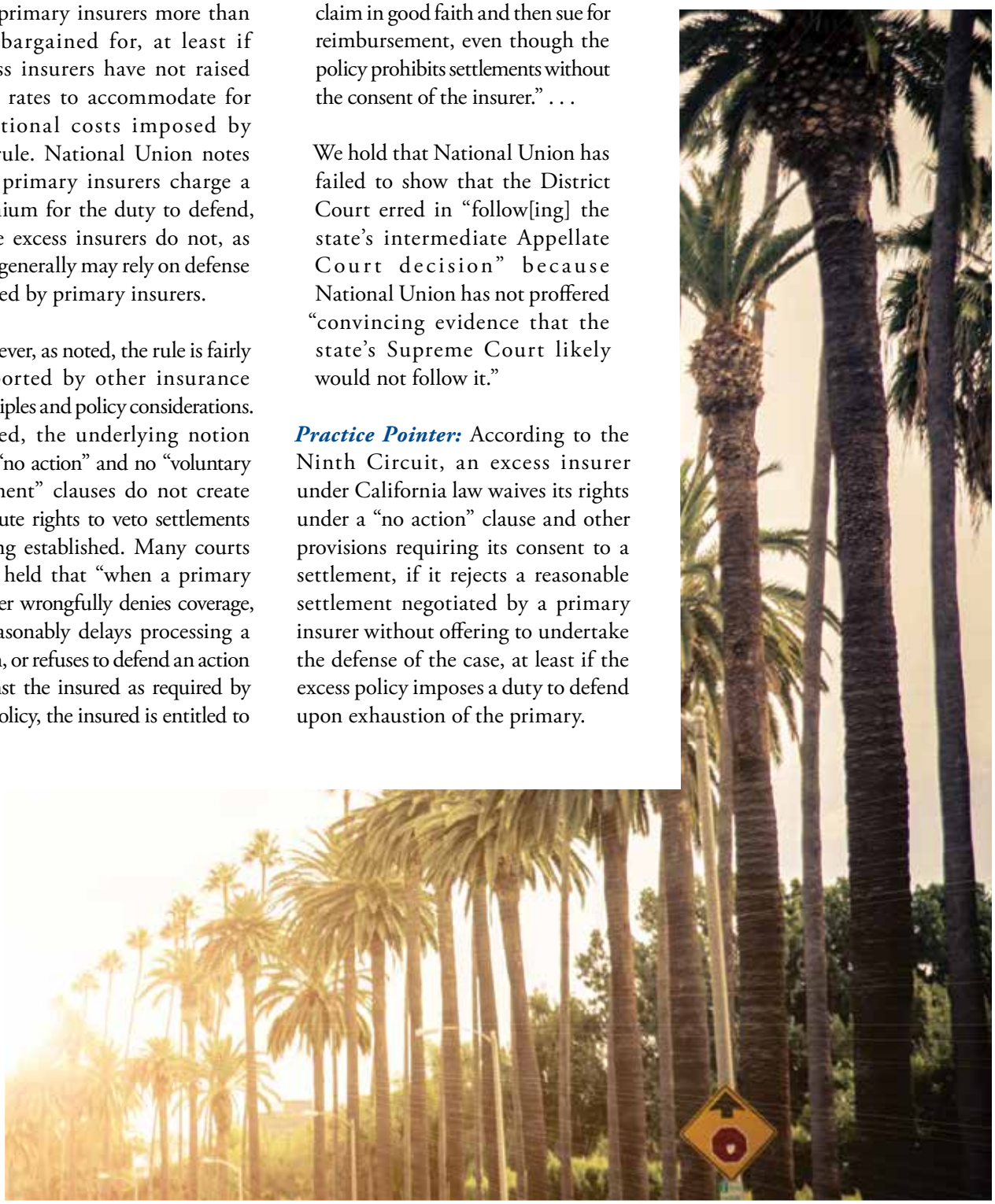
> The wisdom of the *Diamond Heights* rule may not be beyond reasonable debate. But for the implied covenant of good faith and fair dealing, the rule would be contrary to the language of the "no action" and "no voluntary payments" provisions. The rule

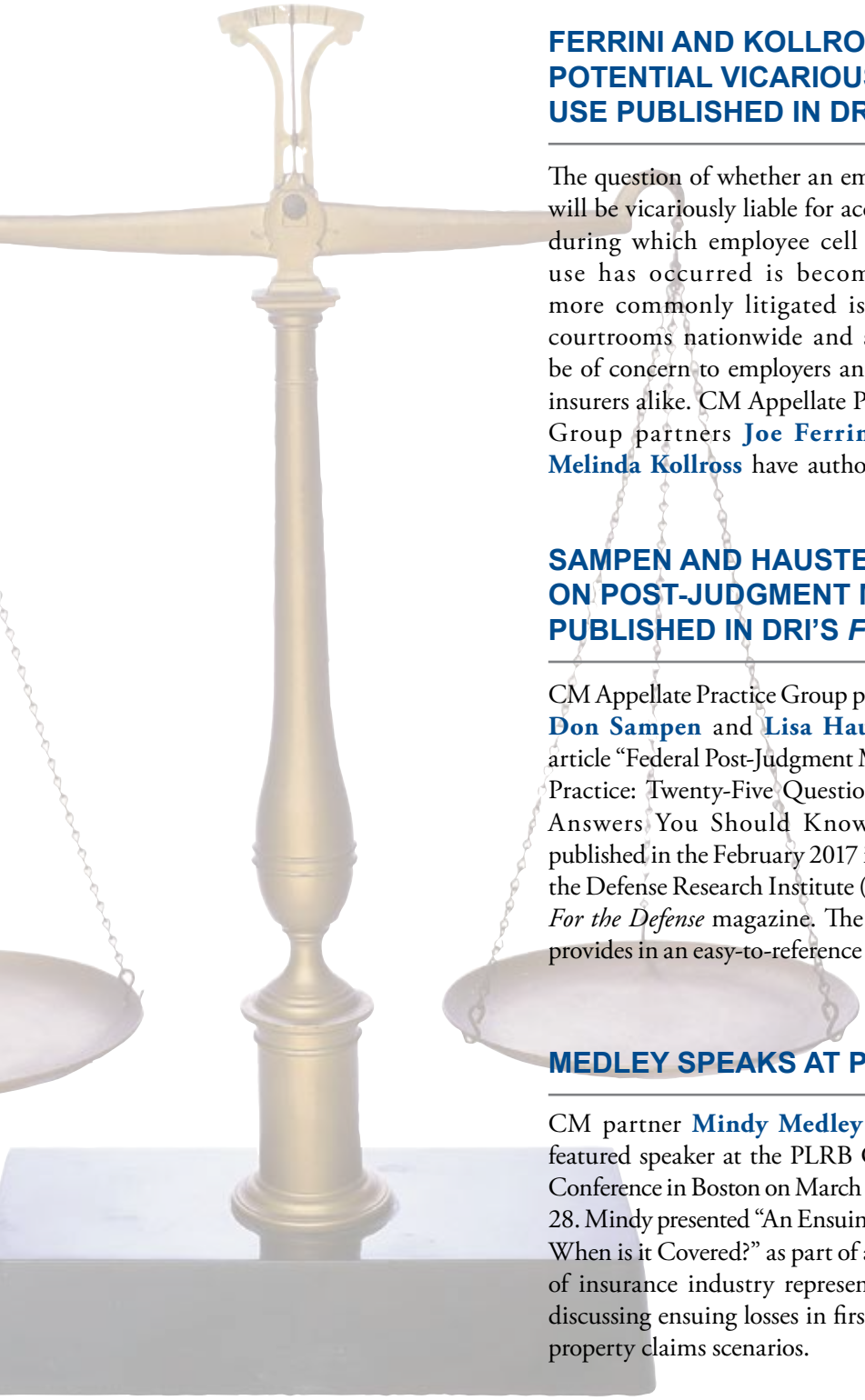
thus arguably gives the insured and primary insurers more than was bargained for, at least if excess insurers have not raised their rates to accommodate for additional costs imposed by the rule. National Union notes that primary insurers charge a premium for the duty to defend, while excess insurers do not, as they generally may rely on defense funded by primary insurers.

However, as noted, the rule is fairly supported by other insurance principles and policy considerations. Indeed, the underlying notion that "no action" and no "voluntary payment" clauses do not create absolute rights to veto settlements is long established. Many courts have held that "when a primary insurer wrongfully denies coverage, unreasonably delays processing a claim, or refuses to defend an action against the insured as required by the policy, the insured is entitled to make a reasonable settlement of the claim in good faith and then sue for reimbursement, even though the policy prohibits settlements without the consent of the insurer." . . .

> We hold that National Union has failed to show that the District Court erred in "follow[ing] the state's intermediate Appellate Court decision" because National Union has not proffered "convincing evidence that the state's Supreme Court likely would not follow it."

Practice Pointer: According to the Ninth Circuit, an excess insurer under California law waives its rights under a "no action" clause and other provisions requiring its consent to a settlement, if it rejects a reasonable settlement negotiated by a primary insurer without offering to undertake the defense of the case, at least if the excess policy imposes a duty to defend upon exhaustion of the primary.





FERRINI AND KOLLROSS ARTICLE ON EMPLOYER POTENTIAL VICARIOUS LIABILITY FOR CELL PHONE USE PUBLISHED IN DRI'S *THE VOICE*

The question of whether an employer will be vicariously liable for accidents during which employee cell phone use has occurred is becoming a more commonly litigated issue in courtrooms nationwide and should be of concern to employers and their insurers alike. CM Appellate Practice Group partners **Joe Ferrini** and **Melinda Kollross** have authored an article examining the current state of the law and suggesting some creative angles to explore in accident cases involving cell phone usage. The article was recently published in DRI's *The Voice*. To read the full article, go to **http://portal.criticalimpact.com/newsletter/newslettershow5.cfm?contentonly=1&content=42821&id=4391**.

SAMPEN AND HAUSTEN ARTICLE ON POST-JUDGMENT MOTION PRACTICE PUBLISHED IN DRI'S *FOR THE DEFENSE* MAGAZINE

CM Appellate Practice Group partners **Don Sampen** and **Lisa Hausten's** article "Federal Post-Judgment Motion Practice: Twenty-Five Questions and Answers You Should Know" was published in the February 2017 issue of the Defense Research Institute (DRI)'s *For the Defense* magazine. The article provides in an easy-to-reference format (almost) everything you should know about post-judgment motion practice. It will assist anyone filing such motions in federal court in navigating the minefield between judgment and appeal. To read the full article, please see **http://www.clausen.com/wp-content/uploads/2017/03/FTD-1702-Sampsen-Hausten.pdf**.

MEDLEY SPEAKS AT PLRB CLAIMS CONFERENCE

CM partner **Mindy Medley** was a featured speaker at the PLRB Claims Conference in Boston on March 27 and 28. Mindy presented "An Ensuing Loss: When is it Covered?" as part of a panel of insurance industry representatives discussing ensuing losses in first-party property claims scenarios. Mindy has practiced at Clausen Miller for nearly 16 years, and routinely represents insurance carriers in first-party property coverage matters throughout the United States. Mindy also represents design professionals, brokers, and corporate defendants in breach of contract and negligence actions where she is responsible for all stages of litigation.

SAMPEN PRESENTS AT ILLINOIS APPELLATE LAWYERS ASSOCIATION "ADVANCED APPELLATE PRACTICE" SEMINAR

CM Appellate Practice Group partner **Don Sampen** was a featured speaker at the Illinois Appellate Lawyers Association's "Advanced Appellate Practice" seminar held April 28, 2017. The seminar covered various topics including preservation of error, appellate ethics, and extraordinary remedies in the Illinois Supreme Court. Don's presentation addressed interlocutory appeals.

HILL PRESENTS AT THE 2017 ABA PROPERTY INSURANCE COMMITTEE ANNUAL SPRING CLE MEETING

Clausen Miller partner **Celeste Hill** presented at the 2017 ABA Property Insurance Committee Annual Spring CLE Meeting held April 6-8 in Orlando, Florida. Celeste was part of a panel addressing the policyholder's and insurer's obligations with respect to ensuring that all proper and necessary parties are included as payees on settlement payments and how policyholders and insurers can protect themselves when a third party asserts an interest in such payments.

Having practiced at Clausen Miller over 30 years, Celeste has broad experience handling complex commercial matters, including the representation of domestic and foreign markets in major property insurance disputes and the prosecution and defense of liability claims in the construction and products liability fields. She routinely represents commercial property insurers in bad faith litigation.

BEVERLY PRESENTS AT 2017 EECMA ANNUAL CONFERENCE

CM partner **Colleen Beverly** was a featured speaker at the 2017 EECMA Annual Conference in Orlando, FL on April 28 and April 29. She presented "Unmanned Aircraft Systems (UAS) for Aerial Inspections/Emerging Legal and Insurance Issues Associated with UAS aka Drones" along with her co-presenter Phillip Watters from Rimkus Consulting.

Colleen has practiced law at Clausen Miller for nearly 18 years, and routinely represents insurance carriers in third party liability coverage matters throughout the United States.

CLAUSEN MILLER WELCOMES KRISTIN ESPOSITO TO ITS CASUALTY DEFENSE TEAM

Clausen Miller is proud to announce that **Kristin Esposito** has joined the Firm's Chicago office as a Senior Associate. Kristin will work with CM partners **Tom Ryerson**, **Ilene Korey**, and **Scott Shinkan** in representing major casualty insurers and medical/professional liability insurers in large case litigation. She will defend physicians in medical malpractice trials. Her practice will also include transportation and trucking defense, professional liability, products liability, premises liability, hospitality defense, municipal liability, cyber-security, environmental and toxic tort, and other civil litigation. Kristin has successfully tried, arbitrated, and negotiated hundreds of claims and lawsuits. Her depth of knowledge and experience will be a great asset to the casualty and medical/professional liability insurers and insureds the Firm represents.

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. You will find available courses listed below. Please view the complete list of individual course descriptions at www.clausen.com/education/ for information regarding the state specific CE credit hours as well as course and instructor details.

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Additional Insured Targeted Tender Issues and Other Legal Considerations Affecting Strategic Coverage and Litigation Determination

Alternatives to Litigation: Negotiation and Mediation

An Ethical Obligation or Simply an Option?: Choose Your Own Adventure When Adjusting a First Party Property Claim

An Insider's Guide To New York Practice

Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

Attorney-Client Privilege and Work Product Doctrine

Bad Faith Law and Strategy for the Claims Professional and Appellate Protocols for the Resolutions of Such Claims

Breaking Bad Faith, Failure To Settle Within Policy Limits, And Strategy For The Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers And Indemnification

Coverage and Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics for "Cool" Claims Handling

Deep Pockets: Prosecuting & Defending Government Liabilities— US & Municipalities

Developments In Property Insurance Coverage Law

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Negotiation: Methods For Determining Settlement Values And Strategies For Acquiring Movement

Recent Developments In Insurance Coverage Litigation

Recent Trends In Bad Faith And E-Discovery Issues And Protocols To Resolve Same For The Claims Professional

Subrogation: Initial Recognition, Roadblocks and Strategies

Targeted Tenders, Suits Against Employers, And Other Legal Issues Facing The Claims Professional

Tips And Strategies For Claims Professionals: The Affordable Care Act, Unilateral Settlement Agreements, And Ethics In Claims Handling

Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

DAUGHERITY AND WOLKOMIR WIN SUMMARY JUDGMENT FOR LARGEST U.S. HOSPICE CARE PROVIDER IN FEDERAL AGE AND DISABILITY DISCRIMINATION/ RETALIATION SUIT

Plaintiff, a 68 year-old with a hearing disability, was employed by the client as a secretary for 12 years. Following a company reduction in force ("RIF"), plaintiff was terminated. She interviewed for an open position at another location within the company but, ultimately, a decision was made to hire a candidate who was not previously employed with the company.

Plaintiff filed a complaint alleging that the employer violated her rights under the Americans with Disability Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Illinois Human Rights Act. Plaintiff asserted that the employer discriminated against her throughout her employment due to her hearing disability. She also alleged that the employer refused to provide reasonable accommodation and created a hostile work environment, consisting of pervasive harassment related to her hearing disability and age. Plaintiff asserted that she was terminated due to her disability, need for accommodation and in retaliation for reporting discrimination and harassment to the employer's corporate office. Lastly, plaintiff averred that the employer refused to transfer her to an open secretarial position, or rehire her at another location, due to her age.

Following defendant's motion for summary judgment, the federal court agreed with defense counsel's argument that the employer "provided substantial evidence that it had a legitimate, non-discriminatory reason for terminating [the plaintiff's] employment" and that plaintiff "failed to provide evidence from which a reasonable factfinder could conclude [that the basis of the employer's adverse employment action] was pretextual…" Defense counsel also convinced the court that plaintiff failed to show a causal connection between her reporting of discriminatory/harassing conduct and her termination. Significantly, the court agreed with defendant's argument that the temporal proximity (seven and a half weeks) between the termination and the alleged report of discrimination was insufficient to support an inference of impermissible motive. This comports with prior holdings finding that a six week lapse between an employee's complaint and termination was too long to draw a reasonable inference of retaliation.

This case highlights the importance of factual context in discrimination/ retaliation claims, and how diligent discovery efforts can significantly positively affect the defense of employers.

Paul Daugherity and **Josh Wolkomir** are Clausen Miller partners handling myriad employment law claims. If you have any questions regarding this case or Judge Kennelly's Opinion, please contact Paul at 312-606-7412 or Josh at 312-606-7538.

CALIFORNIA OFFICE OBTAINS DEFENSE VERDICT IN CONSTRUCTION DEFECT CASE

On March 14, 2017, the Honorable Craig Riemer of the California Superior Court, Riverside County, issued a Statement of Decision in favor of cross-defendant subcontractors represented by partners **Ian Feldman**, **Sheila Totorp** and associate **R. Mick Rubio** of CM's Irvine, California office.

Dozens of plaintiff-homeowners filed suit against a Developer for defects in plaintiffs' homes. Developer then filed a cross-claim seeking indemnity and repayment of defense fees against various subcontractors including CM's clients, a drywall contractor and an electrical contractor. That portion of the underlying suit resolved with Developer reserving its own rights to seek reimbursement for the attorneys' fees and costs expended in defending the construction defect lawsuit.

Concurrently, in a separate lawsuit in federal court, Developer filed an insurance coverage action against an additional insured carrier who had issued a liability policy to a separate subcontractor. This AI Carrier endorsed a policy naming Developer as an additional insured. In this federal coverage action, Developer sought that the AI Carrier pay defense fees related to the underlying plaintiff-homeowner action. The AI Carrier eventually complied, settled with Developer in federal court, and paid in excess of $5 million in defense fees to the Developer for Developer's defense in the underlying construction defect action. The AI Carrier allegedly had ongoing claims against other additional insured carriers and subcontractors who did not "pick up" the defense of Developer during the underlying plaintiff-homeowner action. The AI Carrier purportedly assigned those rights of subrogation to Developer.

Utilizing this assignment, Developer proceeded to prosecute its Cross-Complaint against CM's clients and other subcontractors for the $5 million in defense fees. Aggressive discovery by CM and other defense counsel revealed that the assignment by the AI Carrier to Developer was not full and complete. During a bench trial, the CM team argued that under the terms of the coverage action settlement agreement, the AI Carrier retained significant control over Developer's prosecution of the Cross-Complaint. Certain controlling terms included: the AI Carrier approving any settlement with any subcontractor; the AI Carrier obtaining 82% of any recovery; detailed ongoing reporting guidelines by Developer's counsel to the AI Carrier; and the AI Carrier's own right to sue in the event that certain monetary settlement thresholds were not met.

The court ruled that the AI Carrier was the "real party at interest" and Developer did not have standing to sue on the Cross-Complaint. In its Statement of Decision, the court held

that an assignment must be complete or absolute if an assignee is to have standing to prosecute an assigned claim.

This matter presents a novel issue as there are no published decisions from California's Appellate Courts or Supreme Court addressing this particular assignment posture. Nevertheless, in its California construction defect practice, CM consistently encounters numerous claims involving this very setup where an AI carrier purports to assign third party claims to a developer, who then proceeds to recover against subcontractors. CM expects that this holding and any subsequent appellate opinion will have significant implications in the construction defect industry.

HEILMANN OBTAINS A $1.3 MILLION SETTLEMENT

In a high profile action in the State of Illinois, Clausen Miller partner **Dave Heilmann** obtained a $1.3 million settlement on behalf of client Glenn Meeks against Chicago State University for violation of the Illinois State Ethics Act. Meeks, the former Vice-President of Finance for the University, was fired after making complaints of violations of University policy including improper hiring and pay raises for politically connected employees. Dave is Co-Chair of Clausen Miller's Labor and Employment Practice Group. He represents private and public sector clients regarding labor and personnel relations, collective bargaining, litigation of employment and civil rights cases, sexual harassment, employment contracts, employment terminations, covenants not to compete, ADA and ERISA matters.

CLAUSEN MILLER FEATURED IN *LAW360* AFTER SEVENTH CIRCUIT AFFIRMS ENTRY OF SUMMARY JUDGMENT IN COVERAGE DISPUTE

Clausen Miller was recently featured in a *Law360* article after the Seventh Circuit affirmed entry of summary judgment in an insurance coverage dispute. The decision marked a win for Clausen Miller attorneys **Don Sampen** and **Steve Novosad**.

The United States Court of Appeals for the Seventh Circuit recently affirmed the granting of an insurer's motion for summary judgment, finding no coverage for a settlement for defective work entered into between a condominium association and a contractor. The association's cause of action was based on a theory of implied warranty of habitability. The court said that cause of action applied only to the defective work itself, for which no coverage was provided under the applicable policy. *Allied Prop. & Cas. Ins. Co. v. Metro North Condo. Ass'n*, 2017 U.S. App. LEXIS 4107 (7th Cir. Ill. Mar. 8, 2017)

SAMPEN OBTAINS APPELLATE VICTORY FOR DEFENSE IN WRONGFUL DEATH SUIT

The Illinois First District Appellate Court recently affirmed summary judgment for a condominium association and its management company in a wrongful death lawsuit brought by the estate of a resident. The resident suffered a fatal fall when entering her residence building. Her estate claimed that the fall was the result of the defendants' negligence in maintaining the door to her building. The court, however, found a lack of evidence of negligence or foreseeability. It also struck portions of the plaintiff expert's affidavit which, the court said, were not supported by the facts. Clausen Miller Appellate partner **Don Sampen** successfully defended the appeal on behalf of the defendants. *Dahn v. Regal Chateaux Condominium Association*, 2017 IL App (1st) 152343-U (March 8).

KLEIN AND WOLKOMIR SECURE DEFENSE VERDICT FOR HOSPITALITY CLIENT

CM trial attorneys **Kathleen Klein** and **Josh Wolkomir** recently won a Cook County jury verdict in their hospitality client's favor after a 10-day, high stakes trial. Plaintiff's pre-trial demand had been $3 million in this premises liability case. Plaintiff alleged he was injured when the chair he was seated in broke. Following the incident, Plaintiff received treatment for ankle and back injuries, and the original trial date was continued for additional medical discovery after Plaintiff subsequently had a two level lumbar spinal fusion. The Plaintiff alleged, and obtained opinion testimony from the treating surgeon, that the accident ultimately led to the need for the fusion. Plaintiff pursued a r*es ipsa loquitur* theory, and the jury was instructed accordingly that they could infer negligence.

Despite these significant hurdles, Kathleen and Josh put on a winning defense. They established through testimony and evidence at trial the client's care in maintaining its premises, including the chairs. They also successfully disputed causation, arguing that the plaintiff's symptoms and his eventual fusion surgery were not related to his fall, but rather were attributable to the plaintiff's underlying degenerative disc disease.

After deliberating less than two hours, the jury returned a verdict in our client's favor on all counts. For more information about successfully trying cases in Cook County and other plaintiff-friendly jurisdictions, please contact Kathleen (**kklein@clausen.com**) or Josh (**jwolkomir@clausen.com**).

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"Phony Line" Leads To FMLA Liability

by ***Patrick L. Breen***

The Seventh Circuit affirms a jury verdict for plaintiff against an employer accused of retaliation under the FMLA in *Tracy L. Wink v. Miller Compressing Co.*, Nos. 16-2336, 16-2339 cons., ___F.3d ___ (7th Cir. 2017).

Facts

Tracy L. Wink ("Wink") had been employed in the order processing department at Miller Compressing Company ("Miller") since 1999. In July 2011, Miller granted Wink's request for intermittent leave, pursuant to the Family and Medical Leave Act ("FMLA"), to take her autistic two year-old son to medical appointments and therapy. The FMLA entitles eligible employees to take up to twelve work weeks of leave during any twelve month period for qualifying reasons, one of which is to care for a child who has a serious health condition. 29 U.S.C. §2612(a)(1), (a)(1)(C).

In February 2012, Wink's son was expelled from daycare, which he had been attending two days a week, because of his aggressive behavior, a product of his autism. Wink asked Miller's human resources department to grant her FMLA leave to enable her to work from home two days a week, which would give her enough free time to take care of her child (relatives were able to watch the child the remaining three work days). In response, Miller's human resources department offered a hybrid arrangement. Under the arrangement, Wink would inform the company of the number of hours she worked each day at home. This was based on a computation made by subtracting from the normal eight hour work day the hours spent taking care of her son. The hours spent taking care of her son would be counted as FMLA leave time for which the company would not be required to compensate her.

In the summer of 2012, Miller was experiencing serious financial problems and decided that none of its employees would be allowed to work at home during the week. All employees would be required to work a full five-day forty-hour work week on the company's premises. On a Friday in July, Wink was informed by Miller's human resources department that she would have to show up on the coming Monday and work eight hours in the office five days that week as well as in all subsequent weeks. When told this, Wink stated that, "it was going to be nearly impossible for her to find daycare over the weekend by Monday."

The human resources officer to whom she explained this told her that FMLA covers leave from work only for doctor's appointments and therapy. Wink returned to the office on Monday morning and explained that she had been unable to find daycare for her son over the weekend. She was told that the first day she did not work in the office, full time, she would be considered a "voluntary quit." Because she had to return home to take care of her child as a result of not having been able to obtain daycare for him over the weekend,

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Wink left the office and did not return to work. On that day, shortly after she had gone home to take care of her child, Miller's human resources department ordered that Wink be terminated and that the termination reflect that her last day of work had been the previous Friday.

Wink sued Miller, alleging: (1) interference with her rights under the FMLA, (2) retaliation against her for exercising her FMLA rights, (3) violation of Wis. Stat. §109.03 (a wage statute) and (4) breach of contract. A jury trial ended with a verdict in favor of Wink on three of her claims: retaliation in violation of the FMLA, violation of the Wisconsin wage statute and breach of contract. The jury returned a verdict in favor of Miller on Wink's claim that Miller had interfered with her rights under the FMLA.

Miller moved for judgment as a matter of law, arguing that no reasonable jury could have found enough evidence to justify its verdict. The trial court denied the motion and Miller appealed. Wink cross appealed, seeking a higher award of attorneys' fees for her successful suit.

Analysis

In an opinion written by Judge Posner, the Seventh Circuit Court of Appeals affirmed the jury verdict for Wink and ruled for Wink on her cross-appeal. The Court began by noting that the FMLA "entitled Wink to take leave necessary to take care of a very difficult and at times violent sick child." With respect to the FMLA retaliation claim, the Court found that Wink had proved, and the jury determined, that Miller had retaliated against her for asserting her FMLA right to take leave necessary to enable her to take care of her sick child for several hours two days a week. In doing so, the Court found that "[a]s she was a valued and experienced employee who had worked for the company at home two days a week since February without the company's complaining, the company had no compelling reason to fire her." The Court also found that "the best inference, or at least an inference that a reasonable jury could draw, was that Wink's superiors were angry with her for requesting to be allowed to stay at home (albeit working part of the day) two days a week although she had been doing that since February to the satisfaction of the employer."

This, the Court found, led to the incorrect statement from Miller's human resources officer that FMLA leave covers leave from work *only* for doctors' appointments. Specifically, the Court referred to "the phony line that FMLA can't be used to authorize leave to take care of a very sick child even when obtaining daycare for the child is difficult or even impossible because of the child's particular ailment." The Court stated that the FMLA is "explicit that an eligible employee is entitled to take up to 12 work weeks of unpaid leave per year in order to care for a family member with a serious health condition, including a child with such a condition." 29 U.S.C. §2611(11), 2612(a)(1)(C).

The Court went on to discuss the recoverable damages for the FMLA retaliation claim. In addition to actual damages based on the employee's loss of wages, the Court stated, the violation of a plaintiff's FMLA rights entitles the employee to "liquidated damages equal to the sum of the amount of the loss plus interest, unless the employer can show that it acted in good faith." 29 U.S.C. §2617(a)(1)(A)(iii). Miller argued that it acted in good faith and, therefore, should not have to pay double damages. The district court rejected that argument and the Seventh Circuit affirmed. In doing so, the Court found that the "human resources department's reaction to Plaintiff's situation could reasonably be found to be retaliation against her for asking for FMLA leave for anything other than a doctor's appointment or therapy."

The Court next turned to Wink's Wisconsin wage statute claim. Wink's employment contract with Miller provided that a termination of it "without a reason arising from employee's own action or inaction" was a termination without cause that obligated Miller either to give her three weeks advance notice of termination or continue paying her wages for three weeks. The Court found that the jury was within its rights in finding that Miller had fired Wink without cause or advance notice and, therefore, had broken its contract with her and violated the Wisconsin wage statute, Wis. Stat. §109.03, by not paying her three weeks of wages.

The final issue decided by the Court dealt with the award of attorneys' fees. The FMLA entitles a winning plaintiff to an award of attorneys' fees. 29 U.S.C. §2617(a)(3). The Court noted that a presumptive award is calculated by multiplying the hourly fees charged by the plaintiff's attorneys by the number of hours they had worked on the case. In this case, the district court decided to reduce the award of attorneys' fees to Wink by 20% because she had not prevailed on her claim that Miller had interfered with her FMLA rights, which was a separate violation from retaliation.

In reversing this finding, the Seventh Circuit found that "it's not as if her lawyers had dropped the ball in arguing that Miller had not only retaliated against her for claiming her FMLA rights but also it interfered with her efforts to assert them." The Court found that, because the two FMLA breaches are very similar, it was prudent for the lawyers to press both in order to reduce the likelihood of a total defeat. Further, "because the claims were so similar and based largely on the same facts the marginal costs of presenting the interference claim to the jury was slight." Accordingly, the Court found that the judgment of the district court must be affirmed except for the 20% reduction in plaintiff's attorneys' fees, which was reversed.

Learning Points: Employers should take care not to make misstatements to employees concerning the employee's rights under the FMLA. Employers should also be aware that allowing an employee to regularly work from home in order to take care of a sick child but then suddenly revoking that arrangement and firing the employee who cannot promptly find replacement care as in *Wink* may give rise to FMLA retaliation claims and potential liability thereunder. ♦

Sixth Circuit Enforces Professional Liability Exclusions

by ***Melinda S. Kollross***

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General liability insurers did not have a duty to defend insured engineering and architecture firm in underlying action alleging that insured was negligent in its duty to supervise construction operations, provide adequate safety supervision, and include in its project plans ways to ensure the safe removal of digester lids, because such allegations fell within the policies' professional services exclusions. *Orchard, Hiltz & McCliment, Inc., v. Phoenix Ins. Co.*, 2017 U.S. App. LEXIS 1089, 2017 Fed. App'x 0047N (6th Cir. 2017) (applying Michigan law).

Facts

The Village of Dexter, Michigan ("Dexter"), hired engineering and architecture firm Orchard, Hiltz & McCliment, Inc. ("OHM") to provide "professional engineering services" in connection with upgrades to its wastewater treatment plant's sludge-handling system. The project included a design phase and a construction phase. Initially, OHM agreed to prepare all contract and design documents for the project. During the construction phase, OHM was responsible for "contract administration, construction engineering, construction observation, and construction staking." OHM agreed to provide daily observation of "significant construction work or testing," prepare daily field reports, and check completed work for "compliance with contract documents." OHM conducted progress meetings with Dexter staff and the project's general contractor and subcontractors, and reviewed and approved all shop drawings. OHM also provided an engineer ("Nastally") to monitor and document the general contractor ("Shmina")'s activities at the construction site full time.

Dexter's contract with Shmina (the "prime contract") designated OHM as the project engineer and Dexter's representative on the project. Under the prime contract, Shmina had to maintain liability insurance to protect Shmina, Dexter, and OHM from claims arising out of the work. Shmina obtained a CGL policy through defendant Phoenix. The Phoenix policy contains an additional insured endorsement extending CGL coverage to "any person or organization that you agree in a 'written contract requiring insurance' to include as an additional insured[.]" Excluded from this endorsement, however, is coverage for bodily injury, personal injury, or property damage "arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services, including":

> i. The preparing, approving, or failing to prepare or approve,

> maps, shop drawings, opinions, reports, surveys, field orders or change orders, or the preparing, approving, or failing to prepare or approve, drawings and specifications; and
>
> ii. Supervisory, inspection, architectural or engineering activities.

OHM's project plan required the removal and replacement of two sludge digester tank lids. Shmina subcontracted with nonparty Platinum to provide all labor and materials for the digester cover installation. Platinum in turn subcontracted with nonparty Regal to remove both digester tank lids. Per its contract with Shmina, Platinum had to maintain a CGL insurance policy adding Shmina, Dexter, and any additional parties required by the Prime Contract Document as additional insured(s). Platinum's CGL policy from Federated includes an additional insured endorsement extending coverage to "any person or organization, other than a joint venture, for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." No such contract or agreement exists between Platinum and OHM.

Like the Phoenix policy, the Federated policy contains a professional services exclusion limiting coverage provided for in the additional insured endorsement. The Federated provision similarly excludes coverage for bodily injury, property damage, or personal injury caused by:

> [a]ny person or organization whose profession, business or occupation is that of an architect, surveyor or engineer with respect to liability arising out of the preparation or approval or the failure in preparation or approval of maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs, drawings, specifications or the performance of any other professional services by such person or organization[.]

On April 22, 2013, Regal worker David McBride was using a cutting torch to remove bolts from a digester lid. Sparks from the torch ignited methane gas inside the digester tank and caused an explosion that injured McBride and killed Platinum pipefitter Michael Koch. Nastally was present at the scene of the accident taking photos of McBride as he removed bolts from the digester lid. McBride and Koch's estate sued OHM for personal injuries and wrongful death, alleging negligence and gross negligence by OHM in the performance of its engineering duties. Plaintiffs alleged OHM breached its duty by failing to ensure that its engineering plans and specifications were complied with, and that related safety precautions, such as the use of methane detection devices, were implemented.

Although OHM's professional liability insurer (XL Specialty) assumed it defense, OHM sought a declaratory judgment requiring defendants to defend and indemnify it in the McBride and Koch cases. On cross-motions for summary judgment, the district court granted summary judgment for defendants. The district court ruled that OHM was covered as an additional insured under the Phoenix policy, but not under the Federated policy. Neither defendant had a duty to defend or indemnify OHM, however, because there was no dispute of material fact that the professional services exclusion in both policies barred coverage. OHM appealed.

Analysis

The Sixth Circuit, applying Michigan law, affirmed the district court's holding that the professional services exclusions barred coverage under both policies. The Court first considered whether any of the underlying allegations against OHM could fall outside these exclusions by implicating non-professional acts or omissions. Under Michigan law, "[w]hether a professional service is being rendered depends on the nature of the act or omission, not the character or title of the person who acted or failed to act." Michigan appellate courts have defined "professional services" as those involving specialized skill of a predominantly intellectual nature. Consequently, not all acts performed by professionals constitute professional services. Michigan courts, however, have generally interpreted professional services exclusions broadly. They have even applied them to acts not involving a specialized skill if such acts reasonably related to the overall provision of professional services.

Citing the Michigan Court of Appeals decision in *Hilderbrandt ex el. Estate of Hilderbrandt v. Rumsey & Sons Constr.*, No. 220340, 2001 Mich. App. LEXIS 1517 (Mich. Ct. App. June 5, 2001), the Sixth Circuit concluded that the underlying McBride and Koch allegations fall within the policies' professional services exclusions. The Court explained:

> Both underlying complaints allege that OHM, as the project's consulting engineer, was negligent in its duty to supervise construction operations, provide adequate safety supervision, and to include in its project plans ways to ensure the safe removal of the digester lids. These acts are predominantly intellectual in nature, and both insurance policies exclude coverage for liability "arising out of" an engineer's or architect's failure to prepare or approve drawings and specifications, other "supervisory, inspection, architectural or engineering activities," and indeed "any other professional services." Assuming the underlying plaintiffs can show that OHM owed such duties, accounting for and ensuring the safe removal of the lids in its project plans and on site would require OHM to exercise the specialized knowledge and expertise in wastewater facility project design and supervision that Dexter hired it to provide.

The Court rejected OHM's contention that the underlying plaintiffs would hold it liable for unskilled construction and accident prevention tasks such as failing to hold safety meetings, monitor methane levels, and post warning signs. The Court noted that even if some of the underlying factual allegations implicate tasks that do not, in and of themselves, involve a specialized skill, such acts and omissions are reasonably related to OHM's overall provision of professional services. The Court stated:

> Phoenix and Federated provided *general* liability policies that were never intended to cover professional negligence claims. Indeed, plaintiff's *professional* liability insurer defended it in both underlying tort actions. OHM may dispute that it owed or breached the duties alleged in the underlying actions, but there is no dispute that if the underlying plaintiffs can prove their allegations, OHM's liability is excluded from coverage under the Phoenix and Federated policies.

The Court also rejected OHM's argument that the Court's construction would render the policies illusory. "Because coverage could be triggered where OHM employees are exposed to liability for bodily injury or property damage caused by their ordinary negligence in performing some task that falls *outside* the provision of professional services," the Court wrote, "our interpretation renders neither policy illusory."

Learning Point: Under Michigan law, a professional services exclusion will apply where: (1) the allegedly negligent acts involve specialized skill of a predominantly intellectual nature; or (2) even if not involving a specialized skill, the acts are reasonably related to the overall provision of professional services. ♦

No Defense Duty For Allegations That Merely "Relate" To Potential Coverage

by ***Don R. Sampen***

An insurer's duty to defend typically turns on the allegations of the underlying complaint against the insured. Sometimes those allegations contain statements that arguably could give rise to a defense obligation, but the statements are not the basis for the underlying claimant's cause of action. The question then arises as to what relevance should be given the statements. The United States Court of Appeals for the Seventh Circuit recently evaluated these types of statements in a complaint against a real estate broker for intentional infliction of emotional distress and related claims, to determine whether they triggered the obligation of a professional liability insurer to defend the broker. The Court said no, even though the allegations related to those made in an earlier complaint against the broker, which the insurer did defend. *Madison Mutual Ins. Co. v. Diamond State Ins. Co.*, 851 F.3d 749 (7th Cir. 2017).

Facts

In 1999, the insured, Geraldine Davidson, served as broker for the sale of a 42-acre parcel of land in southern Illinois to Dr. William and Wendy Dribben. The acreage sold the Dribbens contained a dam for a lake that was part of a four-parcel development. Davidson was owner of a second parcel in the development.

In 2006, the Dribbens sued Davidson claiming that she fraudulently concealed that no permit authorizing the dam had ever been obtained from the Illinois Department of Natural Resources. The Dribbens apparently were potentially responsible for the permit as owners of the property on which the dam was located.

Diamond State, Davidson's professional liability carrier, provided a defense for Davidson for the 2006 lawsuit under a claims-made policy. The claims asserted by the Dribbens were eventually resolved in Davidson's favor.

In 2011, the Dribbens brought a second suit against Davidson and her husband. This lawsuit contained a potpourri of allegations against the Davidsons, including that they violated restrictive covenants, polluted the lake, interfered with the Dribbens' easement rights, spread rumors that Dr. Dribben was a serial killer, and did other nasty things. Recovery was sought based on intentional infliction of emotional distress, trespass, and additional theories.

Davidson tendered to her homeowners' carrier, Madison Mutual, which agreed to defend. Later, Davidson also tendered the 2011 lawsuit to Diamond State, which declined to defend on the ground that, in its view, no professional services were at issue in the lawsuit.

In 2014, Madison Mutual filed the instant declaratory action claiming

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that Diamond State had breached its duty to defend the 2011 action. It argued that at least some of the 2011 allegations supported a potential claim against Davidson as a real estate broker for failure to disclose the lack of a dam permit, and that those allegations related back to the 2006 lawsuit.

The district court entered summary judgment in favor of Diamond State, finding that it had no duty to defend the 2011 suit. Madison Mutual took this appeal.

Analysis

In an opinion by Judge Ilana Diamond Rovner, the Seventh Circuit affirmed. The Court characterized the issue as whether the allegations in the 2011 litigation potentially implicated Davidson's conduct as a broker. In doing so, the Court noted the provision in the Diamond State policy, which, although issued on a claims-made basis, provided that any claim subsequently made against the insured arising out of an earlier wrongful act of which Diamond State had notice, would be deemed to have been made at the time Diamond State received the earlier notice.

The Seventh Circuit then observed that various allegations in the 2011 lawsuit concerned the dam and Davidson's status as a real estate broker. These included references to the dam permitting issue and an allegation that, as a real estate broker who convinced the Dribbens to purchase into the development, Davidson had a duty not to engage in the kind of nasty activities alleged in the complaint.

The Court found, however, that none of the 2011 allegations, expressly or impliedly, claimed that Davidson wronged the Dribbens in her capacity as a realtor by not disclosing that the dam was un-permitted. Rather, the reference to Davidson's status as a realtor appeared aimed at suggesting that she should have understood how her actions as a neighbor in the development would interfere with the quiet enjoyment of the property by the Dribbens.

Madison Mutual nonetheless argued that because certain of the factual allegations could support a claim related to Davidson's failure to disclose the dam permitting situation, the Court should construe the 2011 lawsuit as potentially asserting a claim against Davidson for professional liability. The Court rejected the argument based in part on *Health Care Indus. Liability Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689 (7th Cir. 2009).

In that case, an insured nursing home sought coverage under a CGL policy for claims based on retaliation against former employees for exposing fraudulent Medicare and Medicaid charges. Although the underlying complaint described physical harms to the nursing home residents, the court found that the relevant allegations provided mere explanatory background that did not point to a theory of recovery based on bodily injury.

Similarly here, said the Seventh Circuit, the allegations concerning the dam did not point to any theory of recovery against Davidson for breach of her professional obligations as a realtor. This was so despite the fact that the prayer for relief in the 2011 complaint contained a boiler plate request for further relief that "the Court feels is necessary, proper or just." Such a request did not operate as an independent theory of recovery.

The Court therefore affirmed the summary judgment in favor of Diamond State.

Learning Points:

(1) Factual allegations in an underlying complaint that provide mere explanatory background and do not point to a theory of recovery against an insured for which coverage is provided, do not trigger the insurer's duty to defend.

(2) Boilerplate requests in a prayer for relief that the court grant such further relief as may be necessary or proper, are not construed as an independent theory of recovery. ♦

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AUTO INSURANCE

DEATH FOLLOWING FIGHT OUTSIDE VEHICLES NOT COVERED BY POLICY

Estate of Curtis v. GEICO Gen. Ins. Co., 2017 Ind. App. LEXIS 107 (Ind. App.)

After decedent died in a parking lot fight, his estate brought a claim against the assailant's vehicle insurer. ***Held:*** The death did not arise out of the "ownership, maintenance, or use of a vehicle." A covered injury must be "caused by the use of" a vehicle such that it was the "efficient and predominating cause"—a construction narrower than used in other states. Coverage will not extend to "results distinctly remote, though within the line of causation." Once the driver left his vehicle to confront decedent, the vehicle played no role in the death.

FIRST-PARTY PROPERTY

DENIAL OF OWNER'S CLAIM DOES NOT APPLY TO MORTGAGEE'S INTEREST GIVEN INDEPENDENT CONTRACTUAL RELATIONSHIP BETWEEN INSURER AND MORTGAGEE

Stonegate Ins. Co. v. Hongsermeier, 2017 IL App (1st) 151835 (Ill. App.)

Insurer appealed grant of summary judgment to mortgagee and named loss payee where the homeowners did not occupy the property as the policy required. The home was damaged by a fire after the owners moved out and leased to tenants. ***Held:*** The mortgage clause in the insurance policy "provides that a denial of the insured's claim does not necessarily apply to the mortgagee's interest if the mortgagee takes the prescribed steps to secure its claim." Further, the policy language indicates the insurer recognized the mortgagee's separate interest in the policy and that the interest was acquired with the insured's consent. This language created an independent contractual relationship between the parties meaning the denial of the owner's claim did not necessarily apply to the mortgagee's interest.

POLICY REQUIRING INSURED TO RESIDE AT PROPERTY HELD NOT REFORMED

Nicotera v. Allstate Ins. Co., 147 A.D.3d 1474 (N.Y. App. Div. 4th Dep't)

An elderly woman transferred ownership of her home to an irrevocable family trust. She lived at the property for many years before moving to a nursing home. Roughly two years later the home was damaged by fire. The property was insured in the name of the elderly woman only. The insurer disclaimed coverage on the ground that the named insured did not live at the residence, which the policy required. ***Held:*** Although the court has previously reformed insurance policies that contain incorrect ownership, in this case the plaintiffs are not seeking to merely correct a name, but to rewrite the policy so that it does not include the requirement that the homeowner reside at the insured premises. Summary judgment in favor of the insurer affirmed.

WATER ENTERING THROUGH BROKEN CONDUIT FALLS UNDER WATER DAMAGE EXCLUSION AND ENDORSEMENT

Papa v. Associated Indem. Corp., 2017 NY Slip Op 01118 (N.Y. App. Div. 4th Dep't)

A commercial property suffered water damage in the basement after a power company replaced a utility pole and broke an underground conduit. The conduit channeled water into the basement during heavy rain. The property owner sued insurer claiming that the damage did not fall under a water exclusion or an endorsement, entitling the owner to full coverage. ***Held:*** The court erred in denying the insurer's initial summary judgment motion. An insurance contract is read in light of common speech and the reasonable expectations of a businessperson. The policy limited coverage when groundwater entered the basement though a gap, hole or opening in the wall. Water entering through a conduit falls within this language.

TOOLS EXCLUSION DEFEATS TEMPORARY WORKS COVERAGE FOR CRANE

Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co., 28 N.Y.3d 675 (Ct. App.)

A crane being used in the construction of a skyscraper suffered damages during Superstorm Sandy. The builder's risk insurance policy covered temporary works and contained a contractor's tools exclusion that may defeat the temporary works coverage. ***Held:*** If the crane is covered under the temporary works coverage, the contractor's tools

exclusion would defeat that coverage. The exclusion does not render the temporary works provision illusory as it would not defeat all of the coverage afforded under that provision.

LIABILITY INSURANCE COVERAGE

CGL POLICIES DO NOT COVER REPAIRS OF INSURED'S DEFECTIVE WORK

Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n, No. 16-1868, 2017 U.S. App. LEXIS 4107 (7th Cir. Mar. 8, 2017)

A subcontractor defectively installed windows in a condominium resulting in significant water damage, including damage to personal property. The subcontractor's CGL policy contained "your work" and "contractual liability" exclusions. The only claim upon which the subcontractor would be liable was remedying the defectively installed windows. ***Held:*** The CGL policy does not cover the claims against the subcontractor. ***Further held:*** The condominium association lacks standing to recover for damage to the personal property of unit owners as it is an individual loss, not a collective loss affecting multiple units or common areas.

Editor's Note: *This case was successfully litigated by Clausen Miller in the trial court and on appeal.*

LATE NOTICE OBVIATES DUTY TO DEFEND OR INDEMNIFY

BN Partners Assoc., LLC v. Selective Way Ins. Co., 2017 NY Slip Op 02213 (App. Div. 4th Dep't)

Employee injured at worksite sued property owner, general contractor and property lessor. The defendants then commenced an action against the employer and its insurer seeking a declaration that the insurer is obligated to defend and indemnify them in the underlying personal injury action. ***Held:*** The defendants failed to provide proper notice as required by the policy for 17 months after becoming aware of the lawsuit and have no excuse for the delay. Mailing a letter to the employer's insurance agent is not sufficient as the agent was not an agent of the insurer. Leaving a telephone voicemail likewise does not constitute written notice as required by the policy. The insurer had no obligation to defend or indemnify.

NO DUTY TO ADDITIONAL INSURED WHEN INJURY NOT COVERED

Chappaqua Cent. Sch. Dist. v. Phila. Indem. Ins. Co., 2017 NY Slip Op 02015 (App. Div. 2d Dep't)

A school district leased cafeteria space to an organization running an afterschool program for children. An afterschool program employee was injured when she tripped and fell down a staircase that led from the school to the parking lot. The school district sought a declaration that the program's insurer was obligated to defend and indemnify it as an additional insured. ***Held:*** The injury did not arise out of the "ownership, maintenance or use" of the "premises leased" to the insured, which the policy required. There was no causal relationship between the injury and the risk for which coverage was provided. Thus, there was no obligation to defend or indemnify.

LIFE INSURANCE

INSURER CANNOT REJECT COVERAGE WHEN THERE IS SPECULATIVE POSSIBILITY SOMETHING ELSE PLAYED ROLE IN DEATH

Prather v. Sun Life & Health Ins. Co. (U.S.), 843 F.3d 733 (7th Cir. 2016)

An employee of a company with a Group Insurance Policy including coverage for accidental death and dismemberment tore his Achilles tendon playing basketball. The policy limited coverage to "bodily injuries ... that result directly from an accident and independently of all other causes." The employee had surgery to repair the tendon and died a few weeks later from a deep vein thrombosis causing cardiac arrest. The insurer denied a claim as the death had not been the exclusive result of the accident, but the accident and complications from surgery. ***Held:*** The insurer cannot interpret "independently of all other causes" to require the beneficiary to disprove any possible alternative cause of death. Medical literature indicates that the torn tendon alone could cause the deep vein thrombosis. The insurer failed to show that the surgery was a cause of death rather than the accident that required the subsequent surgery.

AMBIGUOUS INTOXICATION EXCLUSION ONLY APPLIES WHEN INTOXICATION IS SOLE CAUSE OF INJURY

Morgan v. Stonebridge Life Ins. Co., No. 15-CV-929-SMY-DGW, 2017 U.S. Dist. LEXIS 8238 (S.D. Ill.)

Plaintiff's father died in a single car accident with a blood alcohol level over the legal limit. The decedent had an accidental death insurance policy with an exclusion for "injury that: ... Is caused by or results from the Covered Person's blood alcohol level being .10 percent weight by volume or higher." The insurer denied the claim based on a medical opinion mirroring the exclusion language. The plaintiff claimed the language was ambiguous and must be construed against the insurer. ***Held:*** The phrase "caused by or results from" is ambiguous and susceptible to more than one interpretation. The phrase must therefore be construed to mean that the blood alcohol content is the sole and proximate cause in order to trigger the exclusion, which the insurer failed to show.

LIMITATIONS OF ACTIONS

LEGAL MALPRACTICE CLAIM DID NOT ACCRUE UNTIL DAMAGES WERE REASONABLY CERTAIN TO OCCUR

Bleecker v. Cahill, 2017 Wisc. App. LEXIS 175 (Wis. App.)

Client sued attorney for negligent drafting of loan amortization schedule as part of lease. ***Held:*** Suit was timely because until lessee terminated lease without fully paying its obligations, a malpractice claim did not accrue. Under the faulty lease terms, lessee could terminate lease prior to fully repaying the loan. But until lessee did so, there were no damages. Because the prospect of damages was only a "mere possibility" at the time the lease was prepared, the limitations period did not begin to run until damages were reasonably certain to occur.

MEDICAL MALPRACTICE

AFTER PHYSICIAN-PATIENT RELATIONSHIP ENDS, CONTINUING-WRONG THEORY DOES NOT TOLL LIMITATIONS STATUTE

Szamocki v. Anonymous Doctor, 2017 Ind. App. LEXIS 49 (Ind. App.)

After ending doctor-patient relationship, patient learned that prescribed medication might have caused renal failure. ***Held:*** The continuing-wrong doctrine did not survive the end of relationship. The two-year limitations statute is occurrence-based; an action must be filed within two years of the negligent act rather than discovery date. Any failure to monitor the patient's medication could not have continued after the relationship ended. ***Further held:*** Patient had enough information to discover the alleged malpractice within the limitations period. When the discovery rule does apply, suit must be filed within the limitations period if there is reasonable time to do so. No fraudulent concealment, incapacity, or obstacle prevented a timely filing.

PATIENT'S SUIT AGAINST DENTIST FILED TOO LATE

Pearsall v. Guernsey, 2017 Ohio App. LEXIS 672 (Ohio App.)

Almost three years after receiving treatment, patient sued dentist. ***Held:*** Claim was barred by the one-year medical malpractice statute of limitations. The statute begins to run at the time of actual or constructive discovery, or when patient-physician relationship for the condition ends, whichever is later. Patient had terminated relationship with dentist almost three years before suit. Had patient timely sent a 180-day letter to dentist, patient still filed suit too late. The saving statute was inapplicable because patient's earlier-filed lawsuit named a different dentist. The statute of repose was inapplicable because patient did not file suit within one year of discovery.

MUNICIPAL LAW AND CORPORATIONS

CITY IMMUNE FROM SUIT FOLLOWING FALL AT SWIMMING POOL

Wilmet v. Liberty Mut. Ins. Co., 2017 Wisc. App. LEXIS 140 (Wis. App.)

Grandmother tripped on doorstop while attempting to supervise grandson at swimming pool. ***Held:*** Grandmother's claim was barred by recreational immunity statute. Grandson was engaged in a recreational activity. Although the immunity statute does not list every covered activity, it includes activities substantially similar or done under

like circumstances. The focus of an inquiry is to determine under the totality of circumstances whether an injured person could be considered to have engaged in a recreational activity. Granting immunity from claims involving supervision of recreational activity is consistent with the statute's language and purpose.

TORTS

HIGH COURT CLARIFIES RULE GOVERNING SPORTS INJURY LIABILITY

Megenity v. Dunn, 68 N.E.3d 1080 (Ind.)

A karate black belt was injured by an errant kick during a class drill. ***Held:*** No breach of care occurs if participant's injury is an ordinary risk of the sport as a whole, not just of the specific activity. The risk of being kicked is an ordinary part of karate. ***Further held:*** To recover for an intentional injury, the intent must fall "totally outside the range of ordinary activity involved in the sport" overall. To recover for recklessness, a participant must intentionally act or be consciously indifferent to safety. And the conduct must fall totally outside the ordinary range of activity. The black belt did not meet these elements.

COUNTY SHERIFF NOT LIABLE FOR SUICIDE OF EMPLOYEE'S WIFE

Harrison Cnty. Sherriff's Dept. v. Ayers, 2017 Ind. App. LEXIS 35 (Ind. App.)

Using deputy's service gun, deputy's wife committed suicide following argument with him. ***Held:*** Sheriff's department was not vicariously liable. Deputy was not acting within the scope of his employment at the time of the shooting. Although a deputy is always on duty, deputy acted solely as a husband. The sheriff had not given instructions placing his department in the situation. A contrary ruling would wrongly turn every crime or tort committed by an officer into a jury issue.

FAILURE TO NOTIFY EXECUTIVE OFFICER FATAL TO CLAIM

Coren-Hall v. Mass. Bay Transp. Auth., 2017 Mass. App. Unpub. LEXIS 41 (Mass. App.)

After an MBTA bus struck a vehicle that the driver was entering, the driver notified the MBTA's claims department, with a request that the claims department give the notice letter to the proper authority. ***Held:*** The driver failed to meet the statutory requirement of notifying the executive officer. Although the driver later received a settlement offer, this did not establish the executive officer's actual notice within the presentment period. The offer had been made by an unidentified MBTA employee after the period expired. The lack of prejudice to the MBTA was irrelevant.

UM/UIM COVERAGE

UIM POLICY APPLIES INDIVIDUALLY TO MULTIPLE INSTANCES, BUT RECOVERY CANNOT EXCEED CONTRACTED AMOUNT

Ill. Emcasco Ins. Co. v. Tufano, 2016 IL App. (1st) 151196 (Ill. App.)

Insurer sought declaration regarding amount of UIM coverage owed to a passenger in a car accident who suffered significant injuries. The passenger sued both drivers involved in the accident. One driver had a $100,000 policy and the other had a $300,000 policy. Both were tendered. Passenger also had a $500,000 underinsured motorist policy (UMP). UMP insurer claimed to owe difference between the UMP and the combined limits of the two drivers—roughly $100,000. The passenger claimed that the UMP applied to each driver individually and that therefore $605,000 was owed. ***Held:*** The UMP applies to each driver individually, but the passenger is not entitled to recover more than the UMP policy limit as that was the contracted amount on which the premiums were based.

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