APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

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Kentucky – Business Description Within Subcontractor's Policy Did Not Reasonably Include Work That Damaged Apartment Project

In *First Mercury Ins. Co. A/S/O Core Lexington 500 Upper, LLC v. ARMR Group, et al*., 2022 U.S. Dist. LEXIS 131946 (E.D. Ky. July 26, 2022), a representative (Deacon) of the insured, ARMR Group ("ARMR"), completed an online application to obtain general liability insurance from State National Insurance Company ("State National"). In the application, he indicated ARMR was a general contractor that performed commercial and residential painting. When asked to identify all activities that ARMR performed, Deacon selected "painting." *Id*. at 2-3.

State National issued a policy to ARMR the day the application was submitted, which included an endorsement limiting coverage to the following business description:

> Painting Contractor – Exterior Buildings and Structures Less Than 3 Stories in Height
>
> Interior Painting
>
> Contractors – Subcontracted Work – Family Dwellings
>
> Contractors – Subcontracted Work. *Id*. at 3-4.

ARMR subcontracted to perform work at a residential construction project in Lexington, Kentucky. Specifically, the work included "cleaning, disinfecting, sanitizing and remediation of water and moisture exposure" following heavy rains that occurred during the construction of the building. ARMR applied a disinfectant, sanitizer and cleaner known as Shockwave to exposed interior lumber surfaces. When residents moved into the building, they reported water leaks traced back to CPVC sprinkler pipes and fittings. A forensic analysis revealed the CPVC pipe assemblies failed due to cracking caused by ARMR's application of Shockwave. *Id*. at 4-5.

The general contractor on the project filed an action against ARMR seeking to recover damages and brought a declaratory judgment against State National and its administrator (collectively "State National") seeking a ruling that it was insured under its policy. After paying the owner over $2,000,000 under its property policy, First Mercury filed an intervening complaint seeking to recover from ARMR and State National. State National

thereafter filed a motion for summary judgment arguing there was no coverage available for the loss under its policy. *Id*. at 5-6.

After determining Kentucky law applied to the coverage dispute, the district court addressed State National's argument that no coverage was available because the application of Shockwave did not fall within the policy's business description. ARMR asserted there were genuine issues of material fact as to what it means to be a "painting contractor," arguing the term may include one who uses painting equipment to perform cleaning services. *Id*. at 11-12.

After examining several dictionary definitions of "paint" or "painting", the court agreed with State National that there was no reasonable way to interpret the business description as inclusive of the work that caused the property damage:

> Multiple definitions of a contested term within a dictionary does not automatically render a contract ambiguous. Instead, a contract is ambiguous if it is "capable of more than one different, reasonable interpretation." And courts will not "torture words to import ambiguity into a contract" where there is none. ARMR may argue under the definitions provided in 1.b. supra that "paint" should be afforded a broader definition. However, the words in a contract must be read together, in their entirety, and when considered in the context of a "painting contractor," these broad ranging definitions are nonsensical. Assigning the term its plain meaning, painting is not cleaning. Accordingly, the work performed when applying Shockwave does not fall within the business description of the Policy. *Id*. at 13 (citations omitted).

First Mercury argued because the word "painting" did not immediately precede the phrase "subcontracted work" in the business description endorsement, it meant "any" subcontracted work was covered by the State National policy. In (again) ruling for State National, the court noted the importance of reading the "entirety" of the provision in context:

> The phrases "Contractors – Subcontracted Work – Family Dwellings" and "Contractors – Subcontracted Work" do not have a clear meaning on their face. However, the business description begins with "Painting Contractor," so, the provision read in its entirety suggests that all activities discussed therein relate to painting. To suggest that "subcontracted work" includes any type of work activity is simply unreasonable. But assuming the phrase is ambiguous, the Court may look to extrinsic evidence to discern the parties' intent.
>
> The Court refers to Deacon's application, which was completed the same day the Policy was issued. There, he reported that 100 percent of ARMR's work was painting. An insured is entitled to all coverage he may reasonable expected to be provided under a policy. It is nonsensical that Deacon intended to purchase (incredibly broad) coverage for activities in which his company did not engage. Accordingly, the subcontracting activities are limited to those of a painting contractor. *Id*. at 14-15 (citations omitted).

The ARMR decision is supported by the plain language of the policy and a review of extrinsic evidence demonstrating the limited activity ARMR sought to insure (i.e. painting). There was simply too large a gap between "painting" and "cleaning" for the court to reach any other conclusion. It speaks to the importance of clearly identifying all activities of an insured when applying for insurance.

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MASSACHUSETTS

State's Highest Court Confirms Attorney's Fees Awarded Against Insured Are Not Recoverable as "Damages" or "Costs" Under General Liability Policy

In *Vermont Mutual Ins. Co. v. Poirier*, 490 Mass. 161 (Mass. 2022), the insureds (the Poiriers) operated a cleaning business called Servpro. It was insured under a Businessowners (general) Liability Policy issued by Vermont Mutual Insurance Company ("Vermont Mutual") during the relevant period. The policy provided that Vermont Mutual would "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage,' 'personal injury or advertising injury' to which this insurance applies." *Id.* at 162.

In June of 1999, Servpro was hired to clean up a sewage spill in a homeowner's basement. Servpro workers cleaned the basement and applied disinfectants. They neglected to tell the homeowner to stay out of the basement until the chemical disinfectants had completely dried. The homeowner continued to clean other parts of the basement in the days that followed and developed respiratory problems caused by the chemicals. *Id*. at 162 -163.

The homeowner and her husband sued the Poiriers for breach of contract, negligence and statutory breaches (General Laws c. 93A) based upon warranties of merchantability and fitness for a particular purpose. Shortly before trial, plaintiff dropped all but the breach of warranty claims, which the trial judge found Servpro had unknowingly violated. The judge awarded plaintiffs' damages for lost earnings, medical expenses, pain and suffering and loss of consortium. *Id*. at 163.

Having found the warranty violation, the trial judge awarded the plaintiff's attorney's fees ($215,328) and costs ($15,447.61) against the Poiriers. Both the substantive rulings and fee/cost awards were affirmed on appeal. Vermont Mutual paid the plaintiffs' the entirety of the judgment, with the exception of the attorney's fees. *Id*.

Vermont Mutual then filed a declaratory judgment action seeking a ruling that its policy did not provide coverage for attorney's fees and that it had paid all amounts due under its policy. On summary judgment, the motion judge held the award of attorney's fees fell within the policy's coverage for "sums that the insured becomes legally obligated to pay as damages" because of "bodily injury." (He did find that attorney's fees did not amount to "costs" available to the insured under the policy's Supplementary Payments Provision.) Vermont Mutual appealed and the case was voluntarily transferred to the Supreme Judicial Court for disposition. *Id.* at 164.

The supreme court began by noting (1) there was no disagreement that the attorney's fees were "sums" that the insured became "legally obligated to pay" and (2) they arose out of a dispute for "bodily injury." However, in reversing the trial court's decision, it quickly dispatched the argument that attorney's fees are themselves "damages" covered by a CGL policy:

> Attorney's fees expended to pursue a c. 93A claim are different. They reflect the cost of bringing suit to recover the c. 93A relief requested. Under the American rule, parties are ordinarily responsible for paying their own attorney's fees, even if they succeed. Had the plaintiffs sued only in tort for breach of

warranty, they would have been responsible for their own attorney's fees in pursuing these causes of action.

There are, however, fee-shifting provisions, including G.L. c. 93A, §9 (4), which is the cause of action at issue in the instant case. Courts may thus award both damages and attorney's fees, but that does not mean they award attorney's fees as damages. General laws c. 93A §9 itself differentiates the two…Consequently, even under G.L. c. 93A, damages and attorney's fees for pursuing the c. 93A action are decoupled and treated differently. They serve two different purposes – damages are to compensate for the injury, and awards of attorney's fees are to deter misconduct and recognize the public benefit of bringing the misconduct to light….

> We therefore conclude that the insurance policy provision covering damages caused by bodily injury does not cover the award of attorney's fees under G.L. c. 93A. Damages and attorney's fees are conceptually different and are so recognized under that chapter. The insurance contract here only provides for the recovery of "damages." *Id*. at 167-168 (citing *Barron v. Fidelity Magellan Fund*, 57 Mass. App. Ct. 507 (2003)) (further citations omitted).

The court also affirmed the trial court's decision that attorney's fees are not "costs" which fall within coverage under the policy's Supplementary Payments provision. Specifically, it noted "the word 'costs,' as applied to proceedings in court, ordinarily mean only legal or table costs, and does not include attorney's fees." Applying this rule, the court disallowed the recovery of attorney's fees in the context of an insurance policy covering 'costs taxed against the insured' and a c. 93A verdict providing for attorney's fees. In so holding, the court correctly recognized that G.L. c. 93A itself distinguishes between costs and attorney's fees." *Poirier*, supra, 490 Mass. 161, 168 - 169 (citing *Styller v. National Marine & Fire Ins. Co*., 95 Mass App. Ct. 538 (2019)).

The decision by Massachusetts' highest court to voluntarily assume the insurer's appeal demonstrates sound judicial discretion. The trial court's ruling that attorney's fees were "damages" covered by a CGL policy ran contrary to decades of precedent and the clear terms of the Vermont Mutual policy.

MONTANA

State Supreme Court Finds Subsidence Exclusion as Read With the "Entire" Policy Unambiguously Bars Coverage for Damage Caused by Settlement of Soil Under and Around Homes

In *Loendorf v. Employers Mutual Casualty Company*, 409 Mont. 248 (Mont. Sup. Ct. July 19, 2022), the insured, S.D. Helgeson ("Helgeson"), built and sold homes in the Falcon Ridge subdivision in Billings, Montana. After moving in, several homeowners noticed small cracks in the homes' interior walls and foundations. The homeowners hired a consultant to inspect their properties, who found misaligned doors and windows, foundation movement, separation of exterior siding and cracks in foundations and drywall. The consultant concluded the damage was caused by the settlement of soil under and around the homes. *Id*. at 250.

The homeowners filed suit against Helgeson seeking damages associated with the negligent construction of their homes. Employers Mutual Casualty Company ("EMC") issued general liability policies to Helgeson for the relevant period. Each of the EMC policies included what was titled "Exclusion – Injury or Damage from Earth Movement" ("Earth Movement Exclusion") which provided:

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> This insurance does not apply to "bodily injury," "property damage," "personal injury" and "advertising injury" … arising out of, caused by, resulting from, contributed to, aggravated by, or related to earthquake, landslide, mudflow, subsidence, settling, slipping, falling away, shrinking, expansion, caving in, shifting, eroding rising, tilting or any other movement of land, earth and mud. *Id*. at 250-251.

Upon receipt of the tender, EMC defended Helgeson under a reservation of rights. It thereafter filed a declaratory judgment action seeking a ruling that there was no coverage for the homeowner claims based upon the Earth Movement Exclusion. The homeowners then intervened in the action. They and EMC filed cross-motions for summary judgment as to the application of the exclusion. *Id*. at 251.

The district court granted the homeowner's motion, holding that EMC "has a duty to provide coverage" for the homeowner's claims. While noting there was no dispute that the alleged damages were caused by Helgeson, the court concluded that Earth Movement Exclusion (while ambiguous) only applied where "the earth movements are the result of settling of the earth rather than earth movement as a result of the insured's actions." Said another way, the court found the exclusion did not apply because "the event at issue here was human caused." *Id.* at 251-252.

The single question put to the Montana Supreme Court was whether the district court erred in determining the Earth Movement Exclusion did not apply to the homeowner's claims. EMC argued the exclusion barred coverage for events that had either a human or natural cause and the district court had impermissibly "re-wrote" its policy. The homeowners argued that because the exclusion did not mention "human-caused events," an "objectively reasonable consumer" would assume it only bars coverage for naturally occurring events. *Id*. at 253.

In reversing the district court's decision, the court began its analysis by noting that a CGL policy's purpose is to provide liability coverage for an insured, which naturally presumes an element of causation in reading the exclusion:

> Consistent with its purpose, the Policy's insuring provision states that EMC will pay sums that the insured, here Helgeson, is "legally obligated to pay as damages." Thus, by its terms, the Policy's coverage is extended to personal or property damages Helgeson is found liable for – necessarily including the element of causation, i.e. for all damages Helgeson caused. By insuring Helgeson's legally established obligations, the causation of personal and property damage necessary for coverage is incorporated in this "up front" general insuring provision of the Policy. Notably, and consistent with the purpose of a CGL policy, the insuring agreement provides no coverage for damages caused by purely natural events…
>
> Read with the general insuring provisions, this Exclusion eliminates or withdraws from the coverage for all personal or property damage the insured is legally obligated to pay, i.e. that the insured caused, which arises from, is caused by, results from, is contributed to, is aggravated by, or is related to subsidence,

> settling, slipping, falling away, shrinking, expansion, shifting, eroding, rising, tilting "or any other movement of land, earth or mud." There is no ambiguity here, by its plain language, all damages Helgeson caused, and would be found liable for in the Underlying Lawsuits, which are "related to" any "movement of land, earth or mud," are excluded from EMC's initial agreement to insured Helgeson's liability. *Id*. at 253-254 (emphasis included).

The court went on to criticize the district's narrow interpretation of the exclusion given it must be read in conjunction with the policy as a whole:

> Applying the Earth Movement Exclusion based on a perceived distinction between "natural" and "human-caused" earth movements is an erroneous framework that improperly injects further causation concepts into the Policy. While the Homeowners are correct that the Exclusion does not attempt to differentiate between natural and human-caused earth movement, that does not render it ambiguous, but rather encompassing, by design. The Exclusion broadly eliminates coverage for the insured's liability for damage that is related to any earth movements. To be sure, some earth movements listed in the Exclusion would have a natural cause, but damage could be inflicted in combination with a human cause, such as a failure to anticipate a natural cause, and thus be caused by a combination of the two, particularly within the broad category of "any other movement of land." Homeowners characterize their damage as "human-caused settling damage," but whether solely human-caused or in combination with natural causes, this is nonetheless damage alleged to have been caused by Helgeson that clearly arises out of, results from, or is related to, "settling," which the Earth Movement Exclusion removes from the agreement to insure Helgeson's liability. Regardless of cause, a mudflow is a mudflow, settling is settling and so forth. If the insured incurs liability for damages that have been contributed to, aggravated by, or related to any of these earth movements, coverage is broadly excluded. *Id*. at 254-255.

The supreme court decision in *Loendorf* offers the reader a masterclass in policy construction, including an understanding that a CGL policy presumes the insured engaged in conduct for which it could be held liable. The idea of suggesting the Earth Movement Exclusion could only apply in circumstances where the insured did "nothing" made no sense. The court correctly determined no reasonable interpretation of the policy could reach such a conclusion.

NEW JERSEY

State Supreme Court Finds No Duty to Defend Owed Manufacturer/Supplier Where Injury Occurred "In Connection With" Insured's Operations in County Excluded by Policy

In *Norman Int'l v. Admiral Ins. Co*., 2022 N.J. LEXIS 674 (N.J. Supreme Court August 10, 2022), Admiral Insurance Company ("Admiral") issued a general liability policy to Richfield Window Coverings, LLC ("Richfield") for the relevant period. Richfield sells window coverage products, including blinds, to national retailers like Home Depot and provides them with machines to cut blinds to meet the specifications of the retailers' customers. Richfield's representatives visit the retailer's stores to maintain and repair the machines and conducts onsite training of retailer employees. It also provides a user manual for the cutting machines to retailer employees. *Id*. at 1-2.

An employee at a Home Depot in Nassau County, New York was injured while operating a blind cutting machine. She and her husband sued Richfield asserting claims for product liability, breach of warranty and loss of spousal services. Richfield tendered the claim to Admiral for defense, which denied coverage on the basis of a Designated New York Counties Exclusion ("NY Exclusion") within its policy. The NY exclusion read as follows:

> This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury", including costs or expenses, actually or allegedly arising out of, related to, caused by, contributed to by, or in any way connected with
>
> (1) Any operations or activities performed by or on behalf of any insured in the Counties shown in the Schedule above:
>
> (The schedule within the endorsement referenced the following counties: "Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk and Westchester Counties in the State of New York."). *Id*. at 2, 14-15.

Richfield filed a declaratory judgment action against Admiral seeking a defense and, if necessary, indemnity for the employee's injuries. Admiral moved for and was granted summary judgment at the trial level, where the court held allegations of bodily injury that are "merely related to" or "in any way connected with [Richfield's] activities or operations" within the Home Depot [are] "sufficient to trigger the New York Counties exclusion" in the Admiral policy. *Id*. at 8-9.

The appellate court reversed the trial court's decision, finding that Richfield's limited activities and operations had no "causal relationship" to the causes of action or allegations within the underlying complaint. More specifically, it noted the claims did not have any relationship with the maintenance or repair of the cutting machines, the training of the Home Depot employees or the cleaning of the machines, which were the extent of Richfield's "connection" to the Nassau County Home Depot. Admiral filed a petition for certification to the New Jersey Supreme Court, which was thereafter granted. *Id*. at 17-18.

The Supreme Court reversed, finding that the appellate court had applied too narrow a reading of a broad and unambiguous exclusion:

> Interpreting the clause, the Appellate Division considered the causes of action in Lorito's complaint and the activities of Richfield and found "no causal relationship." That comparison was not correct because the language of the exclusion clearly and unambiguously requires that the injuries, not the causes of action, be connected to the actions of the insured. Therefore, the appellate court should have considered the connection between (plaintiff's) injuries and Richfield's activities at the store to determine if the exclusion applies.

There is no dispute that (plaintiff) was injured in Nassau County, one of the counties listed in the exclusionary clause. Therefore, the relevant issue is whether Richfield's activities at the store are sufficient to trigger the exclusion – that is, did they "actually or allegedly arise out of, [or are they] related to, caused by, contributed to by, or in any way connected with" the activities of Richfield or "on behalf of" Richfield? Because the exclusion test is disjunctive, each phrase in the exclusion must be considered separately, any one of

which would be sufficient to trigger the exclusion…

Ultimately, whether the is any causal connection between the actions and injuries is not dispositive because the phrase "in any way connected with" and "related to" have been interpreted broadly and do not require any element of causation. (Plaintiff) was injured while using the blind cutting machine, which was provided by Richfield. The fact that Richfield provided the machine to Home Depot is enough to trigger the exclusion because the phrase "in any way connected with" merely requires that the two are linked in some way, even if they are only tangentially connected." *Id*. at 27-29 (citations omitted).

The appellate decision in *Norman* was a curious one, as imposing a strict causation requirement on a plainly worded exclusion seemed well beyond any precedent relied upon by the court. Clearly, Richfield's activities were "connected with" the Home Depot at which Richfield's products were sold. The supreme court's strongly worded decision makes clear that unambiguous policy language will be enforced as written.

NEW YORK

Insurer That Received Notice of Lawsuit After Default Judgment Entitled to Summary Judgment on Late Notice as a Matter of Law

In *Travelers Indemnity Co. v. Patino*, 2022 U.S. Dist. LEXIS 154169 (S.D. N.Y. August 26, 2022), Travelers Indemnity Company ("Travelers") issued a primary general liability policy and a commercial excess policy to its insured, ASNF, LLC ("ASNF"), for the period July 3, 2014 to July 11, 2014. During the policy period, two employees of subcontractors working for ASNF were injured at a site that was alleged owned, operated, controlled or managed by ASNF. *Id*. at 2-3.

On August 14, 2014, Travelers sent a letter to ASNF stating that it had been notified of an incident during which two subcontractor employees (Patino and Aveiga) were injured at a jobsite. Travelers denied coverage based upon the terms of its policy and stated there could be no duty to defend under the subject policy in the absence of an actual lawsuit. Patino's lawyer was copied on this letter. Patino filed an action against ASNF in October of 2014, alleging he sustained injuries when he fell from a scaffold while working at premises owned, controlled or managed by ASNF. *Id.* at 2-3.

Aveiga filed his lawsuit against ASNF on September 22, 2014. On April 8, 2015, presumably after having received notice of the Aveiga suit, Travelers agreed to defend ASNF in this action and copied Patino's lawyer on its correspondence. On April 15, 2015, a default judgment was entered against ASNF in the Patino action. *Id*. at 3.

Another insurer (Hartford) notified Travelers of the Patino action on October 8, 2015. On October 27, 2015, Travelers issued a disclaimer to ASNF on the grounds notice was provided a year after the lawsuit was filed and after a default judgment was entered against ASNF. Travelers reiterated its disclaimer by letter dated November 4, 2015, within which it offered to pay for counsel to attempt to vacate the default. Travelers

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indicated that, if the effort was successful, it would defend ASNF. *Id*. at 4.

Following a judicial inquest of the default judgment in the Patino matter in January of 2019, judgment was entered against ASNF on June 7, 2019. At some point thereafter, Travelers filed a declaratory judgment action against ASNF and Patino seeking a ruling that it owed no defense or indemnity for Patino's claim. *Id*. at 3-4.

The district court initially noted that (1) timely notice is a condition precedent to insurance coverage in New York; (2) notice provided after the passage of a year is untimely; and (3) prejudice to an insurer is presumed where a default judgment precedes notice under N.Y. Ins. Law §3420 (a)(2). *Id*. at 5-7 (citations omitted).

Patino attempted to argue a question of fact existed as to when Travelers received notice of his lawsuit, but offered no evidence to contradict the affidavit submitted by Travelers' representative. The court further rejected the argument that Travelers had "constructive notice" of the Patino lawsuit because Travelers was aware of the Aveiga lawsuit. It likewise dismissed the conclusion that notice of an "occurrence" was the same as notice of a "suit ", which was impossible given notice of the lawsuit took place after Traveler's disclaimer letter to ASNF in August of 2014. *Id*. at 7-9.

Patino's remaining arguments centered on the conclusion that (1) Travelers was not entitled to a presumption of prejudice because it could have sought to vacate the default judgment; and (2) Travelers was not prejudiced because ASNF had no meritorious defense in the underlying action. In ruling in favor of Travelers on summary judgment, the court firmly rejected both arguments as contrary to the facts and the law:

> Patino argues that Travelers is not entitled to an irrebuttable presumption of prejudice because Travelers could have sought to vacate the default judgment or contest damages during the inquest. In support of this argument, Patino relies on cases holding that an insured was not prejudiced by late notice of the commencement of litigation, where the insurer was notified of a motion for a default judgment and took no action. Unlike the cases relied on by Patino, Travelers was not notified of the Underlying Action until after default judgment had been entered and therefore is entitled to an irrebuttable presumption of prejudice…

Patino also argues that Travelers cannot be prejudiced by late notice of the Underlying Action because ASNF had no meritorious defense in the Underlying Action. The argument is improper because the statutory presumption is irrebuttable. The argument is also unpersuasive on the merits. Patino cites no case law in support of the proposition that an insurer is not prejudiced if it is established that the insured had no meritorious defense. Even if this were the case, ASNF could have contested liability based on causation, which is an essential element of liability under New York Labor Law §240 (1).

Patino makes several general arguments that Travelers sought to avoid its duty to defend, including by disclaiming coverage before any action was initiated. These arguments are misplaced. The relationship between an insurer and its insured, as well as any third-party beneficiaries, is contractual. The insurer has no obligation beyond what is contractually required. To the contrary, an insurer has an obligation to its own stakeholders not to expend funds that are not contractually due. In disclaiming coverage based on the terms of the policy when it received notice of occurrence, Travelers complied with its statutory obligation to disclaim coverage "as soon as is reasonable possible." See N.Y. Ins. Law §3420 (d).

Patino, supra at 9-11 (further citations omitted).

The *Patino* decision speaks to the straightforward and rigid nature of notice under New York's insurance statute. The "bright line" rule confirming a default judgment is "irrebuttable prejudice" should make every insured (and claimant) aware of the importance of timely notice. What is curious is Patino's counsel was aware Travelers decision to defend the Aveiga action prior to the default judgment being entered against ASNF in the Patino action. Why he chose not to reach out to Travelers before the default judgment was entered or timely attempt to vacate the judgment remains a mystery.

Federal Appellate Cases

SIXTH CIRCUIT

Insurer Owed No Duties to Insured and Could Not Act in Bad Faith in the Absence of a Lawsuit

In *Trident Fasteners, Inc. v. Selective Ins. Co. of South Carolina*, 2022 U.S. App. LEXIS 21692 (6th Cir. August 3, 2022), Trident Fasteners, Inc. ("Trident") was an automobile supplier in Grand Rapids, Michigan. From 2017 to 2018, it was insured under a commercial general liability policy issued by Selective Insurance Company of South Carolina ("Selective"). Like most CGL policies, Selective agreed to "pay those sums that the insured becomes legally obligated to pay as damages" (because of bodily injury or property damage) and had the right and duty to defend the insured against any "suit" seeking those damages. It further noted that Selective "may, at its discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." *Id*. at 1-2.

In October of 2018, Trident reached out to Selective seeking coverage for an alleged product defect within fasteners it provided to its customers. This led to two product recalls. One customer included the defective fasteners in products it sold to General Motors. Ultimately, the customer was required to reimburse General Motors for damages and sought recovery for such payments from Trident. *Id*. at 3-4.

After not hearing from Selective at all, Trident reached out again in February of 2018 to inquire about Selective participating in a resolution with Trident's customer. While Selective assigned a new adjuster, Trident heard nothing substantive from Selective and again reached out in April of 2018. Selective responded with a request for additional information before it would consent to any negotiations with Trident's customer. *Id*. at 4-5.

On May 10, 2019, Selective denied consent to Trident to engage in settlement negotiations with its customer. Regardless, Trident settled the dispute with its customer on June 28, 2019. Trident and Selective disagree whether Trident received a letter from Selective reserving its rights and offering to defend Trident before it entered the settlement. Selective refused to pay the settlement and Trident filed a declaratory judgment action alleging Selective acted in bad faith by (1) unreasonably delaying its investigation and communications with Trident; (2) refusing to engage in settlement discussions; (3) withholding its consent for Trident to engage in such discussions; and (4) unreasonably delaying its reservation of rights letter and defense. *Id*. at 5-6.

Selective moved for summary judgment on the grounds that there was no "legal obligation to pay damages" under its policy and Trident had violated the "voluntary payment" and "no action" provisions within its policy, which, in relevant part, read as follows:

> 2. Duties in the Event of Occurrence, Offense, Claim or Suit
>
> d. No insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

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> 3. Legal Action Against Us
>
> No person or organization has a right under this Coverage Part:
>
> b. To sue us on this Coverage Part unless all of its terms have been fully complied with. *Id*. at 3, 6.

The district court granted Selective' s motion, finding (1) similar clauses had been upheld under Michigan law; (2) Selective' s obligations to act in good faith arose only after a lawsuit had been filed against the insured; and (3) the voluntary payment made by Trident absolved Selective of any obligations. Trident thereafter appealed. *Id*. at 7.

The Court of Appeals affirmed the district court decision on all counts, tying each of the breaches alleged by Trident to a lack of an actual lawsuit:

> The duty to investigate an insurance claim involving a third party falls under the duty to defend…Michigan courts state that "the duty of the insurer to defend the insured depends upon the allegations in the complaint of the third-party in his or her action against the insured.' … Here, no such complaint or agency letter against the insured existed to trigger the duty to defend and consequently the duty to investigate….
>
> The absence of a lawsuit against the insured also resolved whether the duty to process the Insurance Claim in good faith arose. Michigan courts have viewed this duty as part of an insurer's duty to pay the insured in a timely fashion. Here, it is not clear what [Trident] means by the "duty to process claims." It states that Selective had a duty to "take a position with respect to coverage within a reasonable time," and that the insurer "delayed investigation of the [Insurance] Claim. Those assertions could mean two different things, but neither argument succeeds. If [Trident] is arguing that Selective acted in bad faith in the investigation stage of processing its Insurance Claim, this argument would fall within [Trident's] argument, already addressed above, concerning Selective' s duty to investigate and defend. Alternatively, if [Trident] is arguing that Selective delayed in stating its intent to defend, this argument would also fall under the duty to defend. But, regardless, the duty of good faith requires the filing of a lawsuit. *Id*. at 10-11 (citations omitted).

Trident further argued the policy provision requiring the insured to provide notice of an "occurrence" necessarily required Selective to act in good faith upon receiving such information. The appellate court rejected this position as contrary to Michigan law and the nature of the obligation:

> As the Michigan Supreme Court explained: "The purpose of giving notice as soon as practicable after the occurrence of an accident is to give the insurer an opportunity to investigate the facts and circumstances affecting the question of liability and the extent of such liability." An insured cannot withhold information and then force an insurer to pay out an insurance claim. The reverse would not be true, as Trident already had the facts and opportunity to investigate its insurance claim itself. [Trident] obtained insurance coverage

> from Selective to, as relevant here, hedge its litigation risk from third parties. As this risk never materialized, Selective did not owe [Trident] a good-faith duty and could not have breached the Policy in the absence of actual litigation filed against [Trident]. *Id*. at 16 (citing *Wehner v. Foster*, 49 N.W.2d 87, 90 (Mich. 1951).

The Trident decision reinforces Michigan law in defining when an insurer is obligated to defend, investigate and pay a claim. In the absence of a lawsuit, there is no duty to defend or indemnify and/or grounds for bad faith. Regardless, one can understand how frustrating it was for Trident when Selective did not timely respond to its efforts to engage in settlement discussions when Trident was undoubtedly feeling pressure from a customer to resolve a claim.

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