Tressler LLP

Volume 1, Issue 6 August 2010

Joanna Crosby, Editor
Linda Tai Hoshide, Editor
Michael Morrison, Editor
Kathleen Sweitzer, Editor

CGL Dispatch

In this Issue....

MN Supreme Court Recognizes an Insurer's Right of Contribution for Defense Costs 1-2

In NJ, Risky Coverage Case Leads to Big Reward in Legal Fees 3

WI Court of Appeals Holds Change in Law Relevant in Evaluation of Late Notice Defense Case 4

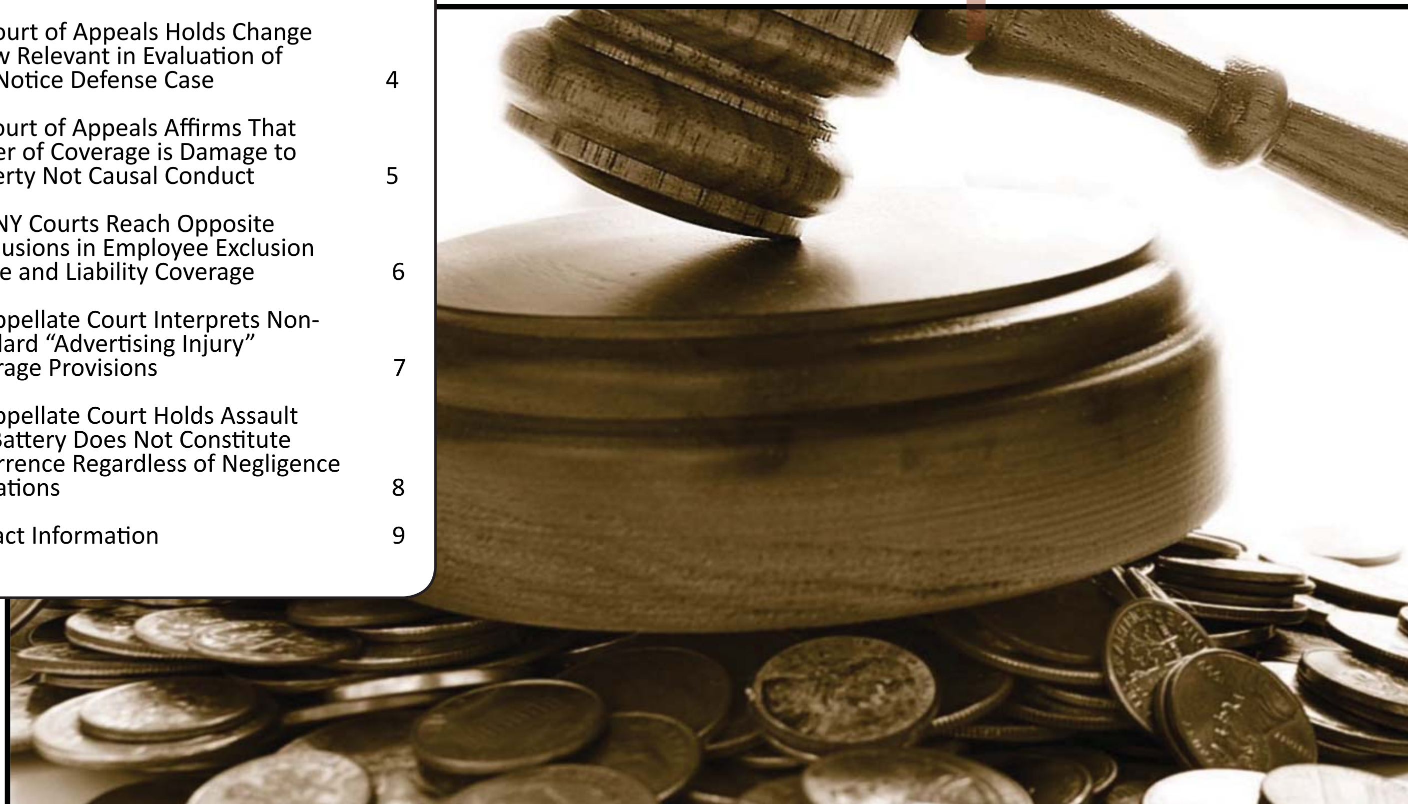
CA Court of Appeals Affirms That Trigger of Coverage is Damage to Property Not Causal Conduct 5

Two NY Courts Reach Opposite Conclusions in Employee Exclusion Clause and Liability Coverage 6

CA Appellate Court Interprets Non-Standard "Advertising Injury" Coverage Provisions 7

CA Appellate Court Holds Assault and Battery Does Not Constitute Occurrence Regardless of Negligence Allegations 8

Contact Information 9



MINNESOTA SUPREME COURT RECOGNIZES AN INSURER'S RIGHT OF CONTRIBUTION AGAINST OTHER INSURERS FOR DEFENSE COSTS

In Cargill, Inc. v. ACE American Insurance Company, 784 N.W. 2d 341 (Minn. June 30, 2010), the Minnesota Supreme Court ruled that a primary insurer, whose defense obligation is triggered, has an equitable right of contribution against other primary insurers whose defense obligations are also triggered. The court also held that defense costs are to be apportioned equally among all primary insurers who owe a defense.

Cargill, one of the largest poultry producers in the country, was sued by the State of Oklahoma under the Comprehensive Environmental Response, Compensation, and Liability Act, for disposal of poultry waste that allegedly contaminated land and water in the Illinois River Watershed. Cargill was also sued in a number of lawsuits in Arkansas alleging personal injury and wrongful death as a result of exposure to the poultry waste.

Cargill notified its liability insurers and requested defense and indemnity. Liberty Mutual, one of the primary insurers, and several other primary insurers, agreed to pay their share of defense costs under a reservation of rights, provided Cargill executed a "loan receipt" agreement. Under a loan receipt agreement, an insurer is deemed to "loan" defense costs to the insured, which the insured then agrees to repay from amounts recovered from other insurers. Prior to the Supreme Court's decision in Cargill, a loan receipt agreement gave an insurer standing to seek contribution from other insurers for reimbursement of defense costs. Without such an agreement, no contribution right existed.

Cargill refused to execute a loan receipt agreement because many of Cargill's other primary policies were fronting policies, had high retentions or deductibles, or had retrospective premiums that were calculated to equal the costs paid out. To the extent those policies would be called upon to contribute to the payment of defense costs, those costs would, in effect, be charged back to Cargill or paid by

See Equitable Right of Contribution page 2 for conclusion

Cargill, thus making Cargill liable for a good portion of its own defense costs. Because Liberty Mutual was only willing to pay a share of defense costs, and because it conditioned payment of those costs upon execution of a loan receipt agreement, Cargill rejected Liberty Mutual's proposal and initiated a coverage action against 50 of its primary and excess insurers.

In the trial court, Cargill argued that it had a right to select Liberty Mutual and to require it to pay all defense costs. Cargill also argued that Liberty Mutual had no right of contribution for defense costs against any other insurers and argued that it had no obligation to enter into a loan receipt agreement with Liberty Mutual. The trial court rejected Cargill's arguments and held that Liberty Mutual did not need a loan receipt agreement to pursue contribution from other insurers. The trial court ruled, in the alternative, that it had the equitable power to impose a "constructive" loan receipt agreement upon Cargill. The trial court then ruled that defense costs were to be shared equally among all primary insurers whose defense obligations were triggered by the underlying complaints.

The Minnesota Court of Appeals affirmed, although for somewhat different reasons. The Court of Appeals held that under the Minnesota Supreme Court's prior ruling in Iowa National Mutual Ins. Co. v. Universal Underwriters Ins. Co., 150 N.W.2d 233 (1967), and its progeny, Liberty Mutual had no right of contribution in the absence of a loan receipt agreement because Liberty Mutual lacked contractual privity with the other primary insurers. The Court of Appeals, however, held that where multiple primary insurers have offered a defense contingent on the receipt of a loan receipt agreement, good faith and fair dealing required the insured to cooperate with its insurers and required the insured to enter into a loan receipt agreement that equitably apportioned defense costs among the primary insurers. The Court of Appeals concluded that Cargill's refusal to enter into a loan receipt agreement violated the cooperation clause of the Liberty Mutual policy and amounted to bad faith. The Court of Appeals held that in such circumstances, a court can impose a constructive loan receipt agreement in order to equitably apportion defense costs among primary insurers who had a duty to defend.

The Minnesota Supreme Court focused much of its opinion on the Iowa National rule, which stood for the proposition that an insurer that defends an insured has no right to seek contribution from other insurers who refused to defend, because each insurer has a separate obligation to fully defend the insured and neither insurer is in privity with the other. After discussing various exceptions that had been created to the Iowa National rule and the history of that rule, the Minnesota Supreme Court overruled its decision in Iowa National, concluding that it did little to encourage insurers to promptly resolve the duty to defend issue among themselves. Liberty Mutual had been reluctant to pay any defense costs without a loan receipt agreement because, under Iowa National, Liberty Mutual feared it would not be able to get back a share defense costs other insurers should have paid. The Supreme Court went on to conclude that the Iowa National rule, which arose in the context of an auto accident, was "ill-suited for the complexity of modern mass torts, multi-party litigation, and disputes involving consecutive liability policies and injuries with long-latency periods." The Supreme Court held that a primary insurer, which has a duty to defend, has an equitable right to seek contribution for defense costs from any other insurer who also has a duty to defend, and ruled that defense costs should be allocated equally among those insurers.

TRESSLER COMMENTS

The Cargill decision is significant for insurers handling Minnesota claims or handling claims where Minnesota law will apply to the coverage issues. Rejecting archaic notions of privity and the antiquated device of a loan receipt agreement, the decision prevents an insured from unfairly trying to shoehorn all of its defense costs onto a single insurer, brings Minnesota into the modern age, and aligns it with other jurisdictions that have recognized that a equitable right to contribution comports with fundamental notions of fairness.

Prepared by Michael Morrison, a partner in our Chicago office.

Tressler LLP has launched its newest newsletter

The Property Quarterly

Tressler publishes a variety of updates in addition to The *CGL Dispatch*.

Visit www.tresslerllp.com/publications to view all our newsletters and additional Tressler publications. Click here to read our current *Property Quarterly*.

NEW JERSEY DISTRICT COURT FINDS THAT A RISKY COVERAGE CASE SHOULD LEAD TO A BIG REWARD IN LEGAL FEES

In Baughman v. United States Liability Insurance Co., Case No. 08-2901, 2010 U.S. Dist. LEXIS 69641 (D.N.J. July 13, 2010), the U.S. District Court for the District of New Jersey ordered an insurer that failed to defend and indemnify its insured must reimburse the insured for approximately $154,000 in legal fees incurred in prosecuting the coverage action and also applied a 35% lodestar enhancement to reflect the risk that the insured's coverage attorneys would not receive payment if the case did not succeed, for a total of approximately $209,000 to be paid by the carrier.

This case arose from a dispute regarding insurance coverage for a number of underlying state court actions involving alleged mercury contamination at a daycare center that was owned by Becky and Stephen Baughman ("Baughman"). United States Liability Insurance Company ("USLIC") declined to defend or indemnify the Baughmans in the underlying actions. As a result, the Baughmans filed suit against USLIC seeking declaratory relief and reformation of the USLIC policy as well as damages for breach of contract, breach of implied duty of good faith and fair dealing, common law fraud, and fraud under the New Jersey Consumer Fraud Act. Both parties brought motions for summary judgment and the court granted partial summary judgment in favor of Baughman, finding that USLIC was obligated to defend and indemnify the Baughmans in the underlying actions. However, the court also granted partial summary judgment in favor of USLIC on its insureds' claims for breach of implied duty of good faith and fair dealing, common law fraud, reformation, and for violations of the Consumer Fraud Act.

Thereafter, the Baughmans sought summary judgment on the question of damages and asked the court to order USLIC to reimburse them for the attorneys' fees and costs incurred in defending the underlying actions, which the court did. The main issue before this court involved reimbursement of the legal fees and costs incurred in prosecuting the coverage action against USLIC. In addressing this issue, the court first held that pursuant to New Jersey Court Rule 4:42-9(a)(6), which allows the reimbursement of legal fees "[i]n an action upon a liability or indemnity policy of insurance in favor of a successful claimant," the Baughmans were entitled to reimbursement of their attorneys' fees even though the basis for USLIC's denial of coverage was in good faith.

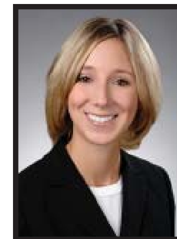
The court next examined the reasonableness of the lodestar requested by Baughman, which was the number of hours reasonably expended multiplied by a reasonable hourly rate. The court found that the requested hourly rates of $325 and $225 were "reasonable given the prevailing market rates for attorneys with their level of experience in the relevant region and in the relevant field." The court next addressed the reasonableness of the time that was expended in prosecuting the coverage action. The court concluded that Baughmans' counsel spent a reasonable amount of time performing the work required for this case, considering the novelty and complexity of some of the legal issues that were involved. However, the court did deduct 20 hours of "excessive legal research" as well as .7 hours of duplicative recorded time.

The final issue before the court was whether the Baughmans were entitled to a 100% contingency enhancement based upon the New Jersey Supreme Court's decision in Rendine v. Pantzer, 661 A.2d 1202 (N.J. 1995). In Rendine, the court held that "a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of the result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." The court ultimately applied a 35% enhancement to the Baughmans' lodestar based upon the following factors: (1) the risk of nonpayment was not, and could not have been, mitigated since Baughmans signed a pure contingency fee agreement; (2) the legal risk was significant given the potential scope of the broad language of the pollution exclusion and the novelty of the damages issue; and (3) because of the lack of case law on the pollution exclusion in the context of mercury contamination, the outcome was likely one of broader public interest.

In sum, in addition to awarding the Baughmans $82,695 in legal fees for the defenses fees and costs incurred in the underlying state court actions, USLIC was also ordered to pay $153,750 for the legal fees incurred in the coverage action, $1,186 in uncontested costs, as well as a 35% lodestar enhancement, for a total award of $208,748.50.

TRESSLER COMMENTS

This case is a clear warning to insurers that they must be cognizant of the laws of the jurisdiction in which they are choosing to litigate coverage. In particular, in deciding whether to litigate certain coverage issues, the insurer must be aware of the consequences should they not prevail in the coverage action. As clearly seen in Baughman, some states such as New Jersey impose stiff penalties upon insurers when they refuse to defend their insured, even if they did so in good faith. However, other jurisdictions do not impose such penalties and thus, it is important to take these issues into consideration as it relates to the specific jurisdiction in which the action is filed when assessing the pros and cons of filing and defending a coverage action.



Prepared by Monica Mendes, an associate in our Los Angeles office.

WISCONSIN COURT OF APPEALS HOLDS THAT SIGNIFICANT CHANGE IN GOVERNING LAW WAS RELEVANT IN EVALUATING LATE NOTICE DEFENSE

In Westport Insurance Corporation v. Appleton Papers Inc., Case No. 2009AP286, 2010 Wis. App. LEXIS 425 (June 8, 2010), the Wisconsin Court of Appeals held that a trial court had properly instructed a jury to consider a significant change in the law about the availability of coverage when considering whether the insured provided timely notice of a claim to its insurers.

In 1994, Appleton Papers, Inc. ("API") was notified that one of the prior owners of API's paper manufacturing plant had released polychlorinated biphenyls ("PCBs") into the Fox River between 1954 and 1971. One of the prior owners of the Appleton paper manufacturing operation, National Cash Register Company ("NCR"), received a letter from the EPA classifying NCR as a "potentially responsible party" ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for the contamination of PCBs in the Fox River and NCR sought indemnification from API for the remediation efforts under the terms of their 1978 sales agreement. After API denied that it had any obligation to NCR, NCR filed suit against API in June 1995. In 1997, the EPA notified both NCR and API that they were PRPs for the remediation of the Lower Fox River and Green Bay. API did not notify its general liability insurers of its PRP classification because at the time the PRP letter was issued, under the Wisconsin Supreme Court's decision in City of Edgerton v. General Casualty Co., 184 Wis. 750 (1994), a PRP letter was not considered a "suit" and did not trigger a defense obligation and the costs of remediation required by the EPA were not considered "damages" within the meaning of the insuring agreement in a liability policy. Ultimately, after years of litigation, API and NCR reached a settlement agreement in 1998, wherein API agreed to pay 55% and NCR 45% of the first $75,000,000 of remediation costs.

In August 1998, API first notified its insurers of the PRP letter and requested that the insurers provide coverage for the remediation efforts demanded by the EPA. Each insurer denied coverage, but API continued to keep the insurers apprised of the remediation efforts and offered them the opportunity to object to API's actions. After negotiations with the EPA, a consent decree was entered in December 2001 setting forth a remediation plan in which API and NCR paid $41.5 million over the next four years for the cleanup of the Fox River.

On July 11, 2003, Wisconsin law was changed dramatically by the Wisconsin Supreme Court's ruling in Johnson Controls, Inc. v. Employers Insurance of Wausau, 264 Wis. 2d 60 (2003), which overturned Edgerton, and held that a PRP letter pursuant to CERCLA began an adversarial process and thus triggered an insurer's duty to defend and that CERCLA response costs, or remediation costs, were "damages" under a liability policy.

In January 2005, API's insurers filed a declaratory judgment lawsuit, arguing, among other things, that they had no coverage obligation because API provided untimely notice of the pollution claims. The coverage case was tried to a jury and the jury concluded that notice had been timely.

On appeal, the insurers argued that the trial judge had given the jury erroneous instructions on late notice. They argued that the trial court "improperly invited the jury to excuse API from providing notice if API believed that its liability was not covered." This argument stemmed from a specific instruction where the trial court had explained how the law in Wisconsin had changed between the time Edgerton was decided until it was reversed in Johnson Controls. The instruction on Edgerton and Johnson Controls was coupled with another instruction that allowed the jury to consider whether API thought the policies provided coverage. The insurers argued that these instructions, as a whole, allowed the notice issue to be decided based on the subjective beliefs of API, rather than what a reasonable insured in the same circumstances would have believed.

The Wisconsin Court of Appeals rejected the insurers' arguments and affirmed the trial court's use of the instructions on two grounds. First, it held that the Edgerton and Johnson Controls instruction was valid because these decisions were relevant to whether notice was required. The court noted that under Wisconsin law, there is no duty to give notice of an uncovered claim, and that until Johnson Controls was handed down, API had no reason to believe that remediation costs were covered. The excess policies at issue provided that notice was required as soon as practicable after the insured obtained information from which the insured may reasonably conclude that an occurrence "is likely to involve this policy." The court noted that the instructions on late notice were consistent with the policy language itself.

Second, the court found that the trial court had explained to the jury that API's subjective belief was not determinative; rather the trial court had instructed the jury to apply an objective standard. The court noted that the trial court had specifically instructed the jury that "they must decide 'what API could reasonably conclude' based upon what a reasonable policyholder with the same information that API had at the time would have reasonably concluded based on that information."

TRESSLER COMMENTS

The Appleton Papers decision considered a unique situation where the governing law, which indisputably barred coverage, changed many years later in favor of policyholders. Although the insured, before notice was given, had entered into a settlement agreement obligating it to pay tens of millions of dollars, without the knowledge or consent of the insurers, the jury still found that notice was timely. The insured's belief that coverage was not available at the time, and a jury instruction allowing the jury to consider the change in the law, appeared to be significant factors for the jury.

Prepared by Nicolas Mesco, an associate in our Chicago office.

CALIFORNIA COURT OF APPEAL AFFIRMS THAT THE TRIGGER OF COVERAGE IS DAMAGE TO PROPERTY, NOT THE CAUSAL CONDUCT

In Pennsylvania General Insurance Company v. American Safety Indemnity Company, 185 Cal. App. 4th 1515 (Cal. Ct. App. 2010), the court held that endorsements to American Safety Indemnity Company's ("ASIC") commercial general liability ("CGL") policy were merely designed to obviate the application of the "progressive damage-continuous trigger" articulated in Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645 (1995). However, they were still reasonably susceptible to the interpretation that the trigger of coverage was damage to property, not the causal conduct.

Pennsylvania General Insurance Company ("PGIC") and ASIC issued consecutive CGL policies to D.A. Whitacre Construction, Inc., ("Whitacre"), a subcontractor on a construction project. PGIC insured Whitacre from October 1998 to December 2001, and ASIC insured Whitacre from December 2001 to December 2002. In 1999, Whitacre entered into a framing subcontract at the project and substantially completed its work by June 2001. In an underlying construction defect lawsuit, PGIC defended and indemnified Whitacre. ASIC declined Whitacre's tender, claiming endorsements to its policy eliminated any potential for coverage under California's "progressive damage-continuous trigger."

PGIC sued ASIC for contribution. Relying on two endorsements, ASIC argued that its policy only provided coverage for damages caused by an "occurrence" during the policy period and excluded coverage for any loss that first manifested before the term of its policy.

The first endorsement changed the definition of "occurrence" by adding the following underscored language:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions that happens during the term of this insurance. "Property damage" ... which commenced prior to the effective date of this insurance will be deemed to have happened prior to, and not during, the term of this insurance. (Emphasis added.)

The other endorsement entitled "PRE-EXISTING INJURY OR DAMAGE EXCLUSION" stated:

> This insurance does not apply to: [¶] 1. Any "occurrence". . . [¶] [(a)] which first occurred prior to the inception date of this policy . . .; or [¶] [(b)] which is, or is alleged to be, in the process of occurring as of the inception date of this policy . . . even if the "occurrence" continues during this policy period.

In granting ASIC's motion for summary judgment, the trial court interpreted ASIC's policy as requiring the "occurrence," i.e., Whitacre's work, to both happen and cause "property damage" during the policy period. It also held that ASIC's policy excluded a prior "occurrence." Since Whitacre's work was completed prior to ASIC's policy period, the trial court ruled that ASIC's policy did not provide coverage for Whitacre.

The court of appeal reversed. Focusing on the language added to the "occurrence" definition, the court found it simply explained what would be deemed not to have constituted an "occurrence," *i.e.*, "property damage" "which commenced prior" to the policy period. Thus, the court held that the endorsement lends itself to the interpretation that what must occur to qualify as an "occurrence" is "property damage" during the term of the policy. Also, the court found that there is nothing in the new language that clearly stated that the causal conduct must also occur during the policy period.

The court also found that the title of the other endorsement -- "PRE-EXISTING INJURY OR DAMAGE EXCLUSION" -- supported the interpretation that the term "occurrence" refers to the "injury or damage" resulting from the conduct, not the causal conduct itself. For example, that endorsement was not entitled a "Pre-Existing Causal Conduct Exclusion."

The court rejected ASIC's argument that since its policy states that it only applies to "'property damage' . . . caused by an 'occurrence' that takes place in the 'coverage territory,'" the policy clearly differentiates the concept of "occurrence" from resulting "property damage." The court found that this provision is at least equally susceptible to the interpretation that it was merely designed to impose territorial requirements on coverage.

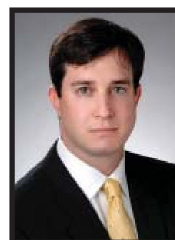
In distinguishing the cases ASIC cited for the proposition that an "occurrence" refers to the underlying cause of injury, rather than the injury or claim itself, the court focused on USF Ins. Co. v. Clarendon America Ins. Co., 452 F. Supp. 2d 972 (C.D. Cal. 2006) ("USF"). While the policy in USF has similar language to ASIC's policy, the USF court only held that there was no indemnity obligation because the damages first manifested before the inception of the policies at issue, not because the causal acts occurred before the inception of those policies. The court also noted that the USF court held that a potential for coverage existed with respect to contribution for defense costs. On this basis, the court found that the USF court's statement that a distinction existed between an "occurrence" and "property damage" was dicta.

Finally, the court stated that its conclusion was supported by the by the "products-completed operations hazard" in ASIC's policy. The court observed that this provision appears to afford protection when the following three conditions are met: 1) there was "property damage;" 2) it arose from "your work;" and 3) which has been completed. The court found that ASIC's endorsements do not clearly add, as a fourth condition, the requirement that "your work" must have happened during the policy period. This supports the court's finding that term "occurrence" refers to the damage and the term "your work" refers to the conduct that created the damage.

TRESSLER COMMENTS

This court's ruling is based upon the specific language of ASIC's policy. While the court acknowledged that ASIC's endorsements were designed to obviate the "progressive damage-continuous trigger," the specific language of the endorsements limited the trigger of coverage to damage to property, not the causal conduct.

The court did not issue a ruling on whether the endorsements would bar coverage based on when property damage first commenced since there was a disputed fact as to whether the damages allegedly caused by Whitacre's work first manifested prior to the ASIC policy period. Had there been no dispute, the court may have barred contribution for indemnity.



Prepared by Adam Hackett, an associate in our Orange County office.

TWO SIDES OF THE SAME COIN? TWO NEW YORK COURTS REACH OPPOSITE CONCLUSIONS REGARDING WHETHER AN EMPLOYEE EXCLUSION CLAUSE PRECLUDES LIABILITY COVERAGE FOR CLAIMS INVOLVING INJURIES TO EMPLOYEES OF UNRELATED CONTRACTORS

In Merchants Mutual Insurance Company v. Rutgers Insurance Company, No. 100256/09, 2010 N.Y. Misc. LEXIS 2735 (Sup. Ct. Richmond Co. March 11, 2010), the Supreme Court of New York for Richmond County determined that an employee exclusion did not apply to preclude liability coverage for an underlying claim wherein the claimant was an employee of a contractor unrelated to the insured. However, just less than two months later, the court in Essex Insurance Company v. Bossart Builders, Inc., No. 9241/2008, 2010 N.Y. Misc. LEXIS 2060 (Sup. Ct. Queens Co. May 3, 2010) determined that an employee exclusion precluded liability coverage for an underlying claim involving similar facts.

In Merchants, Rutgers Insurance Company issued a commercial general liability policy to Tanachion Electrical Contracting, Inc. ("Tanachion"). The Rutgers CGL policy contains an employee exclusion, which precluded liability coverage for:

> "Bodily injury" to *any* contractor or any "employee" of any contractor arising out of or in the course of the rendering or performing services of any kind or nature whatsoever by such contractor or "employee" of such contractor *for which any insured may become liable in any capacity*; (Emphasis added.)

After obtaining the Rutgers CGL policy, Tanachion was hired as an electrical subcontractor for a construction project. Thereafter, an employee of a contractor unrelated to Tanachion was injured at the construction site during the course of his employment. The injured worker then filed the underlying personal injury suit. The worker sued the owner and general contractor and Tanachion was added as a third-party defendant.

In a subsequent declaratory judgment action, Rutgers argued that it did not owe any defense or indemnity obligation to Tanachion under the Rutgers CGL policy and, in part, relied upon the employee exclusion for its position. However, the court disagreed with Rutgers' position and found that Rutgers' "forced interpretation" of the employee exclusion was "overly expansive." Citing to a number of New York cases, the court found that the employee exclusion only precludes coverage for claims arising out of bodily injury to an employee of a contractor "in privity" with the insured. As the record did not contain any evidence that Tanachion contracted with the contractor that employed the underlying claimant, the court determined that the employee exclusion did not apply to preclude liability coverage for Tanachion.

In Bossart, Essex Insurance Company issued a commercial general liability policy to Bossart Builders, Inc. ("Bossart"). The Essex CGL policy contained an employee exclusion, which precluded liability coverage as follows:

> Further, there is no coverage under this policy for "bodily injury," ... sustained by any contractor, self-employed contractor, and/or subcontractor or any employee, leased worker, temporary worker or volunteer help of same. (Emphasis added.)

After issuance of the Essex CGL policy, Bossart was hired as a construction manager for a project involving the construction of a church. The other contractors involved in the project were not hired by Bossart. During construction of the church, an employee of a drywall subcontractor was injured while working at the construction site. Thereafter, the injured drywall worker initiated the underlying personal injury suit against Bossart.

Essex subsequently filed a declaratory judgment action, asserting that it did not owe any defense or indemnity obligation to Bossart, on the basis that the employee exclusion applied to preclude "bodily injury" liability coverage for Bossart. Analyzing New Jersey and New York law, the court first determined that the employee exclusion was unambiguous. The court then determined that the use of the term "any" in the employee exclusion (rather than the terms "you" and "your") indicates that the exclusion applies to all contractors and subcontractors. In other words, application of the employee exclusion was not limited to those contractors or subcontractors hired by the insured, Bossart. Accordingly, the court granted summary judgment in favor of Essex.

TRESSLER COMMENTS

Although the Merchants and Bossart courts reached opposite conclusions regarding whether the employee exclusions at issue precluded liability coverage, the analyses set forth by the courts can arguably be reconciled. The employee exclusions at issue were not identical. The employee exclusion at issue in Bossart applied to "bodily injury" to any contractor, without any other limitation. However, the employee exclusion at issue in Merchants applied to "bodily injury" to any contractor, "for which any insured may become liable in any capacity." As coverage for contractors is more frequently available through the surplus lines market where these types of clauses are prevalent, the wording of the specific exclusion at issue and the facts of each case must be carefully examined when assessing coverage.

Prepared by Dennis Ventura, an associate in our Chicago office.

CALIFORNIA APPELLATE COURT HOLDS THAT INSURER DID NOT ACT IN BAD FAITH IN DENYING COVERAGE UNDER "ADVERTISING INJURY" PROVISION FOR CLAIMS ARISING OUT OF CONDUCT THAT DID NOT CONSITUTE AN "ADVERTISING INJURY OFFENSE" AS DEFINED IN THE POLICY

In S.B.C.C., Inc. v. St. Paul Fire & Marine Insurance Co., 186 Cal. App. 4th 383 (Cal. Ct. App. 2010), the court interpreted non-standard "advertising injury" coverage provisions according to their plain terms and refused to find that an insurer had acted in bad faith when it denied coverage to its insured for claims of misappropriation of confidential customer information.

This litigation arose from allegations that a former employee of San Jose Construction, Inc. ("SJC"), Richard Foust, allegedly misappropriated valuable, confidential information from SJC when he began new employment with the plaintiff, South Bay Construction Company ("South Bay"). Based upon this alleged misappropriation, SJC filed suit against South Bay alleging eleven different causes of action ("the underlying litigation"). All causes of action allegedly arose from Foust's alleged misappropriation and use of SJC's alleged confidential information, which included information about SJC's existing customers and details about SJC's ongoing design contracts. SJC alleged that Foust used this information to solicit existing SJC customers to South Bay. South Bay, insured by St. Paul Fire & Marine Insurance Company ("St. Paul"), tendered the underlying litigation to St. Paul. St. Paul denied coverage asserting that the allegations against South Bay fell outside the "advertising injury" and "personal injury" coverage of the policy.

The appellate court stated that the St. Paul policy was atypical in that it expressly defined the terms "advertising," "advertising idea," and "advertising injury offense." South Bay argued that the policy's definition of "advertising" was expansive enough to encompass personal solicitation of customers, but the court disagreed. The court stated that while the policy's definition was certainly broader than the definition adopted by a majority of courts, the provision required the insured to have been "attracting the attention of others" with the purpose of "seeking customers or supporters" or "increasing sales or business." The court reasoned that, in this case, Foust did not need to attract customers as they were customers he was already doing business with, just at another company. What Foust was seeking to accomplish was to transfer these existing customers' business from SJC to South Bay. The court concluded that this activity did not amount to "advertising" as defined under the policy or under any reasonable interpretation of the term.

Further, the appellate court reasoned that, even if South Bay was arguably engaged in "advertising" when it personally solicited SJC's customers, it was not using SJC's "advertising material" or "advertising ideas" when it did so. The record contained no evidence suggesting that SJC's customer information or project details were subject to copyright law or that they were being used in SJC's advertising as required by the policy's definition of "advertising material." Additionally, the underlying suit alleged that Foust took customer information, including customer lists, and such information is specifically excluded from the policy's definition of "advertising ideas. South Bay, in using SJC's confidential information misappropriated by Foust, was not engaged in "advertising" and was not using SJC's "advertising materials" or "advertising ideas." Therefore, the appellate court agreed with St. Paul that South Bay's conduct could not reasonably be deemed an "advertising injury offense."

Alternatively, South Bay argued it was potentially afforded "personal injury" coverage under the St. Paul policy because Foust took SJC's confidential information and delivered it to South Bay, which violated SJC's right of privacy. However, the appellate court applied the plain terms of this provision and disagreed with South Bay. The definition of "personal injury offense" specifically states that the material must violate a *person's* right of privacy, not an organization. The court reasoned that, had the parties intended organizations to be included within the scope of this provision, they could have added the phrase "or organization's" in referring to the right of privacy. The court found no ambiguity in the policy language and found no potential for coverage under the Personal Injury Liability provision.

The parties also contested the applicability of the policy's Intellectual Property Exclusion. This provision precluded coverage for all injuries resulting from the misappropriation of trade secrets or the violation of other intellectual property rights or laws. South Bay argued that only one out of the eleven claims in the underlying litigation involved trade secret misappropriation and, therefore, this exclusion could only be potentially applicable to this one claim. However, again applying the provision's plain terms and refusing to find ambiguity in the policy language, the court disagreed with South Bay. The appellate court stated that the clear and plain terms of the exclusion expressly provided that no coverage would be afforded for *any other injury or damage that's alleged in any claim or suit which also alleges any such infringement or violation*. By applying its plain terms, the court determined that this exclusion was clearly applicable and would operate to preclude coverage.

The appellate court affirmed the trial court's decision, finding St. Paul did not wrongfully refuse to defend South Bay.

TRESSLER COMMENTS

Given that the appellate court's ruling was based upon rather unique policy language, it may have limited application. However, this decision reflects how carefully crafted policy language will aid an insurer in providing only that coverage it specifically intends to provide. Courts will not strain policy language, even if unique, in order to find ambiguity where none exists.

Prepared by Jessica Swaysland, an associate in our Chicago office.

COVERAGE DEFENSE TRUMPS SELF-DEFENSE: CALIFORNIA APPELLATE COURT HOLDS ASSAULT AND BATTERY DOES NOT CONSTITUTE AN OCCURRENCE REGARDLESS OF ALLEGATIONS OF NEGLIGENCE

In L.A. Checker Cab Cooperative, Inc. v. First Specialty Insurance Co., 186 Cal. App. 4th 767 (Cal. Ct. App. 2010), the Court of Appeal of California held that there was no coverage under the "bodily injury" provision of the insured's CGL policy for an assault and battery committed by its employee, regardless of allegations that the employee acted negligently and that the insured negligently supervised the employee.

The underlying lawsuit arose out of a dispute between the cab driver-employee for the insured, Checker Cab Company, and a potential passenger. The passenger filed a lawsuit against the driver and the insured for claims of assault and battery and against the insured for negligent supervision. The insured tendered its defense to its insurer, who denied coverage. Checker then filed a cross-claim against the insurer for breach of contract and declaratory relief.

The record in the underlying lawsuit indicated that the driver testified that the passenger was intoxicated, spat on the driver's face, kicked him, struck him on the back of his head and threatened to kill him. In response to the perceived threat, the driver warned the passenger that he was armed, and in response to continued aggression from the passenger, the driver fired one shot at the passenger. The passenger admitted to aggressive behavior, but testified that the driver shot him without provocation.

The court held that the underlying claim did not fall within the insuring agreement of the insured's CGL policy because the "bodily injury" to the passenger was not caused by an "occurrence." The court reasoned that the undisputed evidence showed the driver intentionally chambered a bullet in his gun and shot the passenger in self-defense, which was not an accident. The court rejected the insured's argument that the driver's response to the passenger's aggression was negligent and therefore accidental because the driver had an unreasonable belief in the need for self-defense against the passenger. The court noted that it previously rejected such an argument and reasoned that the insured's unreasonable belief in the need for self-defense did not turn the resulting purposeful and intentional action of assault and battery into an accident.

With respect to the claim for negligent supervision, the insured argued that the insurer owed it a defense and indemnity because there was an ambiguity as to whether the policy applied to negligent supervision. The court held that the insured's alleged negligence in not adequately supervising the driver was not a direct cause of the passenger's injury. The court reasoned that because the term "accident" unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury, the alleged negligence in not adequately supervising the driver was not a direct cause of the passenger's injury.

TRESSLER COMMENTS

The court reached a positive result for insurers in finding that despite allegations of negligence, the claim of assault and battery does not constitute an "accident" where the insured's employee purposefully shot a passenger. The fact that the employee may have mistakenly, unreasonably, or improperly acted in self-defense did not convert the employee's actions into an accident. The claim of negligent supervision also could not be sustained because of the finding that there was no accident.

Prepared by Rae Williamson, an associate in our Chicago office.

Tressler | LLP

If you have any questions concerning this bulletin or Tressler's General Liability & Excess Insurance Group, please contact our editors:

Joanna L. Crosby - Newark Office	**973/848-2908**	**jcrosby@tresslerllp.com**
Linda Tai Hoshide - *Los Angeles Office*	**310/203-4816**	**lhoshide@tresslerllp.com**
Michael W. Morrison - *Chicago Office*	**312/627-4019**	**mmorrison@tresslerllp.com**
Kathleen A. Sweitzer - *Chicago Office*	**312/627-4130**	**ksweitzer@tresslerllp.com**

Tressler Offices:

233 S Wacker Drive
22nd Floor
Chicago, IL 60606
312/627-4000
Fax 312/627-1717

744 Broad Street
Suite 1510
Newark, NJ 07102
973/848-2900
Fax 973/623-0405

One Penn Plaza
Suite 4701
New York, NY 10119
646/833-0900
Fax 646/833-0877

2100 Manchester Road
Suite 950
Wheaton, IL 60187
630/668-2800
Fax 630/668-3003

305 West Briarcliff Road
Bolingbrook, IL 60440
630/759-0800
Fax 630/759-8504

3070 Bristol Street
Suite 450
Costa Mesa, CA 92626
714/429-2900
Fax 714/429-2901

1901 Avenue of the Stars
Suite 450
Los Angeles, CA 90067
310/203-4800
Fax 310/203-4850

Tressler LLP (formerly Tressler Soderstrom Maloney & Priess LLP) is a Limited Liability Partnership formed in the State of Illinois. The materials in this newsletter have been prepared by the individual authors and Tressler LLP for general informational purposes only and are not legal advice. Transmission of the information is not intended to create, and receipt does not constitute, an attorney-client relationship. Online and other readers should not act upon this information without seeking specific legal counsel from Tressler LLP or appropriate professional advice from another source. The information contained in this newsletter may or may not reflect the most current legal developments. The articles are not updated subsequent to their inclusion in the newsletter when first distributed. This information is not provided in the course of an attorney-client relationship and is not intended to constitute legal advice or to substitute for obtaining legal advice from an attorney licensed in your state. This information is being sent to you as a client or friend of the firm. If you no longer wish to receive this category of Tressler announcements, respond to this message with "unsubscribe."

Attorney Advertising - This newsletter is for general information only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or fact situation. The reader is advised to consult with an attorney to address any particular circumstance or fact situation. The opinions expressed in this newsletter are those of the authors and not necessarily those of Tressler LLP or its clients. This announcement or some of its content may be considered advertising under the applicable rules of the Supreme Court of Illinois, the courts in New York and those in certain other states. This newsletter is not intended to be advertising and it is not the intention of Tressler LLP to represent anyone desiring representation based upon reading the contents of this newsletter in a state where this newsletter may not comply with all laws and ethical rules of that state pertaining to attorney advertising and solicitation of clients.

For purposes of compliance with New York State Bar rules, our headquarters are Tressler LLP, 233 S Wacker Drive, 22nd Floor, Chicago, IL 60606, 312.627.4000. Prior results described herein do not guarantee a similar outcome.