APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

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ILLINOIS

No Defense Owed Construction Firm Where Allegations of Damage Could Only Be Tied to Work Required by Contract

In *Westfield Ins. Co. v. Zaremba Builders II LLC*, 2022 U.S. Dist. Lexis 36189 (N.D. Ill. March 2, 2022), the insured, Zaremba Builders II, LLC (and related entities) (collectively "Zaremba") contracted to build a home in Chicago for the Vrdolyak Trust ("Vrdolyak"). The contract required Zaremba to supervise the construction of the home and provide all labor, materials, tools and other resources needed to complete the project. Upon completion, Vrdolyak sued Zaremba alleging contract overages and the use of improper building materials, while asserting poor construction resulted in "serious structural and aesthetic issues." *Id*. at 1-2.

Westfield Insurance Company ("Westfield") issued a general liability policy to Zaremba for the relevant period. Upon receipt of the complaint, Westfield filed a declaratory judgment action in district court seeking a ruling that it owed Zaremba no duty to defend or indemnify. Westfield sought summary judgment on both issues, which was opposed by Zaremba and Vrdolyak. *Id*. at 2.

Westfield argued it only provided coverage for third-party damage caused by an "occurrence," which does not include damage to contracted-for projects where such damage is the "natural and ordinary consequence of faulty construction." Zaremba argued the allegations of the complaint included negligence, such that an "occurrence" triggering a duty to defend was in fact pled. *Id*. at 15-16.

In ruling for Westfield, the court relied heavily on the allegations of the complaint as tied to the project:

> The Policy defines "property damage" as "physical injury to tangible property" and "loss of use of tangible property that is not physically injured." But when the alleged damage occurred in the course of a construction project, "tangible property" must be **outside the scope** of the contracted-for project. In other words, courts have "repeatedly recognized that while a CGL policy will not insure a contractor for the cost of correcting construction defects, damage to something other than the project itself does constitute an 'occurrence' warranting coverage."

> Here, the scope of Zaremba's construction project encompassed the entire home. And the Vrdolyak Complaint alleges only damage to the structure itself- that is, damage that falls within the scope of Zaremba's contract…Critically, all of this alleged damage constitutes damage to the very house Zaremba was contracted to build; as such, it does not qualify as "property damage" under the terms of the policy. This conclusion remains true regardless of whether the Vrdolyak Complaint contains any allegations that could constitute an "occurrence," without considering which property was damaged. *Id*. at 14-15 (citations omitted).

Zaremba attempted to "find coverage" by claiming alleged damage to something other than the house, specifically dents in the clothes dryer and damages to kitchen cabinets. The court dismissed this argument as contrary to the scope of work Zaremba assumed by contract:

> Contrary to Zaremba's position, however, both the clothes dryer and the cabinets were part of the project and thus cannot qualify as damage to "other property" so as to trigger coverage. That the clothes dryer was included in the scope of the project is supported by numerous documents in the record…Moreover, a clothes dry is undoubtedly part of the contemplated scope of a contract to build a house with a laundry room. And finally, the Vrdolyak Trust included the dented dryer on its "punch list" of items that it believed Zaremba was contractually required to repair.
>
> Similarly, both common sense and the record confirms that the kitchen cabinets fell within the scope of the project. Kitchen cabinets are undoubtedly included in a contract to build a house with a kitchen; indeed, in the "Cabinets" section of the Specification, "Kitchen Cabinets" are expressly listed. And again, the damage to the cabinets was recorded in the "punch list" as a repair Zaremba was contractually required to make. *Id*. at 20.

Finally, the court summarily rejected the insured's argument that the analysis of property damage changed under the policy's products-completed operations coverage. It specifically noted that when damage takes place did not change the inquiry as to what was damaged. "[T]he purchase of Products-Completed Operations coverage does not mean that, once the project is complete, any damage **to the project** itself is covered." *Id*. at 21-22.

The *Zaremba* decision represents a textbook application of Illinois law to a construction defect claim. What is curious about the opinion is its failure to reference a "Damage to Your Work" exclusion, which, in many CGL policies, includes an exception for damage to "your work" arising out of work performed by a subcontractor. Perhaps no subcontractors were involved in this project.

ILLINOIS

No Duty to Defend Additional Insured Where Underlying Complaint Did Not Allege Negligence on Part of Injured Worker or Named Insured Employer

In *AIX Specialty Ins. Co. v. Raincoat Roofing Systems, Inc.*, 2022 U.S. Dist. LEXIS 43971 (N.D. Ill. March 11, 2022), Raincoat Roofing Systems, Inc. ("Raincoat") hired Chano's Roofing Corporation ("Chano's") to perform some of the roofing work on a project in Franklin Park, Illinois. The Master Subcontract Agreement ("MSA") signed by Chano's required that Chano's add Raincoat as an additional insured on its policies for all projects upon which Chano's worked. It further required that Chano's "perform, furnish and provide all labor, materials, equipment, tools, scaffolding, hoisting and fall protection, and other facilities, things and services necessary or proper or incidental to the performance and completion of the work to be performed by Subcontractor." *Id*. at 4-5.

On September 14, 2017, a Chano's employee was using a hoist to lift gutters onto the roof when one of the gutters came into contact with a power line, fatally electrocuting him. His wife and estate filed suit against Raincoat, alleging it "erected and placed" the hoist on the roof and was negligent in (1) erecting a hoist in close proximity to power lines; (2) directing the deceased to use the hoist to lift metal objects so close to the power lines; (3) failing to contact the power company to cover the lines near the roof; and; (4) failing to warn roofers of the presence of the live power lines. The complaint did not allege negligence on the part of Chano's and only mentions Chano's was the deceased worker's employer and Raincoat's subcontractor. *Id*. at 2-3.

AIX Specialty Insurance Company ("AIX") issued a general liability policy to Chano's for the relevant period. The AIX policy noted that Section II – Who Is An Insured was amended to:

> include as an additional insured any person or organization for whom (Chano's) is performing operations when (Chano's) and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured. Id. at 6.

Upon receipt of Raincoat's tender, AIX filed a declaratory judgment seeking a ruling that it owed Raincoat no defense because the underlying action alleged no negligence on the part of Chano's. Raincoat's own general liability insurer, National Fire Insurance Company of Hartford ("National Fire"), intervened and alleged a defense was owed Raincoat because the complaint must be read (broadly) in light of the employer's tort immunity under the worker's compensation laws. AIX and National Fire each moved for summary judgment. *Id.* at 10-11.

The district court asserted the crux of the dispute

centered upon (1) whether the underlying complaint alleged facts potentially triggering coverage; and/or (2) whether extrinsic evidence might otherwise give rise to the potential the accident was caused, in whole or in part, by Chano's negligence. While recognizing the worker's compensation statute means employees "seldom allege negligence against their employers in these (tort) actions," the court nonetheless found the underlying complaint lacked any allegations supporting Chano's responsibility for the accident:

> In National Fire's view, all it takes to trigger AIX's duty to defend is that Chano's worker was on the job site pursuant to this subcontract… Although courts must construe insurance policies and complaints liberally in favor of imposing a duty to defend, National Fire's contention that a duty to defend exists based solely on the fact that Chano's was a subcontractor that performed some of the roofing work stretches the doctrine beyond its boundaries. Notwithstanding the need to consider the implications of worker's

compensation exclusivity on the allegations of the underlying complaint, Illinois law requires the pleading of some alleged acts or omissions by Chano's suggesting that it is liable for the injuries claiming in the underlying suit…

The lesson of these cases is that it doesn't take much for an underlying complaint to trigger a policy's additional insured coverage, but there must be some fact alleged, if only indirectly, that potentially brings the underlying lawsuit within the scope of the policy. National Fire's problem is that it can point to no such allegation. *Id*. at 12, 14, 19-20 (citations omitted).

National Fire further contended the MSA "bolstered" Raincoat's case for triggering additional insured coverage, given the subcontract specifically mentioned Chano's would provide "scaffolding, hoisting, fall protection and other facilities, things and services necessary and proper" and that it would "take all necessary safety precautions with respect to [its] Work…" Given the allegations surrounding hoisting and safety, National Fire asserted the MSA must be read in conjunction with the complaint and raised the possibility Raincoat could be held vicariously liable for Chano's acts or omissions. *Id*. at 24.

In ruling for AIX, the district court took issue with National Fire's reliance upon the MSA and its interpretation of authority it presented to the court:

> National Fire relies on *CSR Roofing* as an example of a court looking to a subcontractor's obligations in an MSA with respect to safety to find the potential for liability. In *CSR Roofing*, a subcontractor's employee was injured when he fell off a roof, and the contractor tendered its defense to the subcontractor's insurer. Because the MSA in that case provided that the subcontractor was responsible for complying with safety regulations, National Fire says, the Court held that there was the potential for the additional insured to be held vicariously liable for the named insured's failure to follow safety regulations. But the court in CSR Roofing did not ground its decision on the MSA – in the same paragraph cited by National Fire for the proposition that its MSA is dispositive, the court identified the actual foundation for its reasoning: "Seeing as the amended complaint alleges a lack of adequate safety equipment in the violation of OSHA, we find it at least possible that CSR could be found vicariously liable for the [named insured's] failure to ensure compliance with OSHA regulations." The MSA in that matter was merely used to "confirm" the potential based on facts alleged in the underlying complaint, that the additional insured could be found vicariously liable for the named insureds negligence...
>
> Even if the court were to look to the MSA to find a potential for liability based upon acts or omissions by Chano's where the underling complaint suggests none, the language of the MSA does not support National Fire's position. National Fire seizes on the MSA because it makes Chano's responsible for providing hoisting, and the underlying complaint alleges a hazardous condition related to hoisting. This simplistic equation does not hold up to scrutiny. As AIX points out, the [underlying] complaint does not allege that the hoist supplied by Chano's was defective or that Chano's performed its role in operating the hoist negligently. It alleges that Raincoat erected the hoist too close to the high voltage power lines, that Raincoat erected the hoist too close to high voltage power lines, that Raincoat was responsible for that hazardous condition, and it failed to warn Mr. Zuniga and other Chano's employees about the danger. The MSA therefore, does not help National Fire. *Id*. at 25-27 (citing *Pekin Ins. Co. v. CSR Roofing Contractors*, 2015 III. App (1st) 142473 (2015).

The *Raincoat* decision demonstrates the difficulties courts face in evaluating additional insured tenders where the injured party's employer isn't (and can't be) a defendant in the underlying action. While it is clear the deceased's wife and estate in *Raincoat* did not allege negligence on the part of his employer, other courts have come to different conclusions under similar facts and law.

MASSACHUSETTS

Joint Venture Exclusion Does Not Bar Coverage to Additional Insured for Acts of the Named Insured

In *Bacon Constr. Co. v. Ohio Sec. Ins. Co.*, 2022 U.S. Dist. LEXIS 39378 (D.R.I. March 7, 2022), Bacon Construction Company ("Bacon") and Agostini Construction Company ("Agostini") partnered to renovate a high school in Plymouth, Massachusetts. They informally created a joint venture for bonding purposes and called the enterprise "Bacon Agostini Joint Venture" ("BAJV"). *Id*. at 1-2.

BAJV hired Colony Drywall ("Colony") to perform work on the project. A condition to the project required Colony to add BAJV as an additional insured on its general liability policy. Liberty Mutual Insurance Company ("Liberty") (via related companies) issued primary and umbrella liability policies to Colony. Colony notified Liberty that BAJV was to be named as an additional insured by contract and Liberty presented Colony a certificate of insurance to that effect. *Id*. at 2-3.

An employee of Colony fell while working on the project. He and his wife sued Bacon and Agostini for damages and the companies tendered the lawsuit to Liberty Mutual for a defense. Liberty denied the tenders on the grounds that neither company qualified as a named insured or additional insured under the policies. Bacon and Agostini later filed a declaratory judgment seeking defense and indemnity for the underlying claims. It was undisputed that Bacon, Agostini and BAJV were not named insureds under the policies. *Id*. at 3.

While Liberty did not dispute Colony could add (additional) insureds to Liberty's policies by written contract, it argued a Joint Venture Exclusion in its primary policy modified any such promise. The exclusion expressly stated:

> No person is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

Liberty asserted that this language was unconditional and must be read to preclude coverage for any joint venture that did not appear in the declarations of the policy as a named insured. *Id*. at 13.

In ruling for Bacon and Agostini, the district court determined a "reasonable and practical" reading of the language favored a more limited application of the Joint Venture Exclusion:

> In context, the language most logically excludes coverage to joint ventures *for their own tortious conduct*, the way a named insured is covered. If the language were to be read as the defendants urge, it would result in every joint venture being a "named insured" and would disallow "additional insured" status even though the policy clearly otherwise recognizes it. The court finds the so-called exclusion is therefore inapplicable with respect to the plaintiffs' liability for any conduct of Colony…
>
> The purpose of the joint venture exclusionary clause that the insurers rely on seems to be, as applied in this case, to ensure that Colony, by working with other entities, does not open the insurer up to broad coverage for any entity Colony happens to be working with. Therefore,

the policy limits coverage for other companies to those who are either themselves "named insureds" in the Declaration or who are additional insureds for a specific project carried out with Colony, only concerning the work done by Colony, the "named insured" and only with respect to the acts or conduct of Colony. This is a reasonable construction of an arguable inconsistency, and it considers "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *Id*. at 15-16 (citations omitted).

Liberty also asserted that even if the Joint Venture Exclusion did not apply, (1) BAJV was not a party to the underlying action; and (2) neither individual company (Bacon or Agostini) was an insured under the policy. The district court summarily rejected this argument as a technicality not worthy of defeating coverage:

> While it is important that insurers know with precision what entities and activities their policies extend to, the difference between BAJV and the individual entities in this context is one of form, not substance. The policy coverage was extended to the construction entity contracting with Colony on the Plymouth High School project. BAJV is not an independent legal entity having an identity separate from its constituent members…

The insurers' argument that their coverage would extend only to BAJV if it had been named in the lawsuit is neither logical nor equitable. Setting aside the insurers' argument that no joint venture could be an insured under the policy (which the Court has rejected), there was a clear intention on the part of all parties to cover any liability that the contractors incurred as a result of Colony's acts on the Plymouth High School policy. That intention was manifested by the signatures on the Subcontract, by Colony's notification to the insurers to add the contractors and by the Certificate that issued. The scope of that coverage – Colony's acts and conduct on the project that led to liability incurred by the contractors – is the same whether the additional insureds are BAJV or the contractors as individual entities. *Id*. at 18-19.

While the *Bacon* court's decision as to the applicability of the Joint Venture exclusion is sound, there was a "casualness" in how the parties managed the joint venture issue that may have driven Liberty's response to the tender. In the end, the district court appeared most concerned with effecting the intent of the parties.

TEXAS

Allegations in "Live" Complaint Trigger Duty to Defend Where Number and Height of Units Constructed Did Not Fall Within Policy Exclusions

In *Certain Underwriters at Lloyd's v. Keystone Dev*., 2022 U.S. Dist. LEXIS 51790 (N.D. Tex. March 23, 2022), Keystone Development, LLC ("Keystone") constructed a residential development known as Cityscape Plaza in Dallas, Texas. Cityscape Plaza Owners Association ("Cityscape") managed and/or maintained the property. Cityscape ultimately alleged Keystone was negligent in designing and constructing the project(s), which resulted in various defects and damage. *Id*. at 2-3.

Casualty Spotlight

Certain Underwriters at Lloyd's ("Lloyd's") issued general liability policies to Keystone for the relevant period. On February 16, 2021, Lloyd's filed a declaratory judgment action in district court seeking a ruling it had no duty to defend or indemnify Keystone for any claims brought against it. Shortly thereafter, Cityscape filed an action in state court seeking monetary damages because of construction defects and physical damage caused by Keystone's negligence. *Id*.

Lloyd's moved for summary judgment on the grounds that two exclusions within its policies barred coverage. The first was a Condominium, Townhouse or Tract Housing Exclusion ("Condominium Exclusion"), which read as follows:

> This insurance does not apply to:
>
> "Bodily injury", "property damage" or "personal and advertising injury" however caused, arising, directly or indirectly, out of, or related to an insured's subcontractor's operations, "your work", or "your product", that are incorporated into a condominium or townhouse project. **This exclusion applies only to projects that exceed 25 units.** This exclusion does not apply if "your work" or "your product" is to repair or replace "your work" or "your product" that occurred prior to completion and certification for occupancy. *Id*. at 15.

The Lloyd's policy also included the following height exclusion:

> This insurance does not apply to:
>
> 1) "Bodily injury", "property damage" or "personal and advertising injury" arising out of:
>
> b) Any job site where you are working, or have worked, on a roof of a building or structure, whether work is completed or not, **in excess of three (3) stories or thirty-six (36) feet in height.** *Id*.

Lloyds filed a motion for summary judgment based upon the two exclusions when Cityscape's original complaint was the only underlying pleading. While the motion was pending, Cityscape filed two amended complaints. Pursuant to Texas' "eight corners rule", the district court determined that a court may only look to the allegations in the "live" complaint to determine if Lloyd's owed a duty to defend. Thus, the court would consider only Cityscape's second amended complaint in completing its analysis. *Id*. at 11.

Cityscape's second amended complaint alleged defects and damage as a result of Keystone's negligence. More specifically, it alleged:

> Cityscape Plaza is a common interest community which was constructed as two separate projects. The first project, located at 1717 Annex Avenue in Dallas, Texas, is comprised of four buildings with 24 three-story condominiums. The second project, located at 1801 Annex Avenue in Dallas, Texas, is comprised of two buildings with 15 three-story condominiums. Cityscape Plaza also contains common elements such as driveways, sidewalks, and a dog park, among other improvements, that are used by tenants of both projects. *Id*. at 12.

Lloyd's asserted all units at Cityscape Plaza must be taken together in applying the 25-unit limitation within the Condominium exclusion. The court rejected this position as contrary to the clear allegations within the second amended complaint:

> When comparing Cityscape's allegations within the four corners of the second amended petition to the four corners of the Policy,

Cityscape alleges sufficient facts to possibly implicate coverage under the Policy. Indeed, the second amended petition outlines two separate projects neither of which includes more than 25 units. Likewise, taking the plain language of the exclusion term within the four corners of the Policy, the exclusion only applies if a project has over 25 units. Because it is unclear if "project" as used in the Policy means the overall completed condominium or, instead, means each project taken individually, the court resolves the issue in favor of the duty to defend. In other words, the court interprets "project" as used in the Policy to mean each individual project, therefore, Cityscape's allegations that one project consisted of 25 units and the other consisted of 15 units falls outside of the exclusion provision within the policy.

With respect to the exclusion regarding projects exceeding three stories or 36 feet in height, the court finds that Cityscape's second amended petition alleges facts that possibly implicate coverage under the Policy and does not allege facts that fall within the exclusion terms of coverage. *Id*. at 17-18.

Lloyd's separately argued the court should consider extrinsic evidence based upon two exceptions to the "eight corners" rule: (1) where such evidence would determine whether coverage was potentially implicated and did not overlap with the merits of the underlying case; and (2) where there is collusive fraud between the insured and the third-party suing the insured. Specifically, Lloyd's alleged that Cityscape and Keystone colluded to describe the construction of Cityscape Plaza as two separate projects to allow each to avoid the application of the Condominium Exclusion. *Id*. at 4, 18-20.

The court rejected both arguments as inapposite to the law and facts presented and granted Keystone summary judgment on the court's own motion:

> [T]he extrinsic evidence (Lloyd's) seeks the court to consider problematically overlap with the merits of the facts alleged in the live petition. The extrinsic evidence pointedly questions the number of units and the number of floors or height of each unit and impermissibly engages the truth or falsity of the facts alleged in the second amended petition…

Second, (Lloyd's) argument regarding the exception set forth in *Avalos* is improper because it was first raised in (Lloyd's) Reply and inapplicable because the conclusive, sworn, and undisputed evidence in *Avalos* is not present here. In *Avalos*, the Texas Supreme Court reasoned… "an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist." …The extrinsic evidence (Lloyd's) submits does not contain the same conclusive evidence of fraud as in *Avalos* and, therefore, is distinguishable. *Id*. at 19-20 (citing *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 882 (Tex. 2020).

Casualty Spotlight

While the allegations of the original (underlying) complaint were not presented, one can assume Lloyd's believed they triggered either (1) the application of the Condominium Exclusion and/or height exclusion; or (2) the consideration of extrinsic evidence proving that to be true. While an amended pleading potentially bringing a matter within coverage can frustrate insurers, the better lesson of *Keystone* is that an insurer alleging fraud on the part of an insured needs to (1) present it properly; and (2) have proof of that fraud down "cold."

Federal Appellate Cases

NINTH CIRCUIT

Allegations of Negligence in Altering Drainage Pattern Could Not Be Separated from Landslide Damage Barred by Subsidence Exclusion

In *Atain Specialty Ins.* Co. v. *JKT Associates, Inc.,* 2022 U.S. App. LEXIS 6351 (9th Cir. March 11, 2022), the insured, JKT Associates, Inc. ("JKT"), was hired by Bianusa in 2011 to perform landscape and hardscape work at her home in Napa, California. After she sold her home to Meese in 2019, a catastrophic landslide occurred which caused portions of the rear of the property to slide 15 feet downhill. Meese sued Bianusa, JKT, the developers of the subdivision and the homeowner's association for damages. The owner of an adjacent property (Synek) filed a separate state court action naming the developer, homeowner's association and various "John Doe" defendants, including JKT. *Id.* at 1-2.

JKT tendered both lawsuits to its general liability insurer, Atain Specialty Insurance Company ("Atain"), which issued a policy in force at the time of the landslide. Atain defended JKT pursuant to a reservation of rights, but filed a declaratory judgment action in district court alleging it owed JKT no defense or indemnity based upon a Subsidence Exclusion within its policy, which read as follows:

> This insurance does not apply and there shall be no duty to defend or indemnify any insured for any "occurrence", "suit", liability, claim, demand or cause of action arising, in whole or in part, out of any "earth movement". This exclusion applies whether or not the "earth movement" arises out of any operations by or on behalf of any insured.
>
> "Earth movement" includes, but is not limited to, any earth sinking, rising, settling, tilting, shifting, slipping, falling away, caving, erosion, subsidence, mud flow or any other movements or land or earth. *Id.* at 2-4.

Atain moved for and was granted summary judgment on the duty to defend based upon the Subsidence Exclusion. The district court further directed JKT to reimburse Atain for $105,608 in defense costs it incurred defending JKT pursuant to a reservation of rights. JKT appealed these rulings. *Id*. at 2-3.

The Ninth Circuit began its review by noting (1) the language of the exclusion was unambiguous; and, (2) a duty to defend could only exist if either underlying action sought redress for non-landslide related damages. JKT pointed to an allegation in the Meese complaint noting its negligence in changing drainage patterns and water accumulation as evidence of potential damage to property before the landslide occurred. *Id*. at 4-6.

In affirming the district court's ruling, the Court of Appeals pointed to the absence of allegations of damage independent from the landslide itself:

> Nothing in the complaint, however, supports an inference that the accumulation of water *itself* produced a compensable injury that was suffered in advance of the land movement, such as, for example, water damage to wooden backyard furniture, injury to costly backyard plants, or expenses in removing water. On the contrary, the complaint alleges only that JKT's actions in "allowing excess water to accumulate on the Property…thereby ma[de] it *susceptible to failure*. Because all injuries connected to the Meese/Christiansen complaint "aris[e], in whole or in part, out of…'earth movement,'", there is no possibility of coverage under the Atain policies.
>
> We reach the same conclusion as to the Synek complaint. In alleging how the various breaches injured Synek, the complaint states that, "[a]s a direct proximate and legal result of the foregoing negligent acts and/or omissions, the Landslide did occur, and Plaintiff has sustained damages. JKT points to the Synek complaint's allegation that the improvements made by JKT to Bianusa's property "interfered with and encroached [upon] an easement for storm water and irrigation drainage in the backyard" of Bianusa's property. But JKT does not point to any allegation in the Synek complaint that seeks compensable damage flowing from that alleged encroachment apart from its subsequent contribution to the landslide. *Id*. at 6-7.

After rejecting the possibility that interfering with an easement could be damage to "tangible property", the court affirmed both rulings in favor of Atain. It further noted that even if one could construe the Meese complaint to have alleged JKT damaged storm drains, subdrains or drain pipes, any such damage would have taken place long before the inception of the Atain policies. *Id*. at 7.

The *JKT* decision showcases the situation where narrow allegations within a complaint meet a broad and well worded exclusion. The underlying plaintiffs offered no basis to conclude they were damaged by anything other than the landslide. The fact that the landslide may have been caused, at least in part, by drainage and water accumulation could not alter the application of the exclusion.

ELEVENTH CIRCUIT

Insurer "Abandoned" Ability to Challenge District Court's Narrow Interpretation of Firearms Exclusion by Not Properly Raising on Appeal

In *AIX Specialty Ins. Co. v. Everett*, 2022 U.S. App. LEXIS 8332 (11th Cir. March 30, 2022), the insured, Hollywood Nights South ("Hollywood") operated a nightclub in St. Petersburg, Florida. In 2016, Shanika Everett ("Everett") was struck by a bullet while on the premises of the club. She, in turn, sued Hollywood in Florida state court, arguing Hollywood was negligent in failing to protect an invitee from a reasonably foreseeable criminal act. Her complaint alleged she was "shot by a Projectile," but contained no further factual allegations about the circumstances of the shooting. *Id*. at 1-2.

Hollywood was insured under a general liability policy issued by AIX Specialty Insurance Company ("AIX") at the time of the incident. AIX agreed to defend Hollywood pursuant to a reservation of rights, but filed a declaratory judgment action against Hollywood and Everett arguing it owed no duty to defend or indemnify based upon a firearms exclusion within its policy. Specifically, the exclusion provided no coverage:

> [F]or any injury, death, claims, or actions occasioned directly or indirectly or as an incident to the discharge of firearms by person or persons on or about the inured premises. *Id*.

AIX asserted there was no potential for coverage because Everett's injuries were "occasioned" by a shooting and being struck by a bullet was a but-for cause of her injuries. Everett argued that the plain language of the exclusion ("an incident to the discharge of ***firearms***") required the victim be injured in an incident that involved the discharge of multiple firearms (plural). AIX and Everett each moved for summary judgment on the duty to defend (with AIX also moving on indemnity). *Id*. at 3.

The district court granted Everett's motion, finding that a strict construction of the language of the exclusion dictated such a result:

> The district court considered the scope of the firearms exclusion. The court explained that insurance contracts are construed according to their plain meaning and that exclusions must be strictly construed against the insurer. Looking at the text of the exclusion, the court explained that it excluded coverage for injuries resulting from the discharge of "firearms." Because the exclusion used the plural form of firearm, the district court concluded that the exclusion barred coverage only when a person was injured in an incident that involved the discharge of multiple firearms.
>
> The district court then looked to the substance of Everett's state court complaint, which simply alleged that Everett was shot by a bullet but did not address whether the incident involved multiple weapons or a "single firearm." Because Everett's complaint "allege[d] facts which create potential coverage under the [p]olicy", the court determined that AIX owed a duty to defend. *Id.* at 4-5.

AIX appealed the district court decision, but (per the Court of Appeals) limited its argument to the exclusion's requirement that injury be occasioned directly or indirectly as an incident to a shooting. In ruling for Everett, the court concluded that AIX had not questioned the basis of the district court's ruling and thus had "abandoned" its ability to contest the outcome:

> The problem here is that the district court's ruling rested on a different ground, one that AIX does not challenge. The district court interpreted the exclusion as barring coverage only when there was an incident that involved the discharge of multiple weapons…On appeal, AIX, which is represented by counsel, raises no challenge to the district court's interpretation; it advances no argument that the language of the firearms exclusion also bars coverage when an incident involves the discharge of a single firearm. It thus has abandoned any challenge to the district court's interpretation of the policy.

To be sure, AIX makes a passing reference to whether the firearm exclusion bars coverage when an incident involves the discharge of only a single firearm when it states that "it is immaterial" for the exclusion "whether the underlying incident involves a single bullet or multiple gunshots. But "simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that

issue" and precludes us from considering it on appeal.

Our rule on abandonment is based in the "party presentation principle," which recognizes that in our "adversarial system of adjudication…we rely on the parties to frame the issues for decision" and it generally "is inappropriate for a court to raise an issue sua sponte." Because AIX abandoned any argument that the district court erred in interpreting the exclusion as requiring the discharge of multiple firearms, it follows that the district court's judgment that AIX owed a duty to defend Hollywood must be affirmed. *Id*. at 7-9 (citing *Singh v. U.S. Att'y Gen*., 561 F.3d 1275,1278 (11 Cir. 2009) and *United States v. Campbell*, 26 F.4h 860, 872 (11th Cir. 2022)).

The *Everett* decision presents a lot to "unpack", from the district court's narrow interpretation of the firearms exclusion to the seemingly harsh dismissal of AIX's appeal. One wonders if Hollywood's failure to appear (and perceived insolvency) hung over the proceedings. It is not hard to imagine another court reaching a different conclusion.

APPLIED SPECIALTY UNDERWRITERS

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