Covered Events

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Leadership Notes

From the Editor

By Tiffany Brown

Don't you just love summer? People are so much happier in the summer. Maybe because summer is all about fun and good times—vacations, beaches, golf, baseball, parks, and everting else outdoors. I hope your summer is off to a great start. And when the reality of another work week sets in, I hope you'll find time to read the July edition of Covered Events.

Your Insurance Law Committee is keeping busy this summer by planning some work-related fun and good times for later this year. Currently, we are preparing for the DRI Annual Meeting, which takes place October 16–19, at the New Orleans Marriott Hotel. October is the perfect time to enjoy the music, food, and atmosphere of "The Big Easy." The Annual Meeting is designed to provide attendees with opportunities to engage, learn, connect, and grow. And, while one day shorter than years past, each day of the Annual Meeting will be jam-packed with spectacular keynote speakers, cutting-edge CLE presentations, and plenty of networking events.

The ILC's business meeting is on Friday, October 18th, following its 3:00 p.m. presentation of "Extreme Weather: Where Is Insurance Coverage 14 Years Post-Katrina?" This CLE event will focus on insurance coverage for large-scale, weather-related catastrophes, such as hurricanes, floods, and wild fires, post-Katrina. This presentation will discuss the coverage lessons learned by insurers and counsel from these events, as well as the far-reaching affect that natural disasters can have through business interruption and contingent business interruption coverage.

Another a not-to-be-missed event at the Annual Meeting is the Fulton Alley Street Party and Networking Reception on Thursday, October 17, 6:45 pm–10:00 pm. Located in the heart of New Orleans' warehouse district, Fulton Street is one of the city's top entertainment destinations steeped in New Orleans history.

We look forward to seeing you in New Orleans. If you haven't already registered, you may view the brochure and register to attend this year's Annual Meeting at: https://www.dri.org/education-cle/Events/-in-category/categories/events/annual-meeting.

Finally, please mark your calendars for ILC's Insurance Coverage and Practice Symposium, December 5–6 at the Sheraton New York Times Square Hotel in New York. Brochures will be mailed soon!

In the meantime, keep yourself in the know about everything insurance coverage related by reading *Covered Events*. The July edition includes three featured articles: two that you should find helpful when you receive your next Coverage B claim; and one to help you preserve your record on appeal.

Enjoy summer!

Tiffany M. Brown is a partner with Meagher & Geer PLLP in Minneapolis, where she focuses her practice on commercial litigation, with particular emphasis on insurance coverage disputes involving commercial, professional and personal lines of insurance, including breach of contract, declaratory judgments, and bad faith actions. Tiffany's practice also includes E&O liability defense. She has previous experience representing insurance companies in cases involving arson and other insurance fraud.

Advertising Injury and Personal Injury SLG

By Daniel I. Graham, Jr.

Invasion of privacy. Intellectual property infringement. Commercial business disputes. On any given day, in any given court room, courts are asked to assess whether a liability policy's "personal and advertising injury" coverage encompasses emerging risks and exposures.

The Advertising Injury and Personal Injury subcommittee offers its members numerous opportunities to share their insights concerning the evolving landscape of personal and advertising injury insurance law. We author featured articles in the ILC's *Covered Events* newsletter, post on recent legal developments on the ILC's Community page and speak at DRI Insurance Law seminars. If you are interested in the complex coverage issues personal and advertising injury liability coverage presents and are looking for opportunities to get involved with DRI, I invite you to contact me at dgraham@nicolaidesllp.com for more information. And if our subcommittee isn't for you, the ILC offers its members plenty of other SLGs where they can learn and share. We invite you to join us and participate!

Daniel I. Graham, Jr., a founding partner of Nicolaides Fink Thorpe Michaelides Sullivan LLP in Chicago, assists his insurance company clients in both appreciating and navigating the complex coverage issues intellectual property infringement and unfair business practice claims present. He has represented his clients' interests before state and federal courts nationwide, at both the trial and appellate level, and in doing so, helped law addressing the scope of insurance coverage in the context of emerging technology-related coverage issues. He is the chair of the DRI Insurance Law Committee's Advertising Injury and Personal Injury SLG.

Personal Lines - Home and Auto SLG

By Laurie Barbe and Keith Marxkors

The Personal Lines - Home and Auto Substantive Law Group remains focused on keeping our members apprised of current trends and developing issues related to the personal lines coverage and claim defense legal environment. Consistent with the goals of the Insurance Law Committee, we provide a forum for our members to discuss legal issues, author articles, and present topics at DRI sponsored events. The Personal Lines - Home and Auto SLG is pleased to participate with *Covered Events* in presenting relevant, timely information to the DRI membership.

We welcome all DRI members interested in participating in our SLG activities and networking opportunities. We enjoy visiting with our SLG community at the DRI programs throughout the year, to share practice tips and strategies in advising and defending our clients in the insurance industry. If you are interested in joining the Personal Lines - Home and Auto SLG, we encourage you to sign up at the DRI website, or drop us an e-mail at Laurie.Barbe@Steptoe-Johnson.com or keith.marxkors.bqf5@statefarm.com.

Laurie Barbe and Keith Marxkors co-chair the Insurance Law Committee's Personal Lines – Home and Auto SLG. Laurie is a Member of Steptoe & Johnson PLLC in Morgantown, WV where she represents insurance companies in response to first and third party insurance claims and defends individuals and businesses in claims involving personal injury, wrongful death, products liability and property damage. She has also been involved in appellate proceedings before the Supreme Court of Appeals of West Virginia and the United States Court of Appeals for the Fourth Circuit. She is co-leader of the firm's Insurance Company Team. Keith Marxkors is in-house with State Farm Mutual Automobile Insurance Company, in Bloomington, IL where he concentrates on Auto policy, coverage and claim operations issues. Keith has been serving and counseling P&C Claims for over 30 years.

Feature Articles

Personal and Advertising Injury Risks in the Age of Corporate Activism

By Meaghan A. Sweeney

"Our jobs as CEOs now include driving what we think is right," Brian Moynihan, Bank of America's chief executive, told The Wall Street Journal in 2016. In previous generations, bold statements by a company leader on hot-button social or political issues would have presented little, if any, benefit as weighed against the risk of alienating important consumer demographics. Today, however, consumers and employees not only reward such practices, dubbed "corporate activism" or "CEO activism," but increasingly demand it.

"Corporate activism" or "CEO activism" are terms given to efforts by businesses and their leaders to engage in political or social issues that do not directly relate to their companies' bottom line. Historically, corporations worked to increase profitability and cut costs through focused advocacy relating to business policy and legislation. Today, however, companies are pursuing long-term growth and customer loyalty by appealing to the modern consumer's desire to back organizations with a greater social purpose. Further, many recognize that company values now greatly impact recruitment and retention efforts—especially amongst the Millennial workforce.

Though often admirable, the face of a company taking a stance on potentially controversial issues or events does not come without considerable risk. Not only can corporate activism deter potential customers, damaging brand image and profitability, it can also result in reputational harm to other companies or individuals, prompting costly litigation. Organizations facing liability related to corporate activism may look to their Commercial General Liability ("CGL") insurance and their "personal and advertising injury" liability coverage, in particular.

This article explores the rapid rise of corporate activism, the resulting novel risks facing corporations today, and the potential "personal and advertising injury" coverage issues that may arise when corporate activism backfires.

The Rise of Corporate Activism

Companies have always sought to influence policy and legislation related to taxation, employment practices, trade policy, and other marketplace issues directly impacting business goals and corporate strategy. As a result of many well-financed efforts aimed at limiting obligations to employees and consumers, the stereotype of the "big," "heartless," "evil" corporation developed.

In today's socio-political climate, companies embodying this stereotype are increasingly ostracized while those who have actively worked to defy the stereotype enjoy the benefits of positive brand association. This can, in part, be attributed to the more active role consumers and employees are taking – and expect brands they identify with to take – on social and political matters through use of social media. Relatedly, easy access to Internet resources has forced increased transparency regarding corporations' business practices and behind-the-scenes efforts to influence politicians and lawmakers.

Consumers today believe companies and their leaders should be vocal on social issues including race, gender, immigration, environmental concerns, and health, regardless of the issue's relationship to a company's product or brand. Positive corporate activism is rewarded with brand loyalty. CEO missteps, or even silence on social issues, are met with boycotts. It is the consumers and employees driving the corporate activism movement by provoking change through their purchasing habits, brand engagement, and employment relationships.

Mitigating the Mob-Mentality: The Risks of Corporate Activism

Despite the attractive possibility of increased popularity, it is important to evaluate the risks of corporate activism, which, by its nature, often involves controversial topics, inciting heightened emotions and difficult-to-gauge reactions.

Successful corporate activism requires bringing high-level visibility to the targeted subject and the company's respective stance on it. Activism can be proactive or reactive. In the age of social media, many individuals and companies are quick to employ reactive activism, seizing on opportunities to issue statements of condemnation or support in the face of controversies. Improperly vetted statements made by highly visible companies or their

leaders can be extremely damaging both to the author and to others implicated in the statements.

With respect to a company's own reputational risks, depending on consumer demographics, a company may find that speaking out on certain topics provides benefits that outweigh any potential cost of negative pushback.

Just as significant to the risk analysis is the possibility of expensive litigation resulting from potentially false or misleading statements issued on behalf of a company or its leaders effecting other businesses or individuals. Unfortunately, the ease with which a provocative statement can reach a large audience today has led to an increase in lawsuits seeking reputational damages.

Companies face additional risk with respect to the potentially wide range of employee conduct for which the company could be held responsible. For instance, a small-town bakery recently secured a $44 million verdict against a college and its vice president when the jury found it responsible for damages resulting from student and employee boycotts, staged protests, and flyers distributed to potential customers contending that the bakery was racist.

Because of the inflammatory nature of the events or issues involved in corporate activism, failure to responsibly prevent misdirected criticism causing reputational harm may result in large verdicts, including large punitive damages awards. Companies may look to their "personal and advertising injury" coverage to respond to these exposures.

Personal and Advertising Injury Liability Coverage

The standard CGL policy usually offers coverage for "personal and advertising injury." "Personal and advertising injury" is an offense-based coverage, meaning the coverage is potentially implicated where the insured is alleged to have injured another by committing one of the offenses enumerated in the definition of "personal and advertising injury." One "personal and advertising injury" offense particularly relevant to the discussion of corporate activism is the "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services" (the "disparagement offense").

The Disparagement Offense: Activism or Smear Campaign?

Lawsuits against insureds regarding allegedly false and misleading statements made about another business or individual may involve the disparagement offense where the disputed statement criticizes or denunciates – explicitly or implicitly –another entity's actions, products, business practices, or services. *See Millennium Labs., Inc. v. Darwin Select Ins. Co.*, 676 F. App'x 734 (9th Cir. 2017) (competitors' disparagement lawsuits triggered duty to defend where insured's general counsel told customers that competitor sold "bad science," harmed patients, and required government oversight to be acceptable). Potentially undeserved criticism may implicate the disparagement offense and, in some jurisdictions, require an insurer to undertake a costly defense. *Navigators Specialty Ins. Co. v. Beltman*, No. 11-CV-00715-RPM, 2012 WL 5378750 (D. Colo. Nov. 1, 2012), *judgment entered,* No. 11-CV-00715-RPM, 2012 WL 5378804 (D. Colo. Nov. 1, 2012) (disparagement offense potentially triggered where insured environmental research firm conducted "massive public pressure campaign" to force oil company into a payoff using threats and attacks through the media). There is also the potential that an insured's statement could implicate the disparagement offense even if the statement does not expressly reference another company, such as publishing inaccuracies relating to a general class of products, parts, or ingredients.

Bad Business Move or Rouge CEO?

Before the "personal and advertising injury" coverage is implicated, a CGL policy typically requires that the enumerated offense arise out of a named insured's business and be committed in the coverage territory during the CGL policy's policy period. Consequently, in assessing whether an injurious corporate statement involves the "personal and advertising injury" coverage, it is important to evaluate whether the disputed statement was communicated in the context of the named insured's business or in some other capacity. Coverage may not apply where a statement was made with the speaker's personal resources, on a personal website or account, or based on personal experience.

For example, in *State Auto. Mut. Ins. Co. v. RLI Ins. Co.*, the court found a material factual dispute as to whether a defamatory product review was posted in the author's capacity as founder and president of an online music retailer or in his personal capacity as a "natural foods activist." No. 4:11-CV-00134-TJS, 2013 WL 12081102 (S.D. Iowa May 20, 2013). There, the court considered evidence regarding whether company resources were used to create

and operate the consumer review website, and whether comments on food additives or health-related foods were "in any way related to the business activities" of the music retailer. *Id.* In *Zurich American Insurance Co. v. Don Buchwald & Associates, Inc.*, the court found a duty to defend where an employee of the insured leaked sexually explicit and racist footage. 2018 N.Y. Slip. Op. 33325(U) (Sup. Ct. N.Y. County, Dec. 21, 2017). Although the insurer argued that the insured agency did not "make" the publication, the court found personal and advertising injury coverage was triggered where the complaint alleged that the insured "aided and abetted" publication. *Id.*

Policy Exclusions and Coverage Defenses

Even where corporate activism potentially implicates the disparagement offense, there are several exclusions and additional coverage defenses that may preclude coverage. Particularly relevant to an analysis of "personal and advertising injury" coverage for corporate activism are the knowledge exclusions and exclusions pertaining to insured businesses that face increased exposure related to their media activities.

Knowledge Exclusions

The "Knowing Violation Of Rights Of Another" exclusion typically precludes coverage for "personal and advertising injury" caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict "personal and advertising injury." The "Knowledge of Falsity" exclusion precludes coverage for "personal and advertising injury" arising out of oral or written publication of material if done by or at the direction of the insured with knowledge of its falsity.

Lawsuits seeking damages because of false or misleading statements made by an over-zealous CEO or employee may include allegations of intentional or willful conduct. Such allegations may, at first blush, appear to implicate the knowledge exclusions. When assessing coverage, however, practitioners will want to keep in mind that such allegations may not relieve an insurer's defense obligation. Courts have taken different approaches in evaluating whether such allegations preclude a duty to defend when the insured faces causes of action for which liability could be assessed against the insured in the absence of intentional or knowingly wrongful conduct. *See Uretek (USA), Inc. v. Cont'l Cas. Co.*, No. 15-20104, 2017 WL 3225700 (5th Cir. July 28, 2017) (Knowing Violation and Knowledge of Falsity exclusions did not preclude duty to defend where complaint alleged both intentional and negligent conduct); *KM Strategic Mgmt., LLC v. Am. Cas. Co. of Reading, PA,* Case No. CV15-1869, 2015 U.S. Dist. LEXIS 171435 (C.D. Cal. Dec. 21, 2015) (finding no duty to defend where insurer could not provide evidence outside of the complaint that conclusively showed the insured made defamatory statements intentionally). *But see Singer v. Colony Ins. Co.,* Case No. 14-22310, 2015 U.S. Dist. LEXIS 160207 (S.D. Fla. Nov. 30, 2015) (no duty to defend where complaint alleged insured acted knowingly with respect to claims for libel and slander, among others); *Quad/Graphics, Inc. v. One2One Commc'ns, LLC*, No. 09-CV-99, 2011 WL 1871108, at *4 (E.D. Wis. May 16, 2011) (Knowledge of Falsity exclusion precluded coverage where complaint alleging defamation implicitly asserted insured knew statements were false.)

The Media and Internet Type Business Exclusion

The "Media and Internet Type Business" exclusion precludes coverage for "personal and advertising injury" arising out of certain offenses, including the disparagement offense, if committed by an insured whose business is: (1) advertising, broadcasting, publishing or telecasting; (2) designing or determining content of websites for others; or (3) as an internet search, access, content or service provider. This exclusion generally applies to entities whose business operations necessarily involve greater "personal and advertising injury" exposures, requiring a more specialized policy. For example, media companies utilizing their own outlets to further corporate activism may be precluded from coverage pursuant to this exclusion.

Most courts have interpreted this exclusion to require the insured's "primary business" to fall within one of the enumerated business types. *Penn Nat. Ins. Co. v. Grp. C Commc'ns, Inc.*, No. A-2813-09T3, 2011 WL 3241491, at *8 (N.J. Super. Ct. App. Div. Aug. 1, 2011) (whether insured's "primary, essential, chief or principal" business was "advertising, broadcasting, publishing or telecasting" could not be resolved on summary judgment). The exclusion does not apply to any insured whose business merely involves one of the activities encompassed by the enumerated business types. *State Farm Fire & Cas. Co. v. Franklin Ctr. for Gov't & Pub. Integrity*, No. 1:13-CV-957 AJT/TRJ, 2014 WL 1365758 (E.D. Va. Apr. 4, 2014) (finding exclusion ambiguous as applied to insured whose "publishing" was merely incidental to its actual business of exposing governmental fraud, waste and abuse through investigative reporting). In light this narrowly applied exclusion, insurers may consider ways to effectively identify an insured's primary business upon issuing a policy, thereby potentially limiting any unintended defense obligation.

As corporate activism increases, particularly through the use of the Internet and social media, so will the need for adequate media liability coverage to address exposures potentially excluded by this provision.

Considerations

When considering exposures presented by insureds inclined to embrace activism efforts, insurers should pay particular attention to provisions regarding defense obligations and the scope of potentially covered damages. Jurisdictions vary on whether an insurer may look beyond the complaint in determining the duty to defend. Further, courts disagree regarding whether an insurer has the right to reimbursement for defense fees in the event it is later determined the insurer had no defense obligation.

Finally, insurers should be cognizant of the large role punitive damages can play in disparagement cases, and to what extent, if at all, coverage exists for such damages.

Conclusion

While corporate activism has brought considerable visibility and positive change to important social issues, the emerging practice also poses unique business risks. Although these exposures have the potential to implicate a liability policy's "personal and advertising injury" coverage, there are several provisions that may limit, or even preclude, coverage.

This article expresses the opinions of the author and does not necessarily reflect the views of Nicolaides Fink Thorpe Michaelides Sullivan LLP or its clients.

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Comparison Advertising: How Far Is Too Far Under Coverage B

By Courtney Nichol

We have all seen advertisements from companies suggesting their products are comparable but just cheaper than their overpriced competitors' products. As these types of advertisements are commonplace when an advertiser seeks to aggressively market its products, insurers should be aware of the significant implications for coverage of advertising injury liability. Insurers may face significant expense and liability exposure for an advertising insured's advertising under CGL policies, and it is crucial to understand not only how the insured is advertising but also how courts interpret the advertising injury liability policy provisions. This article provides a survey of cases from major jurisdictions analyzing coverage for product comparison claims, as well as an overview of the extent to which comparison of competing products and services in advertising can go too far, and where the line is drawn for the trigger of coverage.

CGL policies often contain coverage for Personal and Advertising Injury Liability, commonly referred to as Coverage B. Pursuant to Coverage B, insurers also have the duty to defend the insured against suits seeking damages because of personal and advertising injury. Coverage B typically defines "personal and advertising injury" in part as the mental anguish, shock, or emotional distress arising out of one or more enumerated offenses. One of the enumerated offenses includes "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." While slander and libel are often well-defined legal terms of art, the term "disparage" is not and as a result, courts are often guided only by its plain ordinary meaning. As a result, courts have sometimes held that seemingly inoffensive advertising rises to the level of disparagement and triggers at least the insurer's defense duty in these claims.

For example, the Seventh Circuit has held that disparagement includes false comparison of products when not even identifying another product by name. In *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.*, 214 F. App'x 596, 599 (7th Cir. 2007) the insured scissor manufacturer was sued by a competitor for allegedly making false and disparaging statements about the competitor's products. Specifically, the complaint alleged that the insured stated

that its "paper trimmers were bonded with titanium, which made them superior to stainless steel scissors and paper trimmers that were not bonded with titanium." *Id*. at 597. The insurer denied coverage under the CGL policy covering "an advertising injury offense" including "material that disparages the [...] products, services, work of completed work of others." The Seventh Circuit reversed the lower court, holding that while the competitor was not named directly in the advertisement, the insurer had a duty to defend the claim because the complaint sufficiently alleged that the insured's advertising was directed at the competitor's product.

Similarly, the Northern District of Illinois held in *JAR Labs. LLC v. Great Am. E&S Ins. Co*. that a false statement equating a competitor's product with an allegedly inferior product is by itself sufficient to constitute disparagement. *JAR Labs. LLC v. Great Am. E&S Ins. Co*. 945 F. Supp. 2d 937, 944 (N.D. Ill. 2013). In *JAR Labs*, a distributor of a prescription pain relief patch filed suit claiming that it was injured by false and misleading advertising statements by the insured manufacturer in promoting its own over the counter pain relief patch. *Id*. at 939. The complaint alleged that the insured's advertisements included misleading statements that would lead consumers to believe that the two products were otherwise similar in all respects, including statements that the over the counter patch "'contain[ed] the same active ingredient as the leading prescription patch'" and would provide pain relief for up to 24 hours "'[l]ike the prescription brand.'" *Id*. at 940. The insurer for the manufacturer denied coverage on the grounds that the insured's advertisements were not disparaging to the claimant's product in that they did not say anything negative about the product. *Id.* at 942–43. The court disagreed with the insurer and held that it owed coverage. *Id*. at 943. *JAR Labs* concluded that a competitor's statements "equating a competitor's product with an allegedly inferior one is logically indistinguishable from and no less disparaging than a statement describing one's own product as 'superior' to the competitors.

The Ninth Circuit has held that imitation of the design of a product alone is insufficient to trigger the disparagement advertising injury clause in an insurance policy. *Homedics, Inc. v. Valley Forge Ins. Co*., 315 F.3d 1135, 1142 (9th Cir. 2003). In fact, the Ninth Circuit reasoned that "it's quite the opposite—as has been oft said: imitation is the highest form of flattery." *Id*. However, in *Homedics*, the defendant did not compare or advertise its "imitation" products to convince potential buyers that they were the actually the higher-quality products. Thus, its holding only applies to limited scenarios. Other courts have distinguished *Homedics* finding that the "imitation in *Homedics* indeed could only have been 'flattery' that in no way reflected badly on the reputation of the plaintiff's products" and still found coverage when the insured imitated products by comparing them to their lesser quality products or by leading buyers to believe their imitation products were the actually originals. *Michael Taylor Designs, Inc. v. Travelers Property Cas. Co. of America*, 761 F. Supp. 2d 904, 910–11 (N.D. Cal. 2011) affd. (9th Cir. 2012) 495 Fed.Appx. 830.

For example, the Northern District of California in *Michael Taylor Designs, Inc*. found that even the implication in a complaint that the insured's actions went beyond pure imitation was sufficient to trigger a duty to defend under Coverage B language. In *Michael Taylor*, the insured used to act as the exclusive sales agent for a designer's line of wicker furniture. However, the insured eventually began selling "cheap synthetic knock-offs" of the designer's furniture in its store but continued to send brochures to its customers that contained photographs of the designer's line of high-quality furniture. The designer brought suit against the insured complaining that the insured's brochures and then acts of "steering" customers into rooms with imitation furniture were misleading the customers as to the origin of the furniture and ultimately tarnishing her trade dress.

The insurer denied coverage under Coverage B in part arguing that the facts failed to constitute disparagement because the insured was simply imitating the designer and pursuant to *Homedics*, imitating a product is not disparaging it. *Id*. citing *Homedics* 315 F.3d at 1142. *Michael Taylor* rejected that argument and concluded that the designer's complaint triggered the insurer's duty to defend. The court held that while the brochures picturing the designer furniture were insufficient to support a claim for disparagement under the policy, the claim that the insured would "steer" customers into a room with the imitation products brought the claims beyond imitation alone. According to the court, "[t]he term 'steered' fairly implies some *further* statements, presumably oral, were being made by [the underlying defendant] to convey information that the imitation products were the [designer's product] depicted in the brochure." *Id*. (emphasis in original). Thus, the buyers would be likely to associate the "cheap synthetic" products with the designer, disparaging the designer's work. The Ninth Circuit affirmed the district court's decision. 495 F. App'x 830, 830 (9th Cir. 2012). Thus, to constitute disparagement under Coverage B in the Ninth Circuit, insureds must at least go further than pure imitation and harm a competitor's reputation in some manner. See generally *Tower Ins. Co. v. Capurro Enterprises*, No. C 11-03806 SI, 2012 U.S. Dist. LEXIS 46443, at *33–36 (N.D. Cal. Apr. 2, 2012).

The Ninth Circuit and California cases have further clarified that to trigger coverage, the insured's advertisement must identify or refer to a competitor's products in some manner. *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.,* 59 Cal. 4th 277, 172 Cal. Rptr. 3d 653, 326 P.3d 253, 266 (Cal. 2014) (holding that the label "patent-pending" was not disparaging because it was "not specific enough to call into question [the competitor's] proprietary rights in his product or to suggest that the [the defendant's product had] any unique feature that [was] an 'important differentiator' between competing products."); *Sei Y. Kim v. Truck Insurance Exchange*, 686 F. App'x 399, 400 (9th Cir. 2017) (holding that claims against the insured did not trigger the advertising injury provision because the false patent mark at issue, "'Patented. Made in USA,' did not constitute disparagement because it did not expressly or impliedly refer to the plaintiff's product.")

The Second Circuit is more limited in guidance on this issue than both the Seventh and Ninth Circuits. However, the Second Circuit has held that the offending advertisement must specifically refer to its competitor's product constitute disparagement under the "personal and advertising injury" policy language. See *Elite Brands, Inc. v. Pennsylvania Gen. Ins. Co.*, 164 Fed. Appx. 60 (2d Cir. 2006), affirming 164 Fed. Appx. 60, 2004 WL 1945732 (S.D.N.Y. 2004). In *Elite*, a competitor filed suit against the insured claiming that "that the low-priced allegedly infringing goods would lead [competitor's] customers to believe that [competitor's] prices were unreasonably high." 164 Fed. Appx. 60, 2004 WL 1945732 at *5. The Second Circuit concluded that these allegations against the insured did not trigger the insurer's duty to defend in part because "[u]nder New York law, a claim of disparagement must contain specific assertions of unfavorable facts reflecting upon the rival product" and the competitor's complaint did not do so. 164 Fed. Appx. at 62 (quotations omitted). Thus, simply because the insured's listing of its low prices for the infringing products may have negatively impacted the competitor, that alone was insufficient to reach the level of disparagement under the policy. See also *Dollar Phone Corp. v. St. Paul Fire & Marine Insurance Co.*, No. CV-09-1640 (DLI) (VVP), 2012 U.S. Dist. LEXIS 45591, at *19-21 (E.D.N.Y. Mar. 9, 2012).

The Fifth Circuit in *Uretek (USA), Inc. v. Continental Casualty Co.* also recently addressed the issue what constitutes disparagement under Coverage B and further defined where the line for coverage is drawn. 701 F. App'x 343, 346 (5th Cir. 2017). In *Uretek*, the insured, a roadway maintenance and repair company, was sued by a competitor for allegedly misrepresenting the scope of a relevant patent in a "concerted effort to intimidate and coerce its competitors into refraining from proper and lawful bidding on, and to intimidate contracting bodies in the selection and award of bids for, construction projects" which did not even involve processes covered by the patent. The insured argued that these claims the competitor asserted arose out of disparagement and therefore covered under Coverage B. The insurer denied coverage claiming that such actions did not constitute disparagement under the policy and the district court agreed.

However, The Fifth Circuit concluded that the facts regarding insured's actions constituted an allegation that insured told its competitor's customer that the competitor had infringed the relevant patent. As a result, the Fifth Circuit ultimately reversed the district court and held that the "suit's allegations that '[insured's] deceptions . . . influenced decisions to have work performed and award contracts that [competitor] would have been awarded but for [insured's] false representations' are adequate to meet the [policy's] requirement that the suit allege an 'injury' arising from 'disparagement.'" *Id.* The Fifth Circuit reasoned that a "statement to a competitor's customer that the competitor is undertaking work that it has no legal right to undertake disparages that competitor and the services it offers by clear implication." *Id.*

As the above cases reflect, many courts have taken a broad view in considering whether claims against insureds are sufficient to allege disparagement and trigger insurers' defense and indemnity obligations. Coverage B insurers should be aware of the methods their insureds are using to advertise their products to understand the risks inherent in their advertising schemes. If those advertising methods use product comparisons, there is the risk of significant costs and liability exposure as disparaging comparison advertising.

Courtney Nichol is senior counsel in the Chicago office of Gordon & Rees. Ms. Nichol's practice primarily focuses on commercial litigation, insurance coverage, and bank litigation.

A Practical Guide to Preserving Your Record for Appeal

By James P. Marsh and Danielle N. Malaty

As legal practitioners, we are trained early on to spot issues, identify questions of law that address those issues, and do so within the time limitations prescribed by the rules of civil procedure and the applicable statutes of limitations. Lawyers must be cognizant of appealable issues or reversible error at every stage in litigation, notwithstanding the day-to-day exigencies so inherent to our profession. Failing to exercise this awareness can have a crippling effect on the defense of a case, as there are few words more tragic to the practitioner's ears as "not in the record—waived." This article will provide guidance for the practitioner to avoid the detrimental effects of failing to preserve your record for purposes of appeal.

Introduction

An appeal is only as viable as the record from which it emanates. That said, preserving the record is not always an easy task. It consumes time and costs, can annoy the judge and opposing counsel, and sometimes alienates the jury. However, a potential appellant must cast these reservations aside to advance her contention of error to the higher courts, which affirm more often than they reverse. "[T]o be preserved, an argument must be pressed, and not merely intimated."[1]

Lawyers have a basic understanding of preserving the record for appeal. The formula is simple: "if it's not in the record, it doesn't exist."[2] To preserve your record for appeal, you must raise all issues available at the summary judgment stage, make the necessary objections during trial, submit motions *in limine* before trial, object during trial (notwithstanding pre-trial adverse rulings), and repeat with specificity those objections in a post-trial motion.

Pattern jury instructions and court rules provide guidance into a variety of trial proceedings and appeals. Most states utilize pattern jury instructions for civil and criminal cases, which are often a fertile ground for appealable error. While jury instructions can be correct as a matter of law, they can also be incomplete or vague enough to be misconstrued by the jury.

The Record on Appeal

Generally, the record on appeal is comprised of: (1) the original papers and exhibits filed in the trial court; (2) the transcripts of proceedings, if any; and (3) a certified copy of the docket entries prepared by the trial court clerk. The record on appeal is the starting point and is therefore of obvious importance. An appellate court may not consider evidence that was not before the district court, absent extraordinary circumstances.[3] The purpose of this rule is to limit the record to what was before the district court.[4]

A reviewing court generally does not take judicial notice of critical evidentiary material not presented in the court below. Thus, preserving the record is all the more critical when a particular item of evidence is of such great significance that it may be the determinative element for the reviewing court to reach an appropriate ruling on the issues between the parties.

Failure to Raise an Issue or Object: Waiver

As noted above, legal practitioners must identify issues and arguments at the inception of a lawsuit, so as to prevent waiver of pivotal issues that can ultimately be waived on appeal. If a litigant raises an issue for the first time on appeal, the court of review generally deems the issue waived.[5] Stated differently, the general rule is that objections not made with the trial court are waived on review.[6] The courts recognize many ways an issue can be waived for purposes of appeal:

- **Acquiescence or inducement.** A party is estopped from claiming error on an issue that the party induced the court to make or to which the party assented.[7]
- **Change of trial theory.** The theory under which a case has been tried in the trial court cannot be changed on review.[8]

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1 Hays v. Sony Corp. of America, 847 F.2d 412, 420 (7th Cir. 1988).

2 Protect Our Water v. County of Merced, 110 Cal.App.4th 362, 36 (2003).

3 Rachman Bag Co. v. Liberty Mut. Ins. Co., No. 95-9273, 1996 U.S. App. LEXIS 25707 (2d Cir. July 25, 1996).

4 United States v. Burke, 781 F.2d 1234, 1246 (7th Cir. 1985).

5 Gaston v. Founders Ins. Co., 365 Ill.App.3d 303, 311 (1st Dist. 2006).

6 United States v. Walters, 638 F.2d 947 (1981).

7 In re Swope, 213 Ill.2d 210, 217 (2004).

8 North Coast Bus. Park v. Nielsen Constr. Co., 17 Cal. App. 4th 22, 29 (1993).

- **Unspecified grounds for objection.** An objection at trial on a specific ground forfeits all objections on unspecified grounds.[9] The Seventh Circuit unforgivingly admonishes the litigant who forfeits a certain point by failing "to press [their objection] by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority."[10] The Court goes further to remind us they "will not do [our] research for [us]."[11]
- **Motion in limine denied.** Where a party's motion in limine to exclude evidence is denied and the party fails to object to the evidence when it is introduced at trial, the party waives the objection on review.[12]
- **Jury Instructions.** A party waives its objections to improper jury instruction unless it both (a) objects to the improper instruction at the instruction conference, and (b) proffers a correct instruction.[13]
- **Failure to rule on objection.** A party waives an objection where a ruling is not requested after the trial court fails to make one.[14]
- **Offer of proof.** Failure to make an offer of proof with respect to a ruling excluding evidence waives the issue for appeal.[15]

Post-Trial Motions

Post-trial motions, such as motions for judgment notwithstanding the verdict, remittitur, or motions for new trial, are typically sought by an attorney facing an adverse or excess verdict. A post-trial movant seeks to cure what they believe was an improperly overruled or sustained objection. This stage in litigation is costly and calls for a great deal of research, usually culminating in an ultimate appeal. While some post-trial motions are routine and filed as a matter of course (*i.e.* remittitur pursuant to statutory cap on damages or an arguably excess verdict), others are more nuanced and narrowly tailored to specific evidentiary issues that arise throughout the course of a trial. Rule 50 of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law in jury cases. The trial court may resolve an issue against a litigant or grant judgment as a matter of law against a litigant, when the litigant has had an opportunity to be fully heard on an issue by a jury, and "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[16] This motion must be filed *during trial* and *before* the evidence is submitted to the jury to preserve the issues therein, and any post-trial motion after judgment must have arguments confined to those contained in the pre-verdict motion. It is at this stage in motion practice that many litigants waive issues. The provisions of Rule 50(a) and (b) thus serve two purposes: they "protect the Seventh Amendment right to trial by jury and ensure that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting."[17]

Rule 52(b) of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law or to amend findings of fact in non-jury cases. As the rule presently stands, a Rule 52(b) motion must be made no later than 28 days after entry of judgment. As with Rules 50 and 59, the time limit for filing a motion under Rule 52(b) cannot be extended.[18]

Exceptions to the Waiver Doctrine

Our courts of review have carved out certain limited exceptions to the waiver doctrine. Importantly, waiver is considered a limitation on the parties, not the reviewing courts. Reviewing courts "may look beyond considerations of waiver to maintain a sound and uniform body of precedent or where the interests of justice so require."[19] Other circuit courts characterize their own role as extraordinary in power and supervisory in practice. The Michigan Supreme Court once went so far as to proclaim that its "superintendent control" could not be "limited by forms of procedure or by the writ used for its exercise."[20]

Moreover, the appellate court may review claims of error which were not properly preserved at trial where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process

[9] Auton v. Logan Landfill, Inc., 105 Ill.2d 537, 548-9 (1984); In re Sandry, 367 Ill.App.3d 949 (2d Dist. 2006).

[10] Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990).

[11] Id.

[12] Illinois State Toll Highway Auth. v. Heritage Standard Bank and Trust, 163 Ill.2d 498, 502 (1994); Spyrka v. County of Cook, 366 Ill.App.3d 156, 165 (1st Dist. 2006).

[13] State v. Bellamy, 323 Conn. 400, 147 A.3d 655 (2016).

[14] Reid v. Google, Inc., 50 Cal. 4th 512, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (2010)

[15] Fitzgerald v. Water Rock Outdoors, LLC, 536 S.W.3d 112 (Tex. App. 2017)

[16] See Fed. R. Civ. P. 50

[17] Marshall v. Columbia Lea Regional Hosp., 474 F.3d 733 (10th Cir. 2007).

[18] See Fed. R. Civ. P. 52(b) and 6(b)

[19] In re Estate of Funk, 221 Ill.2d 30, 98 (2006).

[20] In re Huff, 352 Mich. 402, 91 N.W.2d 613 (1958)

itself.[21] A careful practitioner would be wise not to assume that an appellate court will save the day by invoking this "plain error doctrine."

The issue of subject matter jurisdiction cannot be waived and may be raised at any time.[22] Also, in Illinois, where the trial court did not rule on an issue of public importance, but the issue was argued and decided by the appellate court, the Supreme Court will consider it.[23] However, while the rule against raising new issues on appeal may be "deeply embedded in our jurisprudence," in the end it "is a matter of discretion."[24] Even in the absence of a cogent legal argument at the trial court level, appellate courts occasionally exercise their discretion to address it. The court of review may consider a waived argument if a 'miscarriage of justice' would otherwise result and it raises a pure issue of law.[25]

Opening Statement and Closing Argument

Trial attorneys must object when necessary during their opponent's opening statement and closing argument to preserve an objection for appeal, even if they suspect it may alienate the jury. As we know, absent good faith, it is reversible error to comment in an opening statement about evidence that counsel does not intend to prove.[26]

With respect to closing arguments, an attorney is permitted wide latitude in closing argument, and a judgment will not be reversed unless the challenged remarks were of such a character that they prevented the other party from receiving a fair trial.[27] This latitude is not without limitations, and it is the duty of the trial court to "control the argument of counsel and to see that it is confined to proper limits, especially as in the instant case where a timely objection was made."[28] However, the failure to object to comments made during the closing argument is considered a waiver of the objection.[29]

Offers of Proof

The flipside to an objection or motion in limine seeking to exclude evidence is the offer of proof. To preserve an error in the court's exclusion of evidence one wants submitted, the proponent of the evidence must make an adequate offer of proof in the trial court. Trial courts have broad discretion in directing when the offer of proof can be made, but it is the attorney's duty to make sure it is timely made. Moreover, if the trial court prohibits an attorney from making an offer prior to jury deliberations, reversible error has likely occurred.[30]

An adequate offer of proof apprises the circuit court of what the offered evidence is or what the expected testimony will be, by whom it will be presented, and its purpose. The purpose of an offer of proof is to disclose to the circuit court and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether the exclusion of the evidence was proper.[31] It must "demonstrate the relevancy of the testimony offered, must be specific, and must be definite."[32] The failure to make an offer of proof results in waiver of the issue on appeal.[33]

There are two recognized types of offers of proof, "formal" and "informal." A formal offer of proof involves the proposed evidence or testimony being formally offered in a question and answer manner outside the presence of the jury, and is generally required to preserve the issue of whether preclusion of the evidence was proper.[34] An informal offer, where counsel merely summarizes for the court what the proposed evidence or testimony will show, may be sufficient to preserve the error if it is specific enough in nature and if it is not based merely on speculation or conjecture.[35]

To err on the safe side, counsel should seek a formal offer of proof whenever possible. Informal statements

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21 People v. Glasper, 234 Ill.2d 173, 197-98 (2009).

22 See, e.g., Swinney v. General Motors Corp., 46 F.3d 512, 517–18 (6th Cir. 1995) (subject-matter jurisdiction); Edelman v. Jordan , 415 U.S. 651, 677–78 (1974) (state's sovereign immunity); Schottel v. Young, 687 F.3d 370 (8th Cir. 2012).

23 In re Marriage of Rodriguez, 131 Ill.2d 273, 279 (1989) (referring to issues of "public importance"); People v. Bell Mut. Cas. Co., 54 Ill.2d 433, 439 (1973) (emphasizing that this exception applies to issues of "great" public importance).

24 Nat'l Ass'n of Social Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995).

25 Compare Batiansila v. Advanced Cardiovascular Sys., 952 F.2d 893, 896 (5th Cir. 1992) with Readco Inc. v. Marine Midland Bank, 81 F.3d 295, 302 (2d Cir. 1996).

26 Sutton v. Overcash, 251 Ill.App.3d 737, 762 (3d Dist. 1993).

27 Lerma v. Wal-Mart Stores, Inc., 2006 OK 84, 148 P.3d 880.

28 Harwin v. Jaguar Cleveland Motors, Inc., No. 40578, 1980 Ohio App. LEXIS 11355 (Ct. App. Apr. 3, 1980)

29 Id.

30 In re Marriage of Suriano, 324 Ill.App.3d 839, 850 (1st Dist. 2001); In re Kamesha J., 364 Ill.App.3d 785, 792 (1st Dist.2006).

31 Karashin v. Haggard Hauling & Rigging, Inc. 653 S.W.2d 203, 205 (Mo. banc 1983).

32 Id.

33 Id.

34 People v. Wallace, 331 Ill.App.3d 822, 831 (1st Dist. 2002); Hall v. Northwestern Univ. Med. Clinics, 152 Ill.App.3d 716, 722 (1st Dist. 1987).

35 Id.

by counsel that are unsupported speculation, lacking in specificity or conclusory are insufficient to preserve the issue of exclusion for review.[36] Whether a court will accept an informal offer of proof through the statement of an attorney depends on the specificity of the statement.[37]

Additionally, an appellate court may look only at the purposes of an offer of proof as stated on the record, and may not consider on review purposes for evidence that were not offered at trial.[38] In other words, a reviewing court will not consider an argument in an appeal brief that evidence was improperly excluded at trial, where the argument on appeal is based on a purpose for the evidence that was unstated in the proponent's offer of proof.

Finally, where a single offer of proof is made and part of the evidence offered is inadmissible, the trial court does not err if it excludes all of the testimony offered.[39] The duty is on the proponent of the excluded evidence to obtain a separate ruling as to each portion of the evidence deemed salvageable.[40]

Conclusion

A cursory search through case law at the federal and state levels reveals countless, meritorious arguments that were inadequately preserved at the trial court level. These decisions underscore the frequency of issue waiver resulting from a failing to preserve a pivotal issue, objection or argument. Unfortunately, if a reviewing court is unable to notice reversible error from the record on appeal, it will assume the appellant waived the error. Of course, it is far better to prevail at trial without annoying the trial judge or opposing counsel; however, the record on appeal must remain an active and important element to a litigant's trial strategy from the beginning of litigation through verdict.

We can offer a few helpful hints to ensuring your record on appeal accurately memorializes what transpired throughout the course of trial. First, you may want to designate an associate or perhaps even an appellate specialist to monitor trial. This designated attorney will ensure that issues and objections are properly preserved on the record, that the applicable jury instructions are submitted, and that all testimonial or evidentiary objections are timely made and based on appropriate grounds.

Second, a vigilant trial counsel will ensure that potentially reversible error from the bench is transcribed, so as to prevent insulation of those rulings from review. More often than not, trial attorneys fail to ensure the court reporter memorializes each and every objection, offer of proof or ruling. Without a transcript, the reviewing court cannot reach a position on your contention of error. While some judges take issue with their rulings being scrutinized by counsel who insist that they be made on the record, counsel can ensure an accurate memorialization of the ruling by requesting that the judge summarize the ruling in the presence of a court reporter, which also provides the opportunity to repeat and emphasize the grounds on which the objection was made, if any. It should be noted that the reviewing court will rarely fault the appellant if it is clear from the record that the trial court impeded the appellant's attempt at preservation.

Third, trial counsel should never blindly rely on pattern jury instructions. Those boilerplate instructions provide a mere baseline from which trial attorneys should begin their determination as to which instruction should be submitted. The law is constantly evolving, sometimes leaving pattern jury instructions outdated. Accordingly, one should look to see whether these instructions accurately state the applicable law, propose additional language to ensure the jury is properly instructed, and preserve your objections if your proposed language is subject to an adverse ruling.

Fourth, trial counsel cannot rely on a single, stand-alone objection for grounds on which she seeks reversal. As noted above, trial counsel must contemporaneously object to each submission of evidence to which she objects. Moreover, trial counsel can ask for a standing objection, memorialized into the record to prevent waiver.

Finally, while motions for mistrial or motions for judgment as a matter of law seem like extreme measures, failing to seek these rulings constitutes a waiver. Also, these motions are best made in writing. Verbally moving for mistrial can result in a waiver, while a written motion can expressly address the arguments proposed in support of their contention of error for the reviewing court.

The enormity of responsibility and awareness during trial can be overwhelming. Trying a case is an exceedingly challenging process, notwithstanding the additional burdens of ensuring all objections, issues, rulings and errors are preserved in the record. However, given the frequency of large verdicts across the country, appeals provide a second

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[36] Chicago Park Dist. v. Richardson, 220 Ill.App.3d 696, 701–02 (1st Dist. 1991).

[37] State Farm Gen. Ins. Co. v. Best in the West Foods, Inc., 282 Ill. App.3d 470, 482 (1st Dist. 1996).

[38] Hairgrove v. City of Jacksonville, 366 Ill. 163, 182 (1937).

[39] 4M Linen & Uniform Supply Co. v. Ballard, 793 S.W.2d 320 (Tex. App. [1st Dist.] 1990).

[40] Rinesmith, 293 Ill.App.3d at 348.

chance at prevailing for a losing defendant. Losing an appeal due to a failure to properly preserve a meritorious error is no less disheartening than losing at trial.

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Recent Cases of Interest

First Circuit

Structured Settlements/Fraud (MA)

The First Circuit has affirmed a Massachusetts District Court's dismissal of claims by accident victims who had alleged that Lexington defrauded them by purchasing annuities to settle their claims against Lexington policyholders that proved to have less value than was allegedly originally promised. Despite the plaintiffs' claim that Lexington misrepresented the terms of their tort settlements and had violated RICO through its practice of overstating the ultimate dollar payout from these structured settlements, the First Circuit held in *Ezell v. Lexington Ins. Co.*, No. 18-2064 (1st Cir. June 11, 2019) that the plaintiffs had failed to prove fraud with particularity in light of the fact that the settlement agreements merely stated that the dollar value of the settlements would be "annuitized" and did not make any representations with respect to what the ultimate value of the annuity payments would prove to be.

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Duty to Defend/"Occurrence"/"Bodily Injury" (ME)

The First Circuit has ruled that allegations that a utility negligently misrepresented the cost of electrical services to consumer constituted an accidental "occurrence" under Maine law. While agreeing that the plaintiffs'' RICO claims were not covered, the court declared in *Zurich American Ins. Co. v. Electricity Maine, LLC,* No. 18-1968 (1st Cir. June 17, 2019) that Zurich was obliged to provide a defense since other claims in the suit did not require proof of intentional acts on the part of the insured. Further, the court ruled that these claims potentially sought recovery for "bodily injury" because, even though the claims in no way alleged emotional distress due to the utility's overbilling, such damages might be awarded based on the facts otherwise alleged. The court ruled that the Zurich's policy's definition of "bodily injury," which restricted coverage for emotional distress to mental anguish resulting from an otherwise covered "bodily injury" was ambiguous.

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Third Circuit

NFIP/Proofs of Loss (NJ)

The Third Circuit has ruled in *Uddoh v. Selective Ins. Co. of America*, No. 18-2274 (3d Cir. May 13, 2019 (unpublished) that a property owner was precluded from obtaining coverage for a flood loss sustained during Superstorm Sandy owing to deficiencies in the insured's submitted proof of loss. In a per curiam opinion, the Third Circuit observed that because the policy was issued pursuant to the National Flood Insurance Program, its conditions precedent to coverage must be strictly followed whereas in this case the insured's proof of loss did not comply with the SFIP's requirements in numerous ways including the fact that it was signed "under protest." The Third Circuit rejected the insured's argument that these inadequacies were excused by a November 2012 concerning Sandy claims, noting that the Bulletin in question specifically stated that it "does not constitute a blanket waiver of the Proof of Loss Requirements of the SFIP."

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Fifth Circuit

Civil Rights Claims/Trigger of Coverage (MS)

***Travelers Indem. Co. v. Mitchell*, --- F.3d ---, 2019 WL 2276694 (5th Cir. May 29, 2019)**

The U.S. Court of Appeals for the Fifth Circuit held that two insurers must provide a defense to their insured in a wrongful conviction suit. In the underlying case, the families of three deceased men, who were wrongfully imprisoned, brought suit against Forrest County, Mississippi for wrongfully coercing the men into confessing to a murder they did not commit. Forrest County tendered the suit to its insurers (the "Insurers"), which refused to provide a defense on the grounds that Forrest County's wrongful acts took place before the law enforcement liability policies at issue were in effect.

The U.S. District Court for the Southern District of Mississippi held that, regardless of when Forrest County's wrongful conduct took place, the Insurers had a duty to defend because the three men suffered physical and emotional injuries during the relevant policy periods. On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court, reasoning that while the wrongful convictions took place before the subject policies were issued, the resulting injuries occurred during the policy periods. Specifically, the appellate court stated that "[b]ecause the estates' complaint alleges those injuries during the relevant time periods, both insurers have a duty to defend Forrest County and its officers[.]" Therefore, the Insurers were required to provide a defense to Forrest County.

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Eighth Circuit

"Batch Clauses" (MN)

In a dispute between a primary insurer and an excess insurer concerning the application of "batch clauses" to product liability claims against an air intake duct manufacturer, the Eighth Circuit has ruled in *National Union Fire Insurance Company of Pittsburgh, PA v. Donaldson Company Inc.,* No. 18-1063 (8th Cir. June 14, 2019) that AIG's obligations with respect to funding a $6 million settlement were capped at a single $1 million "occurrence" limit despite the fact that the underlying losses had concededly occurred in several of its policy years. Whereas Federal had argued that the batch clause had the effect of aggregating multiple claims as a single "occurrence" but it did not supersede the separate requirement in the policies that bodily injury or property damage take place during the policy period, the Eighth Circuit ruled that Federal's construction ignored the specific text of the batch clause and conflicted with its principal purpose. As a result, the Eighth Circuit ruled that under Minnesota law "when a defective 'lot' of goods or products is involved, the claims are consolidated into a single 'occurrence' deemed to occur on the date the insured first received notice of the injury during the policy period." Finally, the Eighth Circuit agreed with the District Court that only two "lots" were implicated in this case, rejecting Federal's argument that at least four lots were involved based upon minor changes in the design of the ducts in question. Writing in dissent, Justice Arnold disagreed that the batch clause endorsement should be allowed to aggregate occurrences taking place across different policy periods.

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Eleventh Circuit

Standing/Class Actions (FL)

Having agreed to reconsider its original opinion, the Eleventh Circuit has now ruled in *A&M Gerber Chiropractic, LLC v. GEICO General Ins. Co.*, No, 17-15606 (11th. Cir. May 30, 2019) that a lower court erred in allowing a chiropractic clinic to pursue an assigned claim against GEICO for refusing to pay the $10,000 statutory limit for PIP benefits in Florida. In light of the fact that GEICO had paid its insured over $7,000 despite the fact that he was only entitled to recover $2,500 since he had not received "emergency medical care," the court declared that the insured had not suffered any damage as the result of GEICO;s claims handling and that his assignee therefore lacked standing to bring a putative class action against GEICO.

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California

Coverage B/Privacy/Publication/Criminal Acts

The California Code of Appeal has ruled that an incident in which an employer surreptitiously recorded an interview with a prospective employee constituted an "oral or written publication, in a manner, material that violates a person's right to privacy" within the scope of the policy's "personal and advertising injury coverage." In rejecting the insurer's argument that there had been no "publication" in this case. In an unpublished opinion, the Fourth District ruled in *Nautilus Ins. Co. v. Mingione*, G055914 (Cal. App. May 31, 2019) that a liability insurer was obliged to provide coverage for allegations that the insured violated Penal Code Section 632 was subject to a "criminal act" exclusion as there was never a finding of criminal conduct and because Nautilus had agreed to try the case based on stipulated facts which did not include any stipulation of criminal conduct. The court refused to imply a finding of criminal conduct merely based upon the facts that were described in the course of the trial. The court declared that the insured would reasonably have expected to be covered for conduct of this sort and that eliminating the coverage based upon this exclusion would have rendered this insurance "illusory." Further, the Court of Appeal rejected the insurer's argument that Section 637.2, which permits statutory damages in the amount of $5,000.00 per violation, was a form of "damages" insured by the policy and not merely an uninsurable "penalty."

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Construction Defect/Additional Insureds

The California Court of Appeal has ruled that a trial court erred in refusing to grant additional insured coverage to a general contractor on the basis that the claims in question fell within the scope of a policy exclusion for damage to "property in the care, custody or control of the additional insured." In *McMillin Homes Construction Inc. v. National Fire and Marine Ins. Co.*, DO74219 (Cal. App. June 5, 2019) Dash, the Fourth District agreed with the general contractor that this exclusionary language only applied where the insured had exclusive or complete control—and not shared control—over the property that was damaged. In this case, the Court of Appeal found that the general contractor and the subcontractor shared control over this work. In any event, the court ruled that a contrary interpretation of this language would nullify the broad coverage provided for general contractors under the policy in a manner that was inconsistent with an insured's objectively reasonable expectations of coverage.

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"Occurrence"

The California Court of Appeals has ruled in *CSAA Ins. Exchange v. Herrera*, A153429 (Cal. App. June 17, 2019) that a trial court did not err in ruling that a homeowners' insurer had no obligation to provide coverage for claims arising out of an incident in which the insured committed an armed robbery while under the influence of alcohol and drugs. In rejecting an effort by the assault victim to recover a default judgment against the assailant's homeowners' insurer, the First District agreed with the Superior Court that the assault was not the result of an "accident." Nor did potentially accidental aspects of the assault, such as the discharge of a gun when fell out of the insured's pants, trigger coverage as an independent cause.

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Colorado

First Party/Appraisers/"Partiality"

The Colorado Supreme Court has ruled in *Owners Ins. Co. v. Dakota Station II Condo*, 2019 CO 65 (Colo. June 24, 2019) that an appraisal provision in a property insurance policy directing the parties to each "select a . . . impartial appraiser" required that the chosen appraisers be unbiased, disinterested, and unswayed by personal interest. The majority declared that "The appraisers must not favor one side more than another, so they may not advocate for either party." On the other hand, the justices refused to find that the mere fact that the insured's appraiser was acting pursuant to a contingent fee agreement rendered him "partial" as a matter of law. Writing in dissent, Justice Samour (joined by Chief Justice Coats) declared that the majority's standard for impartiality would be impractical to impose and would just lead to more insurance disputes.

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Florida

Tripartite/Malpractice Claims

The Florida Supreme Court announced this week that it would accept the Fourth District Court of Appeals' invitation in *Arch Ins. Co. v. Kubicki Draper LLP*, No. 4D17-2889 (Fla. App. Mar. 20, 2019) to answer whether "an insurer has standing to maintain a malpractice against counsel hired to represent the insured where the insurer has a duty to defend."

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TCPA Privacy Claims/Exclus

A federal district court has reportedly ruled in *iCan Benefit Group v. Liberty International Underwriters* (S.D. Fla. June 3, 2019) that Liberty did not owe coverage for a $60 million settlement of TCPA claims that a health insurance broker entered into light of an exclusion its policy for claims "based upon, arising out of, or attributable to any actual or alleged defamation, invasion of privacy, wrongful entry and eviction, false arrest or imprisonment, malicious prosecution, abuse of process, assault, battery or loss of consortium."

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"Professional Services" Exclusion/Recoupment

A federal district court in Florida has ruled that a professional services exclusion relieved the liability insurers of an engineering company of any duty to defend claims arising out of the fatal 2018 collapse of its bridge at Florida International University in Miami. In keeping with the Eleventh Circuit's ruling in *Witkin Design Group, Inc. v. Travelers Property Casualty Company of America*, 712 F. App'x 894 (11th Cir. 2017), Judge Altonaga ruled in *Travelers Ind. Co. v. Figg Bridge Engineers*, No. 18-22585 (S.D. Fla. June 24, 2019) that allegations that Figg was liable "[b]y virtue of its professional engineer's status and by accepting the duties, obligations and responsibilities attendant to the design and construction of the FIU Pedestrian Bridge . . . ." clearly arose out of the rendering of or failure to render "professional services." Further, having found that Travelers and were relieved of any duty to defend, the District Court declared that they were entitled to be reimbursed for $270,000 that they had paid to defend the underlying cases following the filing of this coverage case. The court observed that Travelers had expressly included a right to recoupment and rejected the insured's argument that such reservations were only effective if the insured had expressly assented to them.

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Illinois

"Occurrence"/Pornography/"Penal Laws" Exclusion

A federal district court has ruled in *Doe v. Citizens Insurance Company of Illinois*, 2019 WL 2346980 (N.D. Ill. June 4, 2019) that an Illinois legislator who was convicted in 2014 for violating federal criminal child pornography statutes could not obtain coverage from his homeowner's insurer a settlement that he entered into for a civil lawsuit brought by victims depicted in the child pornography. Judge Kocoras ruled that the sexual mistreatment of a minor is not an "occurrence" under a liability insurance policy and noted the insured's admission in the criminal case and in the civil judgment that he entered into with these claimants stating that he had "intentionally intruded upon the solitude and seclusion of the plaintiffs in their most devastating private affairs and concerns." In any event, the District Court declared that any coverage that might apply was defeated by operation of the "penal law" exclusion in the policy as the child pornography statutes in question are clearly penal laws.

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Auto/Excess/Public Policy

The Appellate Court has ruled in *Crowley v. Empire Fire and Marine Ins. Co.*, 2019 IL App. (2nd) 180752 (Ill. App. June 18, 2019) that public policy did not preclude the enforceability of an exclusion in an excess liability policy for accidents occurring while the insured was under the influence of alcohol or drugs. The Second District ruled that the public policy underlying the legislature's approval of the Illinois Safety and Family Financial Responsibility Law that requires all Illinois motorists to have minimum liability insurance coverage regardless of fault did not apply to supplemental or excess liability policies. The Appellate Court ruled that "the Financial Responsibility Law does not mandate that excess or supplemental liability insurance

coverage be obtained once the mandated minimum level of insurance has been met."

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Missouri

Auto/UIM/"Insured"

The Missouri Supreme Court has ruled in *Seaton v. Shelter Mutual Insurance Company*, No. SC 97511 (Mo. June 4, 2019) that the daughter of the named insured under an auto policy was not entitled to entitled to underinsured motorist coverage since she owned the vehicle whereas the definition of "insured" under the policy expressly stated that "relative does not mean any individual who owns a motor vehicle."

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Minnesota

First Party Bad Faith/Reasonable Investigation

***Peterson v. Western National Mutual Insurance Company*, Court of Appeals of Minnesota, 06/03/19**

Peterson was injured in an automobile accident and suffered whiplash. She was covered by an auto policy issued by Western with $250,000 in UIM coverage. Two medical professionals determined that she would need Botox treatments for the rest of her life to deal with chronic headaches. The tortfeasor's policy had liability limits of $45,000. Peterson put Western on notice of a potential UIM claim. Thereafter, she settled with the driver for $45,000.

On July 22, 2014, Peterson sent a written demand for the available UIM policy limits. Western made numerous requests for medical documentation from Peterson over a period of approximately 11 months, many of which had previously been submitted. Peterson had also authorized Western to obtain her medical records. In June 2015, Peterson sent a letter seeking an update on the status of her claim. Western never responded, and Peterson sued two months later.

During the litigation, Western had an IME performed, which found no causal relationship between the headaches and the accident. Western's' counsel concluded that Peterson had been fully compensated by her settlement with the tortfeasor. In its analysis of the claim, Western determined that it had a 100 percent probability of defeating the claim. The case was mediated unsuccessfully: Western offered $2,000 and Plaintiff demanded $200,000. Western's national counsel tried a different case with similar injuries in Hennepin County, and the jury awarded $1.1 million. Counsel reported the verdict to Western's trial counsel, who concluded that it had no impact on his evaluation of Plaintiff's claim.

Before trial, Western increased its offer to $50,000, which was declined. The case was tried, and the jury awarded damages of $1.4 million. Western tendered the policy limits, and the court gave Peterson permission to amend her complaint to add a bad faith claim. The bad faith claim proceeded to trial, and the district court found that Peterson proved that Western lacked a reasonable basis to deny her claim and that it knew of, or acted with reckless disregard of, the lack of a reasonable basis for denying the claim. The district court awarded $100,000 plus $97,940.50 in attorney's fees.

On appeal, the court considered whether the district court misinterpreted the first prong of Minnesota's first party bad faith statute. The first prong requires an insured to show that the insurer did not have a reasonable basis for denying benefits. Reasonable basis is not defined by the statute, and the court concluded that both parties presented reasonable interpretations, which rendered the statute ambiguous. Western argued that Peterson was required to prove that there were no facts or evidence upon which Western could rely to deny coverage to satisfy the first prong. This reading was consistent with Iowa case law. Peterson, in contrast, argued that she only had to prove that a reasonable insurer under the circumstances would not have denied or delayed payment. This approach was consistent with Wisconsin law.

Since the statute was ambiguous, the court consulted the legislative history, where the Wisconsin standard was specifically discussed. The court concluded that an insurer must conduct a reasonable investigation and fairly evaluate the results to have a reasonable basis for denying an insured's first-party insurance-benefits claim. If, after a reasonable investigation and fair evaluation, a claim is fairly debatable, an insurer does not act in bad-faith by denying the claim.

The court then considered whether the court below had followed this standard. The court below found that Western delayed settling or denying Peterson's claim for nearly one year without properly investigation; ignored Peterson's evidence supporting her claim; prepared a

claims summary that misstated facts; and failed to evaluate and weigh competing opinions. Thus, the appellate court held that the district court found that Plaintiff had satisfied the first prong because Western lacked a reasonable basis for denying plaintiff's claim.

The second prong of the Minnesota statute required Peterson to show that Western National knew, or acted in reckless disregard, of the lack of a reasonable basis for denying the claim. The appeals court concluded that Peterson also satisfied the second prong because Western assigned nothing more than nuisance value to the claim and assigned a 100 percent probability of success to the case.

There was a one judge dissent, who argued that there was sufficient evidence in the record for Western to have a reasonable basis for its evaluation of the claim. The dissent argued that the district court dismissed Western's consideration of any information except Peterson's medical records and expert opinions. The court trivialized any reliance on the fact that this claim arose from a minor collision with minimal property damage, no obvious physical injury, and no claim for UIM benefits until nearly five years after the collision. The dissent further emphasized that Western National reviewed the medical records provided by Peterson; it simply disagreed that those records required the conclusion that Peterson's medical expenses resulting from the 2009 collision exceeded the amounts she had already received.

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Assault Exclusion/Arising out of/Estoppel

The Appellate Division has declined to find that an exclusion for "any claim, demand or suit based on assault or battery" precluded coverage for claims that the plaintiff was sexually assaulted because her landlord ignored her request that it install protective coverings over her apartment windows. In *C.M.S. Investment Ventures, Inc. v. American European Ins. Co.,* 2019 N.J. Super. Unpub. LEXIS 1215 (App. Div. May 28, 2019) declared that the exclusion did not apply since the allegations of negligence against the insured were unrelated to the subsequent assault and battery. In any event, the Appellate Division ruled that AEIC was estopped to raise the exclusion since it had waited 20 months to deny coverage. The court also approved the trial court's award of attorney's fees, rejecting AEIC's contention that the insured's lawyers fee should have been calculated at $190, since that was what AEIC's lawyer had charged. The Appellate Division ruled that $190 did not necessarily reflect the commercial rate for lawyers representing insureds, both because insurers are presumed to have superior bargaining strength and because a lawyer representing an insured runs the risk that its bills may not be paid. However, the court rejected the insured's argument that the trial court should not have deducted fees pertaining to a separate suit against its broker or that the trial court acted unreasonably in applying a 10 percent across-the-board reduction based upon his conclusion that the fee claim as a whole was excessive.

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Property Manager's Insured Status

***Diaz v. Norwood, Simotas Property Management*, Superior Court, Appellate Division, June 10, 2019**

Chrys S. Norwood Family, LP ("Norwood") owns a multi-use building in Norwood, New Jersey containing commercial and residential space. Norwood hired Simotas Property Management to manage the property. The ground floor was then leased to Bon Jour Group. Sentinel Insurance Company issued a CGL policy to Bon Jour (the tenant). Simotas was not listed on the Sentinel policy issued to Bon Jour (Author's Note: unsurprising as Norwood hired Simotas – not Bon Jour)

An employee of Bon Jour was injured when he slipped on ice. The employee then sued Norwood and Simotas. Simotas filed its answer, and filed a cross-claim against Sentinel seeking a declaratory judgment that it was entitled to insurance coverage on Sentinel's policy.

Under the lease terms with Norwood, Bon Jour had to keep the walkway clear of snow and ice. Norwood and Simotas entered into a Property Management Agreement, which outlined tasks that Simotas would perform solely on Norwood's behalf, such as screening tenants, negotiating and executing rental or lease agreements, and commencing eviction actions in Norwood's name. The Sentinel Policy did not name Simotas as an insured or an additional insured.

The Sentinel policy provided coverage to a real estate manager acting on Norwood's behalf:

> C. WHO IS AN INSURED ....
>
> 2. Each of the following is also an insured: ....

b. Real Estate Manager

Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

Sentinel's policy defined "your" to mean the named insured, Norwood.

Simotas contended that the tenant, Bon Jour, was responsible for clearing snow and ice from the area of the accident. Simotas further argued that it was a "real estate manager" as that term was used in the Sentinel policy, as it managed real estate for another. However, Simotas never performed any snow or ice removal on Bon Jour's behalf. Accordingly, Simotas was not able to demonstrate it was acting as Bon Jour's real estate manager. Accordingly, because Simotas was not acting as the named insured's real estate manager, the Appellate Division ruled that the property management company was not insured under the policy.

Disclaimer: This is an unpublished decision which has precedential value in only limited circumstances.

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New York

Licensing and Incorporation

***Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, --- N.E.3d ---, 2019 WL 2424476 (N.Y. June 11, 2019)**

The New York Court of Appeals ruled that a group of insurers did not have to pay approximately $20 million to a radiology practice for MRI services it provided to car accident victims. This dispute arose when Andrew Carothers MD, PC (Carothers) sued several insurance carriers (the insurers) for refusing to reimburse Carothers for MRI services it provided to patients between 2005 and 2006. The insurers refused to provide reimbursement on the basis that Carothers was illegally controlled by non-physicians. At trial, a jury issued a verdict in favor of the insurers after finding that non-physicians were the de facto owners of Carothers, and, therefore, that Carothers was incorporated in violation of state law.

On appeal to the New York Court of Appeals, Carothers argued that, under the court's prior decision in *State Farm Mut. Auto. Ins. Co. v. Mallela*, 827 N.E.2d 758 (N.Y. 2005), a finding of fraud was required for the insurers to withhold payments to Carothers. The appellate court disagreed and stated that "[t]oday we clarify that *Mallela* does not require a finding of fraud for the insurer to withhold payments to a medical service corporation improperly controlled by nonphysicians." Therefore, the appellate court upheld the jury's verdict and found that the trial court did not err in failing to instruct the jury that a finding of fraudulent intent or conduct was required.

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Timely Disclaimer Requirement §3420(d)(2) Not Applicable to Non-domiciliary Risk Retention Group

***Nadkos, Inc. v. Preferred Contractors Ins. Co.*, New York State Court of Appeals, 6/11/19**

Nadkos, Inc., a general contractor, sought coverage from Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC), the general liability carrier for Nadkos' subcontractor, in connection with an underlying action for injuries sustained by an employee of the subcontractor. PCIC is a risk retention group (RRG) chartered in Montana and doing business in New York.

Insurance Law §5904 requires nondomiciliary RRGs doing business in New York to comply with New York's unfair claims settlement practices provisions set forth in Insurance Law §2601(a). That provision lists acts by insurers that, if committed as a general business practice, constitute unfair settlement practices. Insurance Law §2601(a)(6) includes "failing to promptly disclose coverage pursuant to Insurance Law §§3420(d) or (f)(2)(A)." RRGs are otherwise generally exempt from state law regulation.

After PCIC disclaimed coverage, Nadkos commenced this action seeking a declaration that the disclaimer was untimely as a matter of law under Insurance Law §3420(d)(2) which requires certain liability insurers to disclaim coverage, as "soon as is reasonably possible."

PCIC moved for summary judgment arguing that Insurance Law §3420(d)(2) is inapplicable to it as a nondomiciliary RRG. Nadkos cross-moved for summary judgment asserting that Insurance Law §2601(a)(6), by referencing §3420(d) subjects PCIC to the timely disclaimer requirements of §3420(d)(2). After the Supreme Court granted judgment to PCIC and the Appellate Division affirmed, the Court of Appeals granted leave to appeal.

The Court of Appeals, in a 6-1 vote with Judge Wilson dissenting, examined the statutory text and structure as well as the legislative history of the relevant statutes and concluded that the disclosure mandates of Insurance Law §3420(d)(1) and 3420(f)(2)(A) differ from the disclaimer provisions of §3420(d)(2). Insurance Law §2601(a)(6) qualifies its reference to Insurance Law §3420(d) by limiting its reach to an insurer's failure "to promptly disclose coverage." The majority found that term distinct from an obligation to disclaim coverage and affirmed the order of the Appellate Division.

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Defense Without ROR/Estoppel

***Temple Beth Sholom, Inc. v. Commerce & Industry Ins. Co.*, Appellate Division, First Department, 06/27/19**

Temple relied to its detriment on the defense provided by defendant Commerce, which was in conflict with the defense Commerce provided to the general contractor, and as a result, Temple lost control of its defense. Commerce was properly estopped from denying coverage by virtue of its conduct in handling the underlying claim.

Moreover, Commerce accepted coverage, without reservation, and without having investigated the tender or having failed to uncover facts that were readily available through a review of the contracts and an interview of its insured, through no fault of Temple.

Finally, it is undisputed that Temple, pursuant to the subcontract, was required to be added as an additional insured to the policy; that the subcontract contemplated that Boyle would perform all of the asbestos removal for Temple's project, including any possible additional work that might become necessary during the construction phase; and that the work performed by Duran, a Boyle employee, constituted both "ongoing operations" and "your work" as defined under the policy. Accordingly, the work performed by Duran at the time of his accident falls within the scope of both additional insured endorsements in the policy.

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Marine Policy Covers Warehouse Fire Loss

***By Design LLC v. Samsung Fire & Mar. Ins. Co. Ltd.*, Appellate Division, First Department, 06/25/19**

Plaintiff lost 19 containers of merchandise in a warehouse fire that occurred at a premises owned by Jordan Logistics. The containers were temporarily stored with Jordan because upon arrival in the United States from abroad it was determined the retailers who were to take ultimate custody of the items were not yet ready to receive the shipment.

After the fire, By Design submitted a claim to Samsung under what appears to have been a marine policy. That policy, however, contained a coverage extension for Consolidation, Deconsolidation & Containerization for goods temporarily stored with a warehouse for, inter alia, distribution or redistribution from overseas vessels. As the plain language of the clause applied to the loss, the Appellate Division found that the policy was triggered.

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Timeliness of Insurer's Contribution Claim

***State of New York v. Flora*, Appellate Division, Third Department, June 13, 2019**

In 2013, State commenced this action pursuant to Navigation Law article 12 seeking to hold defendants strictly liable for $921,904.41—the cost of cleaning up and removing petroleum product contamination of groundwater and soil at a spill site). The State sought to recoup the petroleum cleanup and removal costs from Richmond Automotive and its partners, as well as defendant Kirkwood Heating Oil, Inc.—a corporation that periodically supplied petroleum products to the underground petroleum storage and dispensing system — and Kirkwood's insurance company, defendant Utica Mutual Insurance Company.

Utica Mutual answered and thereafter commenced a third-party action for contribution and/or indemnification against Kirkwood's other insurers during the years in which the petroleum discharges and contamination allegedly occurred—as relevant here, third-party defendants American Automobile Insurance Company (AAIC), National Surety Corporation (NSC) and Arch Insurance Company. After joining issue, AAIC and NSC moved for summary judgment claiming that they did not receive timely notice of the alleged incident, as required by the insurance policies they issued to Kirkwood from August 1991 through

August 1997. Arch moved for summary judgment based on a MTBE exclusion. It established that it applied.

In opposition, Utica Mutual argued that the MTBE exclusion is unenforceable because Arch did not comply with the filing requirement of Insurance Law §2307, which states that "no policy form shall be delivered or issued for delivery unless it has been filed with the superintendent [of financial services] and either he [or she] has approved it, or [30] days have elapsed and he [or she] has not disapproved it as misleading or violative of public policy" (Insurance Law §2307 [b]; see Insurance Law §107 [a] [41]). However, as Supreme Court correctly noted, the failure to file under Insurance Law §2307 "does not, by itself, void the policy clause . . .[; rather,] such clause is void only if the substantive provisions of the clause are inconsistent with other statutes or regulations." This exclusion was not inconsistent and therefore enforceable.

Utica Mutual also challenged the lower court's determination that AAIC and NSC were entitled to summary judgment dismissing complaint against them based upon Utica Mutual's failure to provide prompt notice of the "accident or loss," as required by each of the insurance policies that AAIC and NSC issued to Kirkwood during the relevant time period.

If multiple insurers exist and the insured gives only one of those insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from another insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances.

The undisputed record evidence establishes that Kirkwood first received notice of the petroleum contamination in May 2007, that Utica Mutual received notice of the contamination within a few weeks thereafter and that Utica Mutual learned in July 2007 that the cause of the contamination may have been faulty spill locks that were installed in 1989 at Richmond Automotive. AAIC and NSC's submissions further demonstrated that, notwithstanding its knowledge of the contamination beginning in 2007, Utica Mutual did not provide notice to AAIC and NSC until late August 2010 or early September 2010.

As the evidence established that Utica Mutual delayed more than three years in notifying AAIC and NSC of the underlying incident, AAIC and NSC established their prima facie entitlement to summary judgment dismissing the third-party complaint against them based upon the absence of the prompt notice, as required by their policies. The burden thus shifted to Utica Mutual to establish a reasonable excuse for its failure to provide AAIC and NSC with timely notice of the incident (To that end, Utica Mutual argued that it was not until August 2010 that it learned that AAIC and NSC had previously provided insurance coverage to Kirkwood and that it provided AAIC and NSC with notice of the incident within a month of learning of the prior coverage.

Justifiable ignorance of insurance coverage may excuse a delay in giving notice if "reasonably diligent efforts were made to ascertain whether coverage existed." Insufficient proof was offered by Utica to demonstrate whether it was justifiably ignorant of AAIC's and NSC's prior insurance coverage. Utica Mutual produced no evidence to show that it made any effort to discover AAIC's and NSC's existence before July 2010. This was a pre-prejudice statute case.

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Agent Has No Duty to Advise Policyholder's Decedent of Insurance Requirements Under Policy – Not a Client

***Gatto v. Allstate Indemnity Company*, Appellate Division, Fourth Department, June 7, 2019**

In 2006, Rubino contacted Roman, an insurance agent, to procure a homeowner's insurance policy covering her residence. Allstate thereafter issued Rubino a policy for the initial term of May 17, 2006 to May 17, 2007 with Rubino listed on the policy as the only insured. The policy was renewed each year thereafter and, despite the fact that Rubino died in December 2010, the policy was in force for the term of May 17, 2013 to May 17, 2014 with Rubino still listed as the only insured.

After the residence was destroyed by fire in January 2014, Rubino's daughter, Tomaino filed a claim under the policy, and Allstate disclaimed coverage.

Plaintiff, who was also the administratrix of Rubino's estate, thereafter commenced this action against Allstate and defendant. With respect to Roman, it was claimed that he breached his duty to notify Allstate of Rubino's death and to ensure that the property was properly insured.

Specifically, it was claimed that Roman was informed of the death in 2011 and again in 2012 when Tomaino made payments directly to Roman to renew the policy.

Roman met his initial burden of establishing as a matter of law that he owed no duty to plaintiff, Tomaino, or the estate inasmuch as he demonstrated that none was a client.

Indeed, Roman's submissions established that Rubino alone, was his client and that, after her death, no one represented the estate until September 2014, approximately eight months after the fire and four years after her death.

Furthermore, even assuming, arguendo, that Tomaino was a client, Roman established that he had no common-law duty to advise, guide, or direct her to obtain insurance coverage for additional insureds in light of decedent's Death. He demonstrated that there were no payments made to him beyond the alleged premium payments, that there was no interaction with Tomaino regarding questions of coverage, and that no special relationship was formed between himself and Tomaino.

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Earth Movement/Surface Water Run-Off

***Valente v. Utica First Ins. Co.*, Appellate Division, Fourth Department**

Plaintiffs submitted a claim for damage to their residence. From the decision, it appears that the foundation of plaintiffs' home was compromised due to shifting or sinking of earth. Upon receipt of the claim, Utica First disclaimed on the basis of the earth movement exclusion which included losses caused by "earth sinking," "shifting," or "contracting."

Plaintiffs argued that the issue was caused by surface water which washed away the supporting earth. However, in upholding Utica First's denial, the Fourth Department rejected plaintiffs' argument that the flow of water from a downspout compromised the soil. The Court noted that the movement of the earth was the proximate cause of the damage, and not the flow of water. As such the earth movement exclusion applied, and coverage was extinguished.

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Duty to Defend/Advertising Injury

***Continental Cas. Co. v. KB Ins. Co., Ltd.*, Supreme Court, New York County, June 13, 2019**

Plaintiff issued a general liability policy to Value Wholesale, Inc. ("Value"). Defendant also issued a general liability policy to Value, which apparently was either in effect at the same time or the policies covered successive time periods.

At some point, a lawsuit was brought against Value by Abbott Laboratories. Abbott sells and holds the patents for FreeStyle and FreeStyle Lite blood glucose strips for people with Diabetes. Abbott alleged that Value and numerous other defendants brought and/or distributed versions of the test strips which the defendants imported from other countries and which were not approved for sale in the United States. They then used approved FreeStyle product boxes, sold the less costly imported products in their stead, and reaped the profits.

Defendant denied coverage under the Personal and Advertising section of its policy for the claim on the basis that there was an insufficient causal nexus between Value's alleged advertising and Abbott's injuries. It argued that the lawsuit arose out of a complex and fraudulent conspiracy to divert medical products to the United States and was separate from Value's advertising injuries. It also relied upon the exclusions for knowing acts and knowing publication of false material.

The court began its analysis by considering the language of the underlying complaint which alleged that "[u]sing Abbot's trademarks and trade dress, Defendants advertise to consumers and the market place their ability and willingness to sell FreeStyle test strips." The complaint further alleged that Value widely advertised the unapproved products and sold them to the public as if they were approved test strips. The court found despite defendants' argument that the advertisement did not ultimately contribute to the complained damages, that because the complaint alleged that the packaging and advertising of the unapproved strips contributed to Abbott's injuries this was sufficient to trigger the duty to defend. The court then held the exclusions relied upon by defendant did not apply as recovery could be obtained by Abbott without a finding that Value knew that its conduct would violate Abbott's right and inflict the advertising injury at issue. The court also highlighted the fact that while fraud was alleged there were 300 defendants in the underlying and it was possible that some acted unknowingly in the scheme. Based upon this reasoning, defendant had a duty to defend.

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First Party/RCV

***Dominique Marie Porter v. State Farm Fire & Casualty Company*, W.D. NY**

The action stems from Plaintiff's purchase of the premises located at 254 Strauss Street, Buffalo, New York. Plaintiff purchased the premises in October 2011 in a foreclosure sale. Sometime after the purchase of the premises, State Farm issued a policy of insurance dated August 26, 2013, which listed plaintiff as the insured (the "Policy"). Following the issuance of the Policy, the premises was completely destroyed by fire on September 30, 2013.

On December 16, 2013, Plaintiff testified in connection with the fire at the premises. Plaintiff testified that she purchased the premises as an accommodation for an individual identified as her sister's boyfriend ("Mr. Spencer"). In addition, Plaintiff testified that she did not manage or have any interest in the premises and in fact Mr. Spencer managed, maintained, leased the premises, made renovations and paid the property taxes. Further, Plaintiff testified that she had not authority to sell the property and did not receive any economic benefit from the premises. Moreover, Plaintiff testified that she was not involved in obtaining the Policy and did not pay the premiums. Rather, Mr. Spencer obtained the Policy and paid the premiums.

Following the first deposition, Plaintiff had a second deposition on January 28, 2016. At the second deposition, Plaintiff testified that any money she would receive from State Farm in connection with the fire would go straight to Mr. Spencer because it was his property.

On May 24, 2017, United States Magistrate Judge filing a Report and Recommendation ("R&R"). In the R&R, the Magistrate recommended that the Court grant in part Defendant's motion for partial summary judgment on Plaintiff's claims for replacement cost, rental income, and personal property coverage and deny Defendant's motion for partial summary judgment as to Plaintiff's claim for debris cost removal. Both parties filed objections to the R&R.

The Court here began its analysis by noting that there was no objection to the R&R recommending that the Court grant summary judgment in favor of Defendant on Plaintiff's claims for rental income and personal property coverage.

Next, the Court considered the R&R recommendation granting summary judgment in favor of Defendant on Plaintiff's claim for replacement cost coverage. The Court agreed with the Magistrate's R&R. First, the Court acknowledged that the matter at hand was distinguishable from the decision in *Zaitchick v. American Motorists Ins. Co.*, 554 F. Supp. 209 (S.D.N.Y. 1982). In *Zaitchick*, the court found that the actual repair or replacement of the damaged property, which was a condition precedent to the insured's recovery of any replacement costs, was not required, where it was financially impossible for the insured to replace the damaged property without any payment from the insurance company. In contrast to *Zaitchick*, the found that in this matter, "Plaintiff has repeatedly disclaimed any interest in the subject property and testified unequivocally that she had no plans to replace the property. As such, the Court concluded that the "equitable considerations" as set forth in *Zaitchick* were not warranted in the present matter. Therefore, the Court adopted the Magistrate's R&R recommendation that the Court grant summary judgment to Defendant on Plaintiff's claim for replacement cost coverage.

Next, the Court considered the Magistrate's R&R recommendation that the Court deny Defendant's motion for partial summary judgment on Plaintiff's claim for debris removal coverage. The R&R relied upon a "Demolition Invoice" addressed to Plaintiff from the City of Buffalo and concluded that was "sufficient to raise a question of fact as to whether Plaintiff has incurred expenses for debris removal." The Court disagreed.

In support, the Court noted that the "Demolition Invoice" was submitted through Plaintiff's attorney affirmation, who lacked actual knowledge of whether the services listed in the "Demolition Invoice" are covered under the Policy. In addition, the Court highlighted that at trial, Plaintiff's attorney would not be permitted to testify regarding the timing and nature of the services outlined in the "Demolition Invoice." Further, the Court noted that it was not clear from the face of the invoice "whether these services have already occurred or are scheduled to occur in the future and the invoice fails to explain the nature of the specific services performed, and whether those services contemplated by the insurance Policy."

Moreover, the Court reasoned that it had no explanation from Plaintiff as to why she now believed she is entitled to insurance proceeds under the policy for demolition removal. Rather, the Court found Plaintiff had "clearly and unequivocally claimed no interest in the proceeds of the insurance policy as a result of the fire damage to the subject property by stating that the insurance proceeds belong to Mr. Spencer, and that she did not want any pro-

ceeds paid out to her." Accordingly, the Court concluded Plaintiff's Complaint must be dismissed in its entirety.

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Insurer's File Not Discoverable

***Sanders v. Progressive Insurance Company*, E.D. NY, 6/26/2019**

Plaintiff in this bad faith insurance action seeks the carrier's files relating to a declaratory judgment action brought in state court by the carrier after the carrier had disclaimed coverage. ECF [22]. Plaintiff's motion is denied. Under New York law, which applies in this diversity action and by agreement of the parties, a carrier may withhold privileged documents created after the disclaimer of coverage and/or for a related declaratory judgment coverage action because such documents concern the privileges of the carrier, not of the insured, and those privileges may be maintained by the carrier even in a bad faith action. *See Landmark Ins. Co. v. Beau Rivage Restaurant, Inc.*, 509 N.Y.S.2d 819 (2d Dep't 1986); *see also Bertalo's Restaurant Inc. v. Exchange Ins. Co.*, 658 N.Y.S.2d 656 (2d Dep't 1997).

The privilege log submitted at ECF [26] shows that the documents sought were created either after the disclaimer decision was made or in connection with the carrier's own litigation in declaratory judgment proceeding. *Fields v. First Liberty Ins. Corp.*, 954 N.Y.S.2d 427 (Sup. Ct. Suffolk County 2012). Even though Plaintiff alleges that the carrier's pursuit of the declaratory judgment action was in bad faith in that it delayed payment of the policy such that the underlying plaintiff did not accept the policy in full satisfaction of damages, that claim does not undermine the carrier's right to have had its own privileged communications within the declaratory judgment litigation itself. That an ancillary impact of that declaratory judgment litigation may have been the harm that Plaintiff claims herein, Plaintiff does not need to know the carrier's strategy within the declaratory judgment action to evaluate whether the timing of the proffer of the policy after an arguably adverse court decision in the declaratory judgment action adversely impacted the defendant in the underlying personal injury action (whose claim was assigned to the current Plaintiff). Ordered by Magistrate Judge Vera M. Scanlon on 6/26/2019.

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Ohio

Assault and Battery Exclusion

***Jerome Badders v. Century Ins. Co.*, 2019-Ohio-1900, 2019 WL 2156625 (Ohio App. May 17, 2019)**

The Ohio Court of Appeals held that an assault and battery exclusion plainly applied to preclude coverage to Jerome Badders (Badders), the owner of a bar, for personal injuries to Tatyana Belenky (Belenky), a bar patron, that took place when Marvin Schalk (Schalk), another bar patron, drove his truck through the front of the building shortly after the bar closed. The policy at issue excluded coverage for personal injury or property damage "arising out of or resulting" from "any actual, threatened or alleged assault or battery[.]" Badders asserted that the trial court erred in concluding that the exclusion applied to preclude coverage as a matter of law because there was a genuine issue of material fact regarding whether Schalk intended to injury Belenky when he drove his truck through the front of the building.

The appellate court disagreed with Badders' argument, concluding that the plain meaning of the term "assault" was "[a]n attack or violent onset, whether by an individual [person], a company, or an army." In other words, the term "assault" in the exclusion included both the common law tortious definition as well as the criminal definition. Accordingly, the appellate court determined that "the exclusion of coverage for personal injuries and property damage 'arising out of or resulting' from 'any actual, threatened or alleged assault or battery' unambiguously applies to exclude coverage for personal injuries and property damage that result from any legally cognizable form of assault, without respect to whether the assault is criminal or tortious."

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Property Insurance/Actual Cash Value/Overhead

The Pennsylvania Supreme Court has announced that it will agree to review *Kurach v. Truck* Insurance Exchange in which the Superior Court recently ruled that a homeowner's insurer was not obliged to reimburse its policyholder for General Contractor Overhead and Profit attributable to

the cost of repairing a water damage loss covered by the policy. The intermediate appellate court had taken note of the fact that the Truck policy at issue explicitly defined actual cash value as meaning "the reasonable replacement cost at time of loss less deduction for depreciation in both economic and functional obsolescence" and only promised to pay GCOP "if it is reasonably likely that the services of General Contractor will be required to manage, supervise and coordinate the repairs." The Superior Court had ruled that GCOP was not required to be included by the language in the policy or any public policy of the State of Pennsylvania.

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Rhode Island

Construction Defect/Additional Insureds

The Rhode Island Supreme Court has ruled in *Bacon Construction Co., Inc. v. Arbella Protection Ins. Co.,* 2017-350 (R.I. June 4, 2019) that a trial court did not error in ruling that a subcontractor's liability insurer was not obliged to provide coverage to the general contractor for personal injuries suffered by a worker at a construction project at the University of Rhode Island. The Supreme Court declared that the additional insured endorsement to the policy limited coverage to those situations where liability was attributable, at least in part, to the negligence of the named insured, whereas the allegations in the underlying complaint in no ways suggested that these injuries were due to any negligence on the part of the named insured. The Supreme Court rejected Bacon's argument that the phrase "caused in whole or in part" did not specifically require or imply proof of negligence. The Supreme Court ruled that the endorsements referenced to the terms "liability" and "bodily injury caused by one's acts or omissions" implicitly required proof of negligence on the part of the named. insured. Despite the evidence of any negligent acts on the part of the named insured, the insured had argued the coverage should arise because these injuries would not have occurred but for the named insured's work on behalf of the general contractor at the construction site. The Supreme Court refused to find that the mere fact that the employee was injured while working for the named insured met the causation requirement of the additional insured endorsement.

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South Carolina

Privilege/Bad Faith

***In re Mt. Hawley Ins. Co.*, --- S.E.2d ---, 2019 WL 2441119 (S.C. June 12, 2019)**

Answering a certified question from the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court of South Carolina held that insurers do not automatically trigger the "at-issue" exception to the attorney–client privilege by denying liability in a bad faith action. In the underlying case, the insured was sued for performing defective construction. The insured ultimately settled the construction defect action and brought a bad faith action against its insurer, Mt. Hawley Insurance Company (Mt. Hawley), for failing to provide a defense in the underlying case. Mt. Hawley claimed that it denied coverage to its insured in good faith, and the insured subsequently sought various documents to discover why Mt. Hawley had denied coverage. Mt. Hawley asserted that the documents were protected from disclosure by the attorney–client privilege.

The appellate court certified to the Supreme Court the question of whether an insurer automatically waives the attorney–client privilege by denying liability in a bad faith action. The Supreme Court ruled that an insurer's denial of bad-faith, without more, is not enough to waive the attorney–client privilege. Instead the Supreme Court adopted the standard announced by the Supreme Court of Arizona in *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000). The holding in *Lee* states that a party does not waive the attorney–client privilege unless it has "asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel." The Supreme Court held that "the *Lee* framework is the most consistent with South Carolina's policy of strictly construing the attorney–client privilege and requiring waiver to be 'distinct and unequivocal.'"

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South Dakota

Duty to Defend/Bad Faith

In one of the first cases to rely on the ALI's Restatement of Law, Liability Insurance, a federal district court has predicted that the South Dakota Supreme Court would adopt Section 12's rule that a liability insurer may be sued for providing an "inadequate defense." In *Sapienza v. Liberty Mutual Fire Ins. Co.*, No. 18-3015 (D.S.D. May 17, 2019) , the insured had argued that Liberty Mutual breached the duty to defend by taking over the defense of the lawsuit and countermanding the independent judgment of defense counsel and by failing to retain necessary experts and refusing to pay for certain defense activities. Despite having ruled that a cause of action for "inadequate defense" might be claimed, the District Court dismissed the insured's breach of contract claim, declaring that the factual allegations set forth in this count were mere "naked assertions devoid of further factual enhancement" and therefore fell afoul of the Twombly standard for motions to dismiss. The District Court declined to dismiss the insured's claim that Liberty Mutual owed coverage for $60,000 that they had incurred to demolish their home in response to an order finding that it was in violation of height and set back restrictions and agreed to certify the question of whether complaint with orders for injunctive relief are "damages" under South Dakota law.

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Wisconsin

Auto/UIM/Claim Preclusion

The Wisconsin Supreme Court has ruled that the doctrine of claim preclusion precluded a direct action claim against an automobile liability insurer by the victims of an auto accident involving Wilson Mutual's insured. As these claimants had already unsuccessfully pursued a claim against Wilson Mutual's insured, the court ruled in *Teske v. Wilson Mut. Ins. Co.*, 2019 WI 62 (Wis. June 4, 2019) that the disposition of the earlier claims against the policyholder precluded a new suit against the insurer for the same injuries. The State Supreme court ruled that the doctrine of claim preclusion precluded the re-litigation of these claims as there was an identity between the parties, the causes of action and dispute and that there had been a final judgment on the merits in a court of competent jurisdiction.

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Crime Coverage/Forgery/"Directions to Pay"

The Wisconsin Supreme Court has ruled in *Leicht Transfer & Storage Company v. Pallet Central Enterprises, Inc.*, 2019 WI 61 (Wis. May 31, 2019) that sums that a shipping company paid under false pretenses after a vendor provided them with forged delivery tickets fell outside the scope of a commercial crime policy issued by Hiscox. Whereas the insured had argued that these forged delivery tickets comprised "directions to pay" within the meaning of the "forgery or alteration" coverage terms, the Supreme Court declared that the delivery tickets were merely evidence of deliveries and did not contain any terms requiring the insured to pay a sum certain. Rather, the court found in this case that an invoice is a request for payment, not a "direction to pay." Justice Bradley dissented, arguing against the majority's opinion ignored the standard business practices of the parties and conflicted with the insured's reasonable expectations of coverage.

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