APPLIED SPECIALTY UNDERWRITERS

# CASUALTY SPOTLIGHT™

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FEBRUARY 2022, VOLUME 3

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## State-by-State Cases





# Recent Decisions and Relevant Insights

## State-by-State Cases

**CALIFORNIA**

**Duty to Defend Owed Additional Insured Based Upon Affirmative Defenses It Raised in Underlying Action**

In *Foster Poultry Farms v. Contractors Bonding and Insurance Company*, 2022 U.S. Dist. LEXIS 23761 (E.D. Ca. February 9, 2022), Try-Us Transportation, Inc. ("Try-Us") entered into a contract with Foster Poultry Farms ("Foster") to transport Foster's processed goods. Under that agreement, Try-Us was obligated to procure general liability insurance naming Foster as an additional insured. Try-Us secured such coverage from Contractors Bonding and Insurance Company ("CBIC"), which included a blanket additional insured endorsement which read as follows:

> **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you 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 by your negligence in the performance of your ongoing operations performed for that additional insured. *Id*. at 4-5.

During the policy period, a Try-Us employee (Rathi) stopped at Foster's farm to pick up a load of goods. While there, he tripped over a door stop and fell, causing various injuries. Rathi sued Foster for damages, alleging general negligence and premises liability. It was undisputed that Try-Us was not a party to the

underlying litigation and the complaint included no allegations of negligence against Try-Us. *Id*. at 2-3.

Foster repeatedly tendered the lawsuit to CBIC for defense during the pendency of the underlying action, all of which we were denied by CBIC. CBIC asserted Foster could only be an additional insured when sued because of the Try-Us's negligence - which was not alleged in the underlying complaint. Foster filed a declaratory judgement action against CBIC claiming it was owed a defense, which was met with a motion to dismiss Foster's complaint. *Id*. at 5-7.

In opposing CBIC's motion to dismiss, Foster argued it was owed a defense as an additional insured because the "central issue" as to its affirmative defenses was

whether Rathi and Try-Us were "comparatively or contributorily negligent in regard to the accident." Specifically, Foster alleged that Rathi was not looking where he was walking when he fell and that, to the extent Rathi claims he could not see the door stop, Try-Us should have provided him a flash light or other means to work in a dark space. Foster further noted that while Rathi was precluded from suing Try-Us based upon the worker's compensation laws, both would appear on the verdict form for apportionment of fault by a nonparty tortfeasor. *Id*. at 13-14.

CBIC asserted Foster's affirmative defenses and assertions of negligence by Rathi or Try-Us were legally irrelevant because "'it is not the putative insured's claims or assertions that matter for the purposes of determining additional insured status' – it is the plaintiff's claims in the underlying action that are relevant to the determination." *Id.* at 15-16 (citing *Monticello Ins. Co. v. Essex Ins. Co*., 162 Cal. App. 4th 1376 (2008).

In denying CBIC's motion, the district court distinguished *Monticello* on the grounds that there was no potential for coverage under a subcontractor's policy regardless of the general contractor's cross-complaint. *Foster, supra*. at 16-19. It further rejected CBIC's contention that Rathi could have amended its complaint to allege negligence on the part Try-Us, particularly when he was precluded from suing Try-Us under the workers' compensation laws. *Id*. at 19-21. Instead, the court focused on CBIC's early awareness of Foster's affirmative defenses and other extrinsic evidence which suggested the possibility that Rathi or Try-Us were partly responsible for the accident:

> Given the affirmative defenses asserted by Foster Farms in the underlying action, it is possible that the trier of fact, in apportioning comparative fault, may determine that Mr. Rathi's bodily injury was caused (in whole or in part) by Try-Us's negligence. That possibility – which was known to CBIC at the time Foster Farms tendered its defense – is sufficient to trigger CBIC's duty to defend.

Unlike the extrinsic evidence of the "defects list" that was not considered by the court in *Monticello*, because it was not provided to the insurer during the pendency of that underlying action, here Foster Farms informed CBIC of its affirmative defenses and the factual basis for Try-Us's and Mr. Rathi's alleged negligence while the underlying action was still pending and there was still an opportunity for CBIC to participate. Specifically, in correspondence tendering its defense to CBIC, Foster Farms described the factual basis for its affirmative defenses and quoted an excerpt from what appears to be a transcript of Mr. Rathi's deposition to support its contention that Mr. Rathi "admits that he was not paying attention to where he was walking when he tripped and fell." *Id*. at 22-23.

The *Foster* decision is intriguing, as one can understand an insurer bridling at its duty to defend (arguably) being controlled by the party seeking additional insured coverage. That said, where an injured employee can't sue his employer, one would expect the additional insured would always raise the comparative negligence of the employer as an affirmative defense. Other extrinsic evidence presented to CBIC may have had an impact on the court's decision.

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**FLORIDA**

**Prior Occurrence Exclusion Did Not Render Coverage "Illusory" for Subcontractor Responsible for Faulty Workmanship Completed Prior to Policy Inception**

In *Pro-Tech Caulking & Waterproofing, Inc. v. TIG Ins. Co*., 2022 U.S. Dist. LEXIS 12319 (S.D. Fla. January 18, 2022), the insured, Pro-Tech Caulking & Waterproofing ("Pro-Tech"), was a subcontractor on a luxury residential condominium tower in Palm Beach, Florida. It was retained by the general contractor (Pavarini) to install waterproofing systems on the project and, separately, by the developer (BRE) to install traffic coating on the garage floors. Pro-Tech completed its work for the project before January 6, 2012. *Id*. at 2-3.

In 2014, following receipt and distribution of various Notices of Claim as required by statute, BRE sued Pavarini, Pro-Tech and others alleging damage to the project as a result of construction defects. As to Pro-Tech, this included allegations that it (1) failed to properly install drainage systems, (2) failed to properly waterproof parts of the project; and (3) failed to apply the traffic coating as required by the contracts. The underlying complaint alleged Pro-Tech's defective work caused damage to other portions of the project, but was silent as to when "property damage" resulting from Pro-Tech's work occurred. *Id*. at 7-9.

TIG Insurance Company ("TIG") issued two general liability policies to Pro-Tech between January 6, 2012 to January 6, 2014. The policies included standard language requiring TIG to defend and indemnify Pro-Tech for "bodily injury" and "property damage" caused by an "occurrence" if (1) the "occurrence takes place in the coverage territory; and (2) the "bodily injury" or "property damage" occurs during the policy period. The policies defined "occurrence" as "an accident, including continuous exposure to substantially the same general harmful conditions." *Id*. at 4-5.

The policies also included a "Prior Occurrence and Pre-Existing Damage Exclusion" ("Prior Occurrence Exclusion") which, in relevant part, barred coverage for:

1. Any "occurrence" of incident, claim or "suit:
   a. Which first occurred prior the inception date of this policy or the retroactive date of this policy, if any; or
   b. Which is, or is alleged to be, occurring or in the process of occurring as of the inception date of this policy or the retroactive date of this policy, if any, even if the "occurrence" continues during this policy period.
2. Any damages arising out of or relating to "bodily injury", "property damage" or "personal and advertising injury" which are known to any insured, or which first manifest, prior to the inception date of this policy or the retroactive date of this policy, if any, even if further damages continue during this policy period. *Id*. at 5-6.

TIG denied Pro-Tech's tender of defense, after which Pro-Tech filed a declaratory judgment action seeking defense and indemnity. TIG removed the matter to federal district court and the parties cross-moved for summary judgment as to the effectiveness of the Prior Occurrence Exclusion. *Id*. at 9-10

Pro-Tech raised several arguments against the application of the exclusion, asserting that (1) defective work was not an "occurrence" as defined by the policies; (2) the Prior Occurrence Exclusion was ambiguous; and/or (3) enforcement of the Prior Occurrence Exclusion would render coverage under the policy "illusory." TIG countered that a construction defect is an "occurrence" under Florida law and the exclusion was unambiguous. *Id*. at 12-13.

In granting summary judgment for TIG, the court addressed Pro-Tech's arguments as they were presented. First, the court noted Pro-Tech ultimately conceded faulty workmanship can be an "occurrence" under Florida law and that all of Pro-Tech's work was performed prior to January 6, 2021. Second, it rejected the argument that the Prior Occurrence Exclusion was ambiguous by pointing to the plain language of the endorsement:

[A]ccording to Plaintiff, because the first subsection of the (Prior Occurrence Exclusion) discusses "occurrences" without an express reference to "damage," "the Exclusion does nothing to modify or limit coverage that is available for "property damage." In other words, Plaintiff raises the odd suggestion that the (Prior Occurrence Exclusion) could be read to leave coverage in place for damages associated with the prior "occurrences" that it expressly excludes – i.e., that the exclusion could eliminate coverage for an "occurrence" outside the policy period while simultaneously providing coverage for damages caused by that uncovered "occurrence." This reading of the policies fails under the plain terms of the Insuring Agreement and the (Prior Occurrence Exclusion).

The Insuring Agreement makes clear that the policies provide coverage only for select damage caused by an "occurrence," and that the damage must occur during the policy period to be covered. It is true that the (Prior Occurrence Exclusion) does not repeat the word "damages" in excluding coverage for "occurrences" that occurred in part or in full prior to the policy period, but the exclusion expressly incorporates all other terms and conditions under the Policies, including the affirmative grant of coverage for "property damage" caused by an "occurrence." In any event, Plaintiff's suggestion of the possibility of covered "damage" independent from an "occurrence" flatly contradicts the language of the Policies, which plainly covers damages for "occurrences" as specified by the Policies. *Id*. at 16-18.

Finally, while recognizing Florida prohibits illusory coverage in its insurance policies, it found no such application where the insured knowingly purchased coverage for "occurrences" that took place after the inception of the policy period:

> Rather than "completely contradict" any coverage provisions, the (Prior Occurrence Exclusion) merely narrows coverage to instances where the relevant "occurrence" fully occurs within the policy period. For instance, with respect to products-completed operations coverage, coverage still would apply to qualifying damages that were caused by an "occurrence" (e.g. faulty workmanship) that fully occurred within the policy period. Thus, the (Prior Occurrence Exclusion) limits products-completed operations coverage to some degree but does not render it illusory. Plaintiff does not identify any coverage section that is completely contradicted by the (Prior Occurrence Exclusion). *Id*. at 18.

The *Pro-Tech* court's analyses and conclusions on the application of the Prior Occurrence Exclusion are sound. While the insured may be disappointed it had no coverage for "property damage" arising out of a prior occurrence, that isn't the coverage it purchased. It would be interesting to know what including the Prior Occurrence Exclusion may have saved the insured in buying the policy.

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**ILLINOIS**

**Duty to Defend Triggered Where Complaint Alleged Damage to Project "Outside of Materials Furnished by the Insured"**

In *Ohio Security Insurance Company v. Power Clean, Inc.*, 2022 U.S. Dist. LEXIS 12185 (N.D. Ill. January 24, 2022), the insured, Power Clean, Inc. ("Power") was hired by a general contractor to "clean and seal certain sidewalks" in Algonquin, Illinois. The general contractor determined that Power did not do the work properly and hired another contractor to remove the sealer applied by Power and reseal the sidewalk. The general contractor sued Power, alleging it breached the contract by "providing defective sealant materials and/or failing to properly apply the sealant to the sidewalk…causing damage to and loss of the use of the preexisting sidewalk." *Id*. at 2-3.

Ohio Security Insurance Company ("Ohio Security") issued a general liability insurance policy to Power for the relevant period. The policy provided that Ohio Security would have the "right and duty to defend" any suit seeking damages for "bodily injury" or "property damage," but would have no such duty where the insurance did not apply. It further provided that "property damage" was covered only if caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." *Id*. at 3-4.

Upon receipt of the tender, Ohio Security filed a declaratory judgment action seeking an order that it owed no duty to defend or indemnify Power for the claims raised in the underlying lawsuit. While not described specifically, it appears Ohio Security argued there could be no coverage because the only "damage" associated with Power's work was to remove and replace the sealer itself. *Id*. at 1-2.

While restating Illinois' broad interpretation of the duty to defend, the court honed in on the application of such rules to construction claims:

> Illinois law governing the application of these principles in the context of defective construction or maintenance suits are settled: "Where the underlying suit alleges damage to the construction project itself because of a construction defect, there is no coverage. By contrast, where the complaint alleges that a construction defect damaged something other than the project, coverage exists." *Lagestee-Mulder, Inc. v. Consol. Ins. Co*., 682 F.3d 1054 (7th Cir. 2012). Put another way, for there to be coverage, there must be damage to other materials not furnished by the insured." *Pekin Ins. Co. v. Richard Marker Assocs., Inc*. 289 Ill. App. 3d 819 (Ill. App. 1997). *Power Clean, supra.* at 6.

In ruling Ohio Security owed Power a defense, the district court focused on the allegations tied to third-party property:

> [T]he dispositive question here is whether (general contractor)'s complaint, liberally construed in Power Clean's favor for the purposes of ascertaining coverage, alleges that Power Clean caused damage to something beyond Power Clean's scope of work. The answer to that question is yes. The underlying complaint alleges that "(general

contractor) entered into a written contract with Power Clean" under which "Power Clean

agreed to clean and seal certain sidewalks." The complaint further alleges that "Power Clean breached the [c]ontract by providing defective sealant materials and/or by failing to properly apply the sealant to the sidewalk." And crucially, the complaint alleges not only that "(general contractor) was forced to hire another contractor to remove the sealer applied by Power Clean and reseal the sidewalk," but also that "Power Clean caused damage to…the *preexisting* sidewalk."

Because Power Clean's scope of work was limited to cleaning and resealing the sidewalks that already existed – and not installing the sidewalks themselves, - and because the underlying complaint alleges damage to the preexisting sidewalk, the best reading of the complaint is that it alleges that Power Clean "damaged something *other* than the project," meaning "other materials not furnished by" Power Clean. At a minimum, it cannot be said that it is "clear from the face of the underlying complaint that the allegations set forth in that complaint fail to" allege damage to something beyond Power Clean's scope of work and thus "within or potentially within [Power Clean's] policy coverage. It follows under Illinois law that the underlying suit triggers Ohio Security's duty to defend. *Id*. at 7-8 (citations omitted).

The *Power Clean* decision presents a faithful, albeit technical, application of Illinois law on the duty to defend. One can understand why the insurer sought a declaratory judgment given the obvious question: What "damage" to the sidewalk was even possible where it appears the sealant was simply removed and replaced? While that might preview a favorable result for the insurer on indemnity, any complaint that alleges "damage" to "materials not provided by the insured" will generally result in a duty to defend.

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**ILLINOIS**

**No Duty to Defend Owed Pizza Company Where Allegations Did Not Support Trade Dress Exception to Infringement Exclusion**

In *Amco Ins. Co. v. Ledo's Inc.*, 2022 U.S. Dist. LEXIS 20417 (N.D. Ill. February 4, 2022), the insured, Ledo's Inc. ("Ledo's") operated a single restaurant named "Ledo's Pizza" in Countryside, Illinois. Ledo's System and Ledo's Pizza Carryout (collectively "Ledo's Carryout") operated a chain of 100 restaurants nationwide and owned the trade and service marks titled "Ledo Pizza", "Ledo Pizza and Pasta" and "Ledo Pizza and Subs." *Id.* at 3.

Ledo's Carryout filed suit against Ledo's in federal district court alleging trade mark infringement, false designation of origin and unfair competition based upon trade mark infringement. Specifically, Ledo's Carryout identified the various marks they owned and that Ledo's Carryout sells a "special type of pizza" with a "secret recipe, proprietary ingredients and a distinctive rectangular presentation." It further noted the proprietary nature of its other products (subs, salads and other entrees) and that its products were delivered to the public in a unique manner through its various franchise locations. Ledo's Carryout also alleged that Ledo's was not authorized to use any of its trade marks and that Ledo's advertising itself as "Ledo's Pizza" was likely to cause confusion among consumers. *Id*. at 4-6.

Amco Insurance Company ("Amco") issued a primary general liability policy and an umbrella policy to Ledo's in place as of the date of the underlying lawsuit. The Amco primary policy provided that it would have the right and duty to defend Ledo's against any suit seeking damages for "personal and advertising injury to which the policy applied. "Personal and advertising injury"





included injury arising out of "infringing upon another's copyright, trade dress or slogan in your advertisement." In relevant part, "advertisement" was defined as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." *Id.* at 7-9.

The Amco policies likewise included an exclusion labeled "Infringement of Copyright, Patent, Trademark or Trade Secret" ("Infringement Exclusion") which barred coverage for:

> "Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement". However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan. *Id*. at 8.

Amco denied Ledo's tender and filed a declaratory judgment action seeking a ruling that the underlying lawsuit involved only trademark infringement claims excluded by the policies. Ledo's counterclaimed and argued it was owed a defense because the underlying complaint raised a claim for "trade dress" excepted from the Infringement Exclusion. The district court recognized the dispute rested entirely upon whether a "trade dress" claim could be recognized within the complaint. *Id*. at 12-13.

The district court summarized "trade dress" protection under the Lanham Act, noting that trade dress encompassed the design of a product:

> "Trade dress of a product is essentially its total image and overall appearance", including "size, shape, color and color combinations, texture, graphics or even particular sales techniques." While a "design or package that acquires a secondary meaning…is a trade dress that may not be used in a manner likely to cause confusion as to the origin…of the goods," "trade dress protection cannot be claimed for product features that are functional." *Id*. at 13 (citations omitted).

While the underlying complaint did not specifically allege "trade dress," Ledo's argued it stated such a claim by mentioning Ledo's Carryout's "distinctive rectangular presentation", its "uniform business format utilizing specially designed equipment, methods procedures and designs at its locations" and the "certain image" "it prescribes for and that customers expect from the Ledo Pizza name." *Id*. at 15.

The district court rejected Ledo's claim and granted Amco summary judgment on the duty to defend. Specifically, it found no basis to conclude Ledo's attempted to appropriate Ledo's Carryout's "trade dress" and determined that any alleged confusion was based upon trademark infringement:

> The Court disagrees with Ledo's, Inc.'s assertion that those references arguably states a trade dress claim. Merely indicating that Ledo Pizza® has achieved a particular image and product quality does not amount to a claim that Ledo's, Inc. has in some identifiable way infringed upon the "total image and overall appearance" that would make up the trade dress for Ledo Pizza® or related franchises (as opposed to infringement of the Ledo Pizza® mark itself). Even grafting onto the complaint the additional allegations Ledo's, Inc. relies

upon from the heavily redacted settlement letter, such as Ledo's Systems and Ledo Carryouts proprietary rights in a particular Ledo Pizza® "sauce [], cheese, thin crust" and presentation, the court discerns no trade dress claim – in other words, the Court finds no allegation that Ledo's, Inc. has appropriated those traits so as to cause conceivable customer confusion….

Neither the complaint nor settlement-posturing assertions of a distinct business model and proprietary ingredients so much as hint that Ledo's, Inc. has wrongfully appropriated the look and feel of Ledo Pizza® such that Ledo's, Inc.'s presentation might confuse consumers as to the source of the pizza. Instead, Ledo System and Ledo Carryout consistently contend that Ledo's, Inc.'s name, in conjunction with similar food products, is likely to cause confusion with the Ledo Pizza® mark. The Court will not inject into the complaint assertions that are not there. *Id*. at 16-20 (citations omitted).

While one can sympathize with a small business facing an expensive lawsuit brought by a larger company, the *Ledo's* decision demonstrates courts cannot infer claims that don't match the allegations of a complaint. Many of the factual statements Ledo's Carryouts made about its operations were superfluous to the allegations against Ledo's. Here, pizza was pizza (regardless of how sliced) and the only plausible argument for confusion rested upon trademark infringement.

**NEW YORK**

**Conflict Between Other Insurance Provision and Additional Insured Endorsement Rendered General Contractor's Policy Co-Primary Insurance With Subcontractor's Policy**

In *Travelers Prop. Cas. Co. of Am. v. Wesco Ins. Co*., 2022 U.S. Dist. LEXIS 22581 (S.D.N.Y. February 8, 2022), Broadway 52nd LP ("Broadway") hired JT Magen ("Magen") as the general contractor on a construction project in New York City. Broadway's contract with Magen required that it be named as an additional insured under Magen's general liability policy on a primary and non-contributory basis. Magen, in turn, hired RBS as a subcontractor on the job. RBS's contract with Magen similarly required that it name Magen and Broadway as additional insureds on its general liability policy. *Id*. at 1-2.

Travelers Property Casualty Company of America ("Travelers") issued a general liability policy to Magen during construction. Wesco Insurance Company ("Wesco") issued a similar general liability to RBS. During construction, an employee of Magen was injured at the job site. He sued Broadway and RBS to recover for his injuries. *Id*. at 2-3.

Broadway's insurer tendered the claim to Magen and Travelers. Travelers accepted the defense, but tendered the claim to Wesco asserting it was excess over the Wesco policy. Wesco acknowledged it owed Broadway a defense, but argued its duty to defend Broadway was co-primary with Travelers. Travelers filed a declaratory judgment action seeking a ruling on priority of coverage, after which both parties moved for summary judgment. *Id*. at 3-4.

The Travelers' policy included a "Scheduled Persons Endorsement" which specifically designated Broadway as an additional insured. It also amended the "Who is an Insured" provision within the policy form so that a "person or organization shown in the Schedule [is an insured], but only with respect to liability arising out of [Magen's] ongoing operations performed for that insured." *Id*. at 4.

The policy also included a "Blanket Additional Insured Endorsement" which likewise amended the "Who is an Insured" provision and stated:

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> Any person or organization that [Magen] is required to include as an additional insured…by a written contract or written agreement…[is an insured] …the person or organization is only an additional insured with respect to liability caused by "your work" for that additional insured.
>
> Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured…unless a written contract or written agreement…specifically requires that this insurance apply on a primary or non-contributory basis. When this insurance is primary and there is other insurance available to the additional insured from any source, we will share with that other insurance by the method described in the policy. *Id.* at 4-5.

The Travelers' policy also included an endorsement amending the Other Insurance provision, providing that if there was an insured loss, Travelers' obligations were "excess over any of the other insurance…that is available to the insured when the insured is added as an additional insured under any other policy, including any umbrella or excess policy." *Id*. at 5-6.

The Wesco policy included a Scheduled Insured Endorsement amending the "Who is an Insured" provision while adding Broadway and Magen as additional insureds. Such coverage applied only with respect to "liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in while or in part by: (1) [RBS's] acts or omissions; or (2) the acts or omissions of those acting on [its] behalf." The Wesco policy form further stated:

> If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance. *Id*. at 6-7.

Travelers argued the amendment to its Other Insurance provision rendered its policy excess to the Wesco policy, regardless of any language that existed within the Blanket Additional Insured Endorsement. Specifically, Travelers argued that the Other Insurance endorsement created an exception to the Blanket Additional Endorsement where other insurance was available to the additional insured, even if the contract required the insured to provided primary and non-contributory coverage to the additional insured. *Id*. at 15.

After concluding that each policy provided coverage for the same risk (i.e. work done by Magen directly or through its subcontractor (RBS)), the district court determined Travelers' Other Insurance endorsement did not override the primary and non-contributory promise within Travelers' Blanket Additional Insured Endorsement:

> The flaw in Travelers' argument is that the Other Insurance Amendment does not modify the Blanket Additional Insured Endorsement; it

modifies Paragraph 4. b. of the policy's Commercial General Liability coverage form regarding other insurance. Thus, the Policy itself provides no clear relationship or hierarchy between two conflicting provisions; it is equally plausible that one controls over the other. This conflict between the Other Insurance Amendment and the Blanket Additional Insured Endorsement constitutes an ambiguity warranting consideration of extrinsic evidence of the parties' intent.

The best extrinsic evidence of the parties' intent with respect to Travelers coverage to Broadway is the contract between Broadway and [Magen], Travelers' primary insured. Schedule B of that contract clearly required [Magen] to include Broadway as an additional insured under its commercial general liability policy on a primary and non-contributory basis. The contract between [Magen] and Broadway, coupled with the Blanket Additional Insured Endorsement, evinces an unambiguous intent to provide Broadway with primary coverage. Accordingly, Wesco and Travelers have a co-primary duty to defend Broadway. *Id*. at 15-17 (citations omitted).

The *Wesco* decision show how "tricky" the priority of coverage issue can be for insurers. While one can understand why Travelers believed its Other Insurance endorsement should prevail as to "the" insured (including an additional insured), there was sufficient confusion among policy terms to have dictated the result.

**WASHINGTON**

**Extrinsic Evidence Favors Duty to Defend Manufacturer That Sold and Installed Defective Fire Mitigation Systems**

In *Twin City Fire Ins. Co. v. Lundberg, LLC*, 2022 U.S. Dist. LEXIS 23545 (W.D. Wash. February 9, 2022), the insured, Lundberg LLC ("Lundberg") was hired to design and install fire and explosion mitigation systems in five paper mills owned by Packaging Corporation of America ("PCA"). After Lundberg installed 57 such devices within the mills, PCA independently tested the devices and allegedly found defects. PCA removed and replaced the devices and sued Lundberg for the cost of "purchasing, maintaining, testing, and replacing" Lundberg's defective devices. *Id*. at 1-2.

Twin City Fire Insurance Company ("Twin City") issued a general liability policy to Lundberg for the relevant period. Upon receipt of Lundberg's tender, Twin City agreed to defend the action pursuant to a reservation of rights. It thereafter filed a declaratory judgment action seeking a ruling that PCA's claims were (1) not covered by its policies; or (2) subject to a policy exclusion. Both parties thereafter sought partial summary judgment on the duty to defend. *Id*. at 2.

Washington law recognizes a broad duty to defend, including the consideration of extrinsic evidence if a complaint is ambiguous or conflicts with facts known or reasonable ascertainable by the insurer. *Id*. at 5 (citing *Woo v. Fireman's Fund Ins. Co*., 164 P.3d 454, 459 (Wash. 2007). Initially, Twin City argued there was no "occurrence" under its policy given any alleged defect in Lundberg's product was a design defect and thus "intentional." The district court rejected this conclusion by noting the allegations of the complaint were not that limited:

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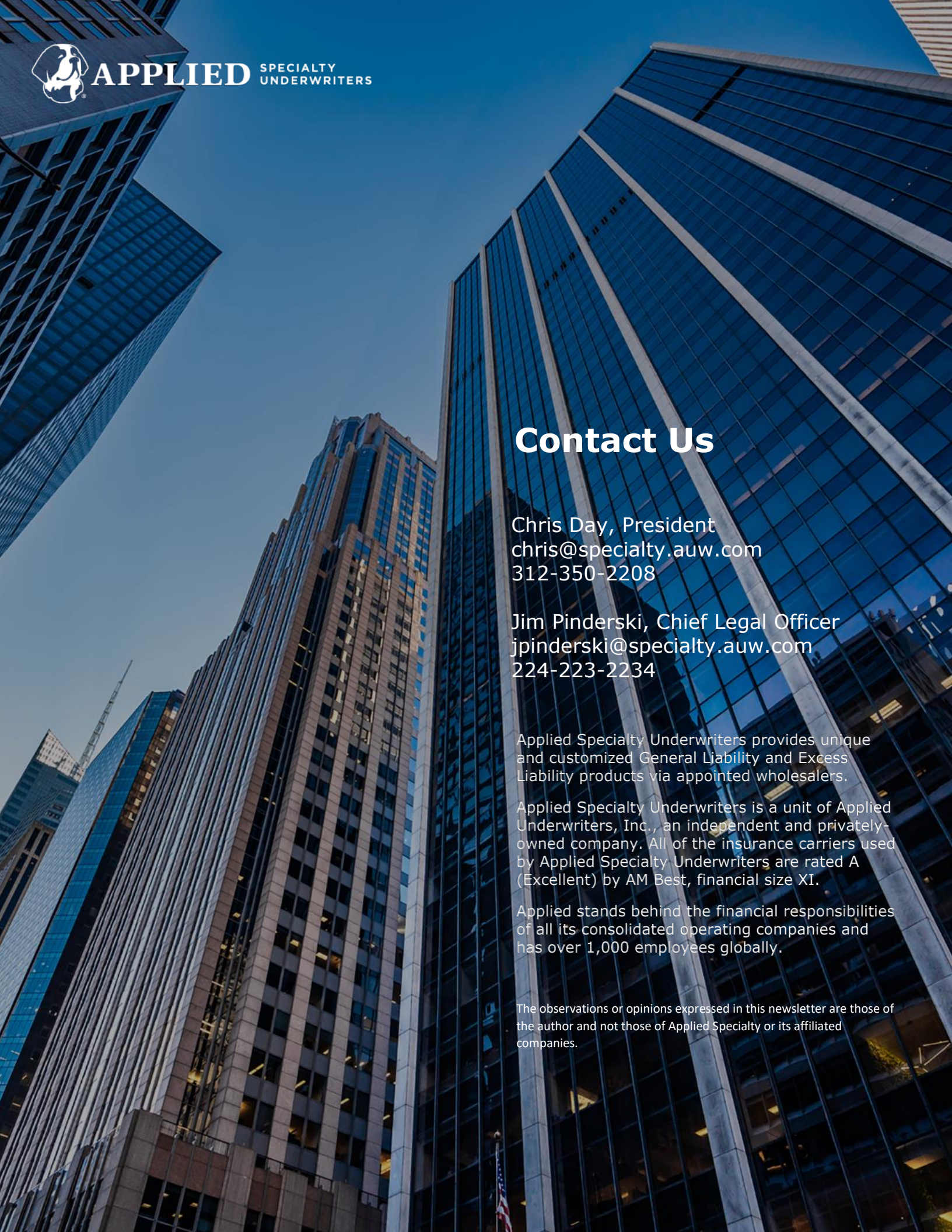
A reasonable interpretation of PCA's amended complaint is that the alleged defects are not traceable solely to design errors. (arresters were not "manufactured to appropriate tolerances"), (arresters were "defective as designed, **manufactured**, sold, and installed by Lundberg). Twin City suggests that PCA's vague allegations regarding manufacturing error, along with the extrinsic evidence presented by Lundberg, are insufficient to establish a mistake in manufacturing. But "under Washington law, an 'occurrence' includes the *deliberate* manufacture of a product which inadvertently is mismanufactured." Here, it can reasonably be concluded that PCA's amended complaint contains sufficient allegations to trigger a duty to defend. *Lundberg, supra.* at 6-7 (citing *Mid-Continent Cas Co. v. Titan Constr. Corp*., 281 F. App'x 766 (9th Cir. 2008) (further citations omitted)).

Twin City further contended that its "Your Own Product" and "Impaired Property" exclusions barred coverage because (1) damage existed only to Lundberg's products; and (2) PCA's property could be rendered "useable" simply by removing or correcting the insured's product or work. The court rejected these arguments based upon extrinsic evidence which showed damage to PCA's property outside of that installed by Lundberg:

> Lundberg presents unrebutted testimony and other evidence indicating that pipes which had to be cut in at least two of the five locations <u>*were not installed by Lundberg*</u>. This is in addition to the exhibits attached to PCA's complaint suggesting that Lundberg routinely sold its flame arresters à la carte; *i.e*. separate from the connecting piping…[N]othing in PCA's complaint or the extrinsic evidence Twin City received suggests that the allegedly defective flame arresters could be removed without making PCA's piping unusable, in at least two of the five locations. *Lundberg, supra.* at 9-10.

The *Lundberg* decision illustrates the impact extrinsic evidence can have on the duty to defend. While the full measure of the complaint was not included in the opinion, the court repeatedly referred to extrinsic evidence in validating its conclusion. One needs to be aware of state rules on such evidence when evaluating coverage.



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