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

CGL Dispatch

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Introducing...

Tressler's *CGL Dispatch* Newsletter

Dear Friends and Colleagues,

At Tressler, we believe that sharing knowledge is instrumental to success. Today, the firm launches the *CGL Dispatch* as a platform for our clients to keep up with the most recent noteworthy decisions and news related to general liability insurance coverage.

The attorneys involved in the compilation of this newsletter all practice in the General Liability and Excess Insurance Practice Group and enjoy national reputations in the area. Among the many issues that we address under general liability policies are questions of coverage for advertising and personal injury, additional insureds, antitrust, bodily injury, consumer fraud, construction and construction defects, contractual liability, discrimination, environmental claims, excess liability claims, fax blasting, privacy claims, intellectual property claims, internet liability, mold, motor vehicle claims, premises liability claims, product liability claims, property damage, OCIP and wrap-up claims, sexual abuse, toxic tort claims, umbrella liability and unfair business practices. Our vast experience in the GL arena gives us a lot to say on the topic!

The *CGL Dispatch* will be emailed to you monthly. We hope that you find our case summaries beneficial to your work. If you should ever want to unsubscribe to the newsletter, sign a friend up for the newsletter, or if you would like to offer a comment or question to the editors, please click here.

Sincerely,

Joanna Crosby
Partner, Newark Office

Linda Tai Hoshide
Partner, Los Angeles Office

Michael Morrison
Partner, Chicago Office

Kathleen Sweitzer
Partner, Chicago Office

SUBCONTRACTOR'S LIABILITY POLICY PROVIDED NO COVERAGE TO DEVELOPER AS ADDITIONAL INSURED ABSENT SUBCONTRACTOR'S PAYMENT OF SELF-INSURED RETENTION

In Forecast Homes, Inc. v. Steadfast Ins. Co., 181 Cal. App. 4th 1466 (Cal. Ct. App. 2010), the California Court of Appeal for Fourth Appellate District held that a developer, as additional insured under its subcontractors' liability policies, was not entitled to coverage under those policies because the subcontractors, as named insureds, had not satisfied self-insured retention ("SIR") requirements.

Forecast Homes, Inc. ("Forecast"), a developer of single-family homes, filed this lawsuit against Steadfast Insurance Company ("Steadfast"), after Steadfast refused to provide coverage to Forecast for construction defect claims under liability policies ("Steadfast Policies") issued to several of Forecast's subcontractors.

After several homeowners sued Forecast for construction defects, Forecast sought contractual indemnity from the subcontractors and coverage as an additional insured under the subcontractors' liability insurance policies. Steadfast refused to defend or indemnify Forecast, maintaining that the named insured subcontractors, which were not defendants in the underlying action, had not paid the Steadfast Policies' SIR amounts, a precondition to coverage.

Each of the Steadfast Policies included an endorsement setting forth an SIR amount applicable to each occurrence under the policy. After listing the amount of the SIR, each endorsement stated:

> *[T]hroughout this policy the words "you" and "your" refer to the [n]amed [i]nsured shown in the declarations, and any other person or organization qualifying as a [n]amed [i]nsured under this policy.*

Steadfast issued two different variations of SIR endorsements, which are referred to throughout the opinion and herein as "Form-A" and "Form-B". Section I of each endorsement provides, in relevant part, as follows, with the additional language in Form-B highlighted in bold:

> I. Self-Insured Retention and Defense Costs – Your Obligations.
>
> A. The self-insured retention amounts stated in the Schedule of this endorsement apply as follows:
>
> 1. If the [p]er [o]ccurrence self-insured retention amount is shown in the Schedule of this endorsement, ~~you shall be responsible for~~ **it is a condition precedent to our liability that *you* make actual** payment of all damages and defense costs for each occurrence or offense, until you have paid self-insured retention amounts and defense costs equal to the [p]er [o]ccurrence amount shown in the Schedule . . . . **Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention. Satisfaction of the self-insured retention as a condition precedent to our liability applies regardless of insolvency or bankruptcy by you.** The [p]er [o]ccurrence amount is the most you will pay for self-insured retention amounts and defense costs arising out of any one occurrence or offense, regardless of the number of persons or organizations making claims or bringing suits because of the occurrence or offense.
>
> * * *
>
> 4. Except for any 'defense costs' that we may elect to pay, you shall pay all such "defense costs" as they are incurred until you have paid "defense costs" and damages for … property damage … equal to the applicable "self-insured retention" amount.

Section IV in each endorsement includes the following definition:

> A. "Self-insured" retention means: the amount or amounts which you or any insured must pay for all compensatory damages which you or any insured shall become legally obligated to pay because of … "property damage" … or any other such coverage included in the policy, sustained by one or more persons or organizations . . . ."

Both Forecast and Steadfast agreed that any combination of defense costs and damages could be paid to satisfy the SIR requirements. The sole dispute between the parties regarding the SIR was the question of *whose* payment of the SIR amounts would trigger coverage under the Steadfast Policies. Steadfast denied coverage to Forecast under the Steadfast Policies because the subcontractors, as named insureds, had not satisfied the SIR requirements, despite the fact that Forecast had incurred costs sufficient to satisfy the SIR amounts.

The Court of Appeal first examined the language of Form-B. Because the endorsements define "you" to be the named insured, the Court of Appeal determined that the plain language in subparagraphs 1 and 4 of Section I(A) of Form-B requiring payments by "you," and not others, to satisfy the SIR amount, means that the SIR must be satisfied by the named insured.

The Court of Appeal rejected Forecast's argument that language in Section IV of the endorsements defining SIR to mean the amount that "you or any insured" is required to pay contradicts the language in Section I limiting the SIR to amounts paid by the named insured. The Court of Appeal concluded that, when read in the context of the entire policy and its intended purpose, the definition in Section IV did not conflict with Section I. Instead, according to the Court of Appeal, the two sections served different purposes, Section I describing who is obligated to pay the SIR, and Section IV addressing *what* amounts and expenses satisfy the SIR.

According to the Court of Appeal, the "you or any insured" language in the definition of SIR addresses lawsuits naming only the additional insured as a defendant, but does not change the requirement that the named insured pay the SIR amount. The Court of Appeal explained:

> If Forecast requested the subcontractor to make payments (pursuant to its hold harmless agreement with the developer) this would satisfy the subcontractor's SIR obligation and trigger further insurance coverage for an additional insured, like Forecast. We conclude that the purpose of the policy is satisfied by this interpretation of the unambiguous language of the SIR endorsement.

The Court of Appeal concluded that language making the named insured's payment of the SIR a "condition precedent" to Steadfast's obligations "could not have been clearer," dismissing authorities cited by Forecast addressing the interpretation of ambiguous policy terms.

The Court of Appeal reached the same conclusion with respect to Form-A, despite the absence of the "condition precedent" language that was added to Form-B. The Court of Appeal noted that Form-A still required that "you" pay the SIR, meaning that the SIR could not be satisfied unless paid by the named insured. The Court of Appeal rejected Forecast's argument that the

See Forecast Homes on page 4 for conclusion

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WEST VIRGINIA FEDERAL COURT JUDGE DENIED MOTION TO DISMISS DJ FILED BY CGL INSURER DESPITE PARALLEL STATE ACTION

In USF Insurance Co. v. Stowers Trucking, LLC, S.D. W.Va., 2010 U.S. Dist LEXIS 12117, a federal judge, applying the Nautilus factors, permitted an insurer to proceed with its declaratory judgment action in federal court as opposed to requiring the insurer to defend in state court the insured's third party complaint.

The USF Insurance Co. v. Stowers Trucking suit ("the DJ suit") arises out of a personal injury action pending in the state court of West Virginia, Lambert v. Stowers Trucking, LLC, et al ("the Lambert suit"). USF Insurance Co. had issued a CGL policy to Stowers Trucking. Stowers had entered into a contract with Laurel Creek Co., Inc. to haul coal to Laurel Creek coal preparation plants. The USF Insurance policy issued to Stowers named Laurel Creek as an "additional insured."

Lambert, an employee of Stowers, sustained injury when a truck on which he was performing maintenance allegedly fell on him. The incident occurred at the Odell plant, and Lambert filed suit against Odell, Laurel Creek, and Stowers asserting claims of negligence and deliberate intent. USF agreed to defend Odell and Laurel Creek pursuant to a reservation of rights but denied any coverage afforded to Stowers for the Lambert suit.

USF's disclaimer of coverage to Stowers under its CGL policy relied upon the automobile exclusion, the employer's liability exclusion, which precluded coverage for any claims of bodily injury by an employee, and a punitive damages exclusion. USF then filed suit in the United States District Court for the Southern District of West Virginia seeking a declaration that it had of no duty to defend or indemnify Stowers, Odell or Laurel Creek. These defendants, in turn, filed a Third Party Complaint in the Lambert state court suit seeking a declaration that coverage was owed by USF to each of them and moved to dismiss the federal court DJ suit filed by USF.

The federal court not only rejected the argument presented by defendants that the existence of a parallel state litigation "is not itself enough to compel dismissal and remand," but the court's denial of the defendants motion to dismiss the DJ suit was also supported by the court's consideration of the factors set forth by the Fourth Circuit in Nautilus Ins. Co. v. Winchester Homes, Inc. 15 F.3d 371 (4th Cir. 1994), abrogated on other grounds by, Centennial Life Ins. Co. v. Poston, 88 F.3d 255 (4th Cir. 1996). Applying the Nautilus factors established to guide federal district courts as to whether to exercise jurisdiction over declaratory judgment suits or remand to state court when a parallel state court action is pending, this federal court in West Virginia found that the defendants did not meet their burden to justify a dismissal and remand. Specifically, the Nautilus factors require a review of the following: (1) state interests, (2) efficiency, (3) federalism, and (4) "procedural fencing." In each instance, the court found that consideration of these factors did not require a dismissal of the DJ suit from federal court.

TRESSLER COMMENTS

This decision provides guidance to insurers contemplating declaratory judgment actions and considering a choice of venue and forum.

Of course, the fact that the insurer was the first to file its DJ suit in the federal court gave it the benefit of arguing to the court that any "procedural fencing" or forum shopping was that of the defendants as the defendants filed the third party complaint in state court after the federal DJ suit and then moved to dismiss the DJ suit.

Prepared by Joanna Crosby, a partner in our New Jersey office.

Forecast Homes continued from page 2

revisions incorporated in Form-B amounted to an implied recognition that Form-A did not preclude an additional insured from satisfying the SIR, determining instead that the revisions merely provided "further clarification" of the language in Form-A.

Finally, Forecast argued that a rule precluding additional insureds from satisfying SIR requirements violated public policy, because it would leave the additional insured without a defense if the named insureds refused to pay or were incapable of paying the SIR amounts. The Court of Appeal rejected the public policy argument, reasoning that the detailed insurance provisions in the subcontracts could have required the subcontractors to add Forecast as a named insured under their liability policies, or specifically addressed the subcontractor's responsibility for satisfying the SIR. The Court of Appeal further noted that Forecast apparently never requested that the subcontractors satisfy the SIR before proceeding against Steadfast.

TRESSLER COMMENTS

The Court of Appeal's analysis in this decision is based almost entirely upon the language of the SIR endorsements in question, each of which included language specifically providing that Steadfast would not be obligated under the Steadfast Policies unless and until the named insured paid the SIR amount. The decision does not stand for the blanket proposition that an additional insured can never satisfy an SIR. Accordingly, careful attention should be paid to the specific language of the SIR at issue. To the extent there is any ambiguity as to which party may satisfy the SIR amount, the ambiguity is likely to be resolved in favor of coverage.

Prepared by Ryan Luther, an associate in our Orange County office.

CALIFORNIA COURT OF APPEALS HOLDS THAT A "PRODUCTS-COMPLETED OPERATIONS" EXCLUSION PRECLUDES NEGLIGENT SERVICES CLAIMS

In Baker v. National Union Insurance Company, 180 Cal. App. 4th 1319 (Cal. Ct. App. 2009), the California Court of Appeal held that an exclusion for damages falling within the "products-completed operation hazard" applied to negligent inspection services that were only remotely related to a product.

American National Fire Insurance Company's ("American") insured, Four Winds Day Camp, Inc. ("Four Winds"), sold one of its used buses to La Shaun Clemmons. After the sale, Four Winds inspected the bus for the California Highway Patrol's change of ownership inspection. Several months later, Clemmons sustained fatal injuries in an accident when the driver's side seat broke loose and ejected her through the front windshield.

Clemmons' heirs filed a wrongful death lawsuit against Four Winds based on its negligent inspection of the bus. American denied Four Winds' tender of defense based on an exclusion for damages arising within the "products-completed operations hazard" definition in the policy (the "Products-Completed Operations Exclusion"). American also rejected an offer to settle the wrongful death action within policy limits. The heirs obtained a judgment above the policy limits. In return for a covenant not to execute, the heirs acquired Four Winds' rights under the policy and filed a breach of contract and bad faith action against American.

The trial court denied American's motion for summary judgment, which was based on the Products-Completed Operations Exclusion, holding that the exclusion only applied to product liability related claims, not to negligent inspection claims. The Court of Appeal reversed. It held that the Products-Completed Operations Exclusion precluded claims for damages due to "your [Four Winds'] products," once they were out of Four Winds' possession, or from "your [Four Winds'] work", once it was completed and put to use away from Four Winds' premises. Since the policy defined "your product" and "your work", the Court of Appeal rejected American's argument that the Products-Completed Operations Exclusion applied to Four Winds' products or for Four Winds' work *on its own products*.

TRESSLER COMMENTS

The Court of Appeal provided a well-reasoned roadmap for interpreting similarly worded Products-Completed Operations Exclusions. It also distinguished the 40-year-old holding in Insurance Co. of North America v. Electronic Purification Co., 67 Cal. 2d 679 (1967). The California Supreme Court interpreted a somewhat similarly worded "products hazard" exclusion and held the exclusion applied to products and completed operations involving a product. In reaching that conclusion, the Electronic Purification Court admitted that it was not willing to narrow coverage by expanding the application of the exclusion. Here, it appears that the Court of Appeal will now strictly construe the wording of these types of exclusions, even if it means limiting the coverage that would have been otherwise available under the holding in Electronic Purification.

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

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SIXTH CIRCUIT HOLDS THAT DAMAGE TO A GENERAL CONTRACTOR'S PROJECT IS NOT COVERED "PROPERTY DAMAGE" UNDER INDIANA LAW

In Cincinnati Ins. Co. v. Beazer Homes Investments, LLC, 2010 U.S. App. LEXIS 2351 (6th Cir. Feb. 4, 2010), the Sixth Circuit, applying Indiana law, held damage to a general contractor's project does not constitute covered "property damage."

Beazer Homes Investments, LLC ("Beazer") incurred the costs of repairing homes by the work of Crossman Communities, LLC's ("Crossman") subcontractors. Crossman was a general contractor for the construction of houses in a subdivision near Lexington, Kentucky from 1998 to 2002. Crossman merged into Beazer in 2002. After the homes were completed, several homebuyers complained of damage caused by water intrusion into the homes. Beazer incurred the costs of repairing the homes.

Cincinnati Insurance Company ("CIC") issued a commercial general liability policy to Beazer that covered "ultimate net loss" that Beazer was legally obligated to pay because of "property damage" caused by an "occurrence." Beazer submitted a claim to CIC and sought reimbursement for the costs of repairing the damaged homes. CIC filed a declaratory judgment action against Beazer seeking a declaration that it had no obligation to pay for the repairs.

Beazer argued that CIC was collaterally estopped from contesting coverage because of a prior South Carolina lawsuit between CIC and Beazer. In 2007, a South Carolina state court had issued a declaratory judgment ruling in a prior dispute between CIC and Beazer involving damage to homes in different states in similar cases. Applying South Carolina law, the South Carolina court found that damage to those homes caused by the defective work of subcontractors was "property damage" caused by an "occurrence" and fell within the coverage of the policy.

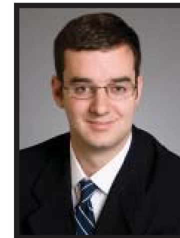
The Sixth Circuit held that CIC was not estopped from denying coverage. It found that collateral estoppel " 'bars subsequent relitigation of a fact or issue where that fact or issue was necessarily adjudicated in a prior cause of action' between the same parties or their privities, but is appropriate only where the 'precise issue' in a subsequent case was raised and litigated in the prior proceeding." Beazer argued that the "precise issue" in the two actions was the same: whether "the Policies covered the damage to the homes because it was 'property damage' caused by an 'occurrence.'" The court disagreed, holding, "[c]ollateral estoppel does not bar the relitigation of issues where the legal rules governing a specific case or issue are different." Because Indiana law governed the parties' dispute, the Sixth Circuit found the parties' prior action, which was governed by South Carolina law, did not have preclusive effect.

The Sixth Circuit then turned to the merits of the claim. Beazer argued that CIC owed coverage because the damage caused by water intrusion constituted "property damage" caused by an "occurrence." Beazer attempted to distinguish between repairs to "faulty components" and damage to "properly constructed parts of the houses that were damaged as a result of the faulty components," arguing that the latter constituted "property damage." The Sixth Circuit found that "property damage," as defined by the policy, did not include damage to the contractor's "own work." Further, the court found that "each completed house" was the work of Beazer.

Beazer also pointed to the "your work" exclusion, which contained an exception for property damage caused by the work of the insured's subcontractors. Beazer argued that if property damage did not include damage to work done by subcontractors, then the "your work" exclusion would be rendered "superfluous." However, the Sixth Circuit rejected this argument, noting that "the Indiana Supreme Court has rejected the concept that exclusion clauses can be interpreted to enlarge coverage." The court held that "CGL policies cover the risk of damage to property other than the project itself."

TRESSLER COMMENTS

This decision is interesting because while the court focused on the definition of "property damage" in finding that coverage was not owed, nothing in that definition draws a distinction between damage to property the insured constructed and damage to other property. If the policy was never intended to cover damage to property constructed by the general contractor's subcontractors, why does the "your work" exclusion carve out of the exclusion that category of damage?



Prepared by Michael DiSantis, an associate in our Chicago office.

INSURER FOR SUBCONTRACTOR ON A CONSTRUCTION PROJECT CAN SEEK EQUITABLE CONTRIBUTION FROM OTHER SUBCONTRACTOR INSURER WHERE BOTH INSURERS PROVIDE ADDITIONAL INSURED COVERAGE TO SAME GENERAL CONTRACTOR

In American States Insurance Company v. CFM Construction Company, Case No. 02—08—0781, 2010 Ill. App. Lexis 14 (Illinois Appellate Court, Second District, January 12, 2010), the court held that an insurer that paid the entire settlement on behalf of an additional insured could seek reimbursement from the other insurer that also provided additional insured coverage under the doctrine of equitable contribution.

This case stems from a coverage dispute over whether the doctrine of equitable contribution under Illinois law can be used by an insurer to seek reimbursement of indemnity payments from another insurer that declined coverage. The action arose out of an accident at a construction site. The general contractor subcontracted with NF Construction ("NF") to provide carpentry services and to supervise the construction of the project. American States Insurance Company issued a commercial general liability policy to NF. This policy named the general contractor as an additional insured. The general contractor also subcontracted with International Decorators on the project. Michigan Mutual Insurance Company ("Michigan") insured International Decorators as a named insured and the general contractor as an additional insured. An employee of International Decorators was injured on the project and sued NF and the general contractor. The general contractor tendered its defense and indemnity to American and Michigan as an additional insured under the respective policies. Michigan agreed to defend. American refused to contribute to the defense and indemnity of the general contractor. The additional insured endorsement in the American policy provided that the general contractor was an additional insured only with respect to liability arising out of the subcontractors' "ongoing operations" performed for the general contractor.

Procedurally, the dispute between the parties dated back to 2005 where the trial court found that American owed a defense obligation to the general contractor as an additional insured under the policy. That holding was affirmed on appeal in American States Insurance Co. v. CFM Construction Co., No. 2—05—0077 (2005). In the present dispute, the underlying parties and Michigan agreed to a settlement. Michigan agreed to pay the sum of $700,000 on behalf of the general contractor to resolve the underlying lawsuit. American refused to participate in the settlement on behalf of the general contractor and filed an amended complaint seeking a declaration that it had no indemnity obligation. Michigan filed a counterclaim seeking reimbursement for half of the $700,000 settlement amount.

The trial court found that Michigan could not recover under the theory of equitable contribution because the policies of Michigan and American did not cover the same risk. The policies provided additional insured coverage to the general contractor with respect to liability arising out of the respective named insureds' work. Because the subcontractors worked on different portions of the project there was no mutual risk. The trial court determined, however, that the operation of the "other insurance" provisions in the policies required American to reimburse Michigan $350,000 of the settlement amount. American appealed the decision of the trial court.

On appeal, the Illinois Appellate court initially noted that the doctrine of equitable contribution allows an insurer that has paid an entire loss to be reimbursed by other insurers that are also liable for the loss. The purpose of this doctrine is to provide a remedy when one insurer had paid a debt that is equally owed by another insurer. However, for the doctrine to apply the two insurers must provide concurrent policies that insure the same entities and the same "risks". American argued that the doctrine of equitable contribution did not apply because its policy insured the general contractor for the general contractor's liability arising out of NF's work which had no connection to the work performed by International Decorators. The Appellate Court disagreed. The Appellate Court reasoned that the term "ongoing operations" as described in the additional insured endorsement encompassed NF's supervision of the construction project. Because the general contractor hired NF to supervise the construction of the project, both American and Michigan insured the same risk. As the supervisor of construction, NF was responsible for supervising the subcontractors, including International Decorators. Using this analysis, the appellate court distanced itself from the holding in Home Insurance Co. v. Cincinnati Ins. Co., 213 Ill.2d 307 (2004), where the Illinois Supreme Court found that for equitable contribution to apply the policies must insure the same entities, the same interests and the same risks. Therefore, both American, through NF's supervision of the site, and Michigan insured the same risk, the general contractor's supervisory liability arising out of International Decorators' acts or omissions.

American next argued that it had no duty to indemnify because the injured employee made incompatible tort claims against the subcontractor and the general contractor. The injured employee alleged that both the general contractor and NF supervised the construction of the project. NF had denied it was the construction supervisor. The Appellate Court did recognize that the duty to indemnify is narrower than the duty to defend and that the duty to indemnify turns on whether a claim is covered. The Appellate Court, however, found that American could not factually support its argument that NF was not the construction supervisor on the project. American provided no facts to rebut the allegations in the complaint that NF had supervisory duties on the project. The Appellate Court affirmed the trial court judgment based on the doctrine of equitable contribution, and thus did not address the "other insurance" provision of the policy.

TRESSLER COMMENTS

This case provides further support for seeking reimbursement of defense costs and indemnity from insurers who have refused to participate in the defense or indemnity of a mutual insured. The Illinois appellate court reached its conclusion by broadly interpreting the equitable contribution doctrine and the requirement that the insurers insure the same "risks."

Prepared by Anthony Balice, an associate in our Chicago office.

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THE CALIFORNIA COURT OF APPEAL HOLDS NO ADVERTISING INJURY COVERAGE FOR INJURIOUS FALSEHOOD CLAIMS WHERE COMPLAINT LACKS SPECIFIC REFERENCE TO UNDERLYING PLAINTIFF

In Total Call International, Inc. v. Peerless Insurance Company, 181 Cal. App. 4th 161 (Cal. Ct. App. 2010), the insured, Total Call International, Inc. ("TCI"), filed suit against its insurer, Peerless Insurance Company ("Peerless"), for breach of insurance contract, bad faith, unfair business practices and declaratory relief with respect to Peerless' denial of a defense obligation for the underlying lawsuit.

IDT Telecom, Inc. and Union Telecard Alliance, LLC (collectively "IDT"), two of TCI's competitors in the prepaid domestic and international phone card industry, sued TCI in the underlying lawsuit. The lawsuit asserted claims for deceptive business practices, false advertising and unfair competition. IDT alleged that it is the leading provider of prepaid phone cards, an industry that is driven by brand loyalty and price. Consumers allegedly receive information about the phone cards from advertising and voice prompts, which provide the consumer with information on the remaining calling time on a particular card. IDT alleged that as a result of its provision of high quality and low priced services, it has garnered good will and a loyal customer base.

TCI allegedly marketed its phone cards through "point of purchase posters, television and radio advertisements, packaging and voice prompts." IDT alleged that TCI failed to provide the minutes advertised to consumers on its posters, television and radio advertisements, packaging and voice prompts, allegedly only providing approximately 60% of the minutes promised. IDT claimed that TCI's conduct damaged IDT's reputation of being the best prepaid calling card provider, as well as the reputation generally of the prepaid calling industry. IDT further claimed that much of its market share has been destroyed by TCI's misleading promise to provide minutes that were never delivered to the consumers.

In the coverage litigation, TCI first argued that the claims in the underlying lawsuit fell within the "advertising injury" offense of "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," given the allegations of damage to IDT's reputation. The court noted that in order to state a claim for any of the torts that fall within this offense, whether it be defamation, product disparagement or trade libel, it is required that the injurious false statement "specifically refer to, or be 'of and concerning' the plaintiff in some way." The court found that because the underlying complaint contained no specific reference to IDT or its cards, there was no claim for an injurious false statement potentially falling within the "advertising injury" coverage. The court also rejected TCI's argument that the allegations of damage to reputation were sufficient to trigger coverage. The court noted that mere mention of an element of a covered claim does not trigger a duty to defend where the facts, as a whole, demonstrate no such claim is asserted. The court further noted that the duty to defend is not triggered by speculation about additional facts or potential amendments to the complaint in the future.

The court also found that the exclusion for "advertising injury" "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the named insured's] 'advertisement'" precluded coverage for the underlying complaint. The court rejected the insured's argument that the exclusion was ambiguous and should be reasonably interpreted to apply only to claims brought by consumers and not competitors, noting that the exclusion does not suggest, in any manner, that it relates only to consumer claims. The court also noted that various courts have found this exclusion bars coverage for lawsuits brought by competitors alleging that the "insured's advertising misrepresented the quality or price of the insured's own product."

The court also found no abuse of discretion with respect to the trial court's sustaining of the demurrer without leave to amend, as TCI offered no amendments before the trial court or an appeal.

TRESSLER COMMENTS

This case confirms that insurers have no duty to defend under the "personal injury," "advertising injury" or "personal and advertising injury" coverage of a commercial general liability policy where the underlying lawsuit merely alleges damage to reputation. Rather, an underlying case must contain specific references to the underlying plaintiff and/or underlying plaintiff's business or products in order to trigger a defense obligation. The case also supports a broad application of the exclusion for "advertising injury" "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the named insured's] 'advertisement.'"

Prepared by Dana Ugolini, an associate in our Chicago office.

INDIANA COURT OF APPEALS FINDS INSURED'S CONTACT WITH ENVIRONMENTAL AGENCIES STARTS CLOCK RUNNING ON INSURERS' LATE NOTICE DEFENSE TO COVERAGE

In P.R. Mallory v. American Cas., 920 N.E.2d 736, 2010 Ind. App. LEXIS 91 (Ind. App. 2010), the Indiana Court of Appeals held that an insured provided late notice of its environmental claim, thus vitiating coverage, when a state agency began its investigation of the pollution 16 years before the insured provided notice to its insurer. The insured, Radio Materials Corporation, manufactured picture tubes for televisions. Shortly after being purchased by P.R. Mallory, Radio Materials opened a plant in Attica, Indiana. From approximately 1950 to 1980, P.R. Mallory disposed of industrial wastes into two pits at the plant known a "Site A" and "Site B." Ultimately, P.R. Mallory sold its assets back to Radio Materials, who then sought coverage for the pollution that occurred during the years P.R. Mallory owed the plant.

The appellate record reflected that Radio Materials and its successors had a significant amount of contact with state and federal agencies concerning the pollution at the Attica plant. In May 1969, the Indiana State Board of Health contacted Radio Materials concerning the presence of industrial wastes settling in the two pits and into a nearby ditch. The Indiana State Board of Health sent another letter to Radio Materials in 1972 stating it must address the pollution in a nearby creek caused by its dumping into one of the pits at the Attica plant. In 1980, Radio Materials informed the EPA that it was "a generator of hazardous waste" and stored

hazardous waste at its Attica plant.

In addition to its contract with state and federal agencies, there were a number of incidents where it was apparent that Radio Materials had grown concerned, or at least should have been concerned, with the pollution in Site A and Site B. For example, Radio Materials' board of directors discussed whether they should inform prospective buyers of the assets of Radio Materials "about their potential liability for clean up of hazardous wastes generated and buried underground here during the Mallory years." Radio Materials also retained its own environmental engineers to conduct tests on the two sites. Following the recommendations of the environmental engineers, Radio Materials excavated the area from November 1995 through February 1996.

By December 2004, Radio Materials had filed a declaratory judgment action seeking coverage for the costs and expenses incurred in the clean-up of Site A and Site B. The insurers moved for summary judgment, arguing that Radio Materials failed to provide notice "as soon as practicable" as required by the notice provisions in the policies. The trial court granted the insurers' motion, finding that Radio Materials should have provided notice of its claim after the Indiana Department of Environmental Management began its investigation sixteen years earlier and finding that the insurers were prejudiced by the late notice. Radio Materials appealed.

The Court of Appeals concluded that Radio Materials did not provide notice "as soon as practicable" because it "had knowledge of an occurrence" long before notice was given. The Court of Appeals then affirmed the trial court's holding that the insurers were prejudiced. Under Indiana law, prejudice to an insurer is presumed once it is shown that there was an unreasonably long delay in giving notice to an insurer, but that presumption of prejudice can be overcome by evidence showing that no actual prejudice occurred. Radio Materials took the position that the insurers could not have been prejudiced because even if notice had been timely, the insurers would have denied coverage anyway on other grounds. The Court of Appeals rejected this argument, noting that just because the insurers "maintained there was no coverage based upon other grounds," it did not preclude them from raising late notice and did not rebut the presumption of prejudice.

Radio Materials had also asserted that the insurers were not prejudiced because they provided no evidence they would have handled the claim differently had notice been timely. In fact, Radio Materials pointed out that the insurers' own expert had "praised the investigatory and remedial work being performed at the Attica site by the environmental consultant" hired by Radio Materials after notice had been given. The Court of Appeals rejected this argument, holding that it was not sufficient to rebut the presumption of prejudice that arose under Indiana law. Ultimately, the Court of Appeals affirmed the ruling of the trial court, which had found that the insurers had been prejudiced because, among other things, Radio Materials had entered into a consent decree and had engaged in various clean-up efforts, some of which actually exacerbated the problems, without the knowledge, consent or participation by the insurers, thus depriving them of their rights under the policies.

TRESSLER COMMENTS

P.R. Mallory is noteworthy in that it recognizes that an insured has fundamental obligations under a policy and recognizes that timely notice of a claim is not a mere formality or technicality. Rather, an insured must provide timely notice in order to allow an insurer adequate time to investigate circumstances giving rise to a claim. P.R. Mallory also provides an example where a court found an insurer was actually prejudiced by the insured's late notice.

Prepared by Todd Rowe, an associate in our Chicago office.

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NEW YORK THIRD DEPARTMENT RULES THAT DESPITE THE COMPLETION OF PHYSICAL CONSTRUCTION WORK, REQUIRED TESTING OF THE WORK ALSO CONSTITUTES "ONGOING OPERATIONS"

In Town of Fort Ann v. Liberty Mutual Ins. Co., 2010 N.Y. App. Div. LEXIS 582 (3d Dept. Jan. 28, 2010), the Third Department of New York's Appellate Division, expands the interpretation of "ongoing operations" to find the Town an "additional insured."

The New York Supreme Court, Appellate Division, for the Third Department held that Defendant, Liberty Mutual Insurance Company ("Liberty Mutual") owed a duty to defend Plaintiff, Town of Fort Ann ("the Town") against the underlying claims for property damage as a result of the failure of a dam owned by the Town. The court found the Town qualified as an additional insured under a CGL policy issued by Liberty Mutual to Kubricky Construction Corporation ("Kubricky') because Kubricky had "ongoing operations" at the dam construction site when the dam failed.

Prior to the dam failure, the Town entered into a contract with Kubricky for construction work on the dam. The Town also entered into a contract with Heynan Teale Engineers ("Heynan") for engineering services related to the dam construction. The dam subsequently failed, and numerous lawsuits were filed against the Town and others. The Town sought a defense and indemnity from Liberty Mutual, Kubricky's CGL insurer, and Steadfast Insurance Company ("Steadfast"), Heynan's CGL insurer. Both insurers denied coverage to the Town because they claimed, in part, the Town did not qualify as an additional insured under the policies.

The Town filed a declaratory judgment action and asked the court to declare, among other things, that Liberty Mutual and Steadfast owed a duty to defend and indemnify the Town with respect to the underlying claims. The court noted the Town had the burden to establish its coverage as an additional insured under the policies. The court ultimately concluded the Town met its burden.

The Liberty Mutual policy "extended additional insured status to an entity when Kubricky's written contract to provide work for the entity required such coverage." The contract between Kubricky and the Town required Kubricky to maintain insurance for the Town until the construction project was complete.

Liberty Mutual argued the Town did not qualify as an additional insured under its policy because Kubricky no longer had ongoing operations at the project when the dam failed. The court disagreed. According to the court, "the term 'ongoing operations' is interpreted broadly in New York." For example, "[w]ork may be considered as ongoing during a short lapse of time necessary to conduct tests designed to assure proper performance where such testing is an essential element of the work by the insured." Although Kubricky's "major construction" at the project was completed one to two months before the dam failure, the work had not yet passed inspection by an engineer, which was required by Kubricky's contract with the Town. The court noted that in light of the nature of the project, "such inspection was not merely a minor after-the-fact detail." Therefore, the court concluded Kubricky still had "ongoing operations" at the project at the time of the dam's failure and thus, the Town qualified as an additional insured under the Liberty Mutual policy.

The court also concluded the Town qualified as an additional insured under the Steadfast policy. The contract between the Town and Heynan provided that a certificate of insurance would be produced to the Town as an additional insured upon request. The Steadfast policy provided that a client of Heynan would qualify as an additional insured when required by a written contract. The Town did not request a certificate of insurance until after the dam failure. The court concluded, "[t]he status of the Town as an additional insured is not made contingent upon the request for a certificate of insurance." The court also determined the written agreements evidenced intent to include the Town as an additional insured in the Steadfast policy. Therefore, the court found Steadfast also had a duty to defend the Town.

TRESSLER COMMENTS

This case exemplifies a New York's court's willingness to broadly interpret policy terms, such as "ongoing operations," to justify extending coverage to an additional insured under the policy. The term "ongoing operations" is generally not defined in CGL policies, and New York is among many courts which have shown a willingness to construe the term broadly in favor of coverage.

Prepared by Amber Coisman, an associate in our Chicago office.

TEXAS SUPREME COURT FINDS THAT EVEN IF A DUTY TO DEFEND DOES NOT ARISE FROM THE PLEADINGS PURSUANT TO THE EIGHT-CORNERS DOCTRINE, A DUTY TO INDEMNIFY MAY NEVERTHELESS ARISE

In D.R. Horton-Texas, Ltd. v. Markel International Insurance Company, Ltd., Case no. 06-1018, 2009 Tex. LEXIS 1042 (Tex. Dec. 11, 2009), a general contractor, as an additional insured on its subcontractor's commercial general liability ("CGL") insurance policy, sought a defense and coverage from the insurer for alleged construction defects to a home, whereby the homeowners alleged that latent defects in the chimney, roof, vent pipes, windows, window frames, and flashing around the roof and chimney allowed water to enter the house, eventually causing mold damage. The homeowners' petition only identified the general contractor as responsible for the defects and negligent attempts to repair them, however, the general contractor claimed that its masonry subcontractor performed masonry work on the home as well as some of the repairs contributing to the alleged defects.

The insurer refused to defend the general contractor because the underlying petition did not plead facts indicating that the masonry subcontractor's work was defective and, thus, did not invoke coverage under the CGL policy for the general contractor. The general contractor settled with the homeowners, and a lawsuit ensued against the CGL insurer by the general contractor.

The insurer moved for summary judgment, arguing that it had no duty to defend the general contractor, as the petition did not contain allegations triggering coverage. The general contractor contended that, although the eight-corners doctrine may limit the insurer's duty to defend and indemnify the additional insured, the homeowners' pleadings should be liberally construed in favor of a defense and coverage. The general contractor attached extrinsic evidence, including affidavits, inspection reports, the subcontract, depositions in the underlying action, and mold investigation reports.

On appeal, the court affirmed the trial court's ruling that the insurer had no duty to defend or indemnify the general contractor, explaining that the eight-corners doctrine precluded the general contractor's claim that the insurer owed a duty to defend because there were no allegations on the face of the petition that implicated the subcontractor's work. The court of appeals also reasoned that because the insurer had no duty to defend, it also had no duty to indemnify the general contractor.

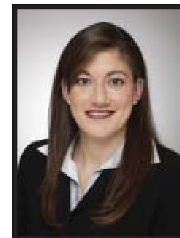
The Texas Supreme Court rejected this reasoning, finding that, while the eight-corners doctrine has been strictly applied to the analysis of the duty to defend, "it is well settled that the 'facts actually established in the underlying suit control the duty to indemnify.'" The Texas Supreme Court found that even if a duty to defend does not arise from the pleadings, a duty to indemnify could arise from proof of the allegations in the petition, as these duties are independent, and the existence of one does not necessarily depend on the existence or proof of the other. The court noted:

> The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case. We hold that even if… [the insurer] has no duty to defend… [the general subcontractor], it may still have a duty to indemnify… [the general contractor] as an additional insured under… [the subcontractor's] CGL insurance policy. That determination hinges on the facts established and the terms and conditions of the CGL policy.

The Texas Supreme Court further explained that the general contractor presented evidence with its response to the insurer's summary judgment motion that showed the masonry subcontractor was a subcontractor for the general contractor for the home, the masonry subcontractor performed masonry work and repairs allegedly contributing to the defects, and the CGL policy for the masonry subcontractor named the general contractor as an additional insured. The Texas Supreme Court reasoned that this evidence raised fact questions that defeated the insurer's motion for summary judgment on the duty to indemnify claim. Accordingly, the Texas Supreme Court reversed the judgment on the duty to indemnify, remanding the duty to indemnify issue to the trial court for proceedings.

TRESSLER COMMENTS

This case is significant because, while a CGL insurer may strictly rely on the eight-corners doctrine in Texas in determining whether it has a duty to defend an insured, extrinsic evidence may be used to go beyond the eight-corners doctrine, establishing a duty to indemnify. Also noteworthy is that the Texas Supreme Court made it clear that even if there is no duty to defend in a particular case, there still may be a duty to indemnify, as these duties are independent of each other.



Prepared by Linda Corrie, an associate in our Orange County office.

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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

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