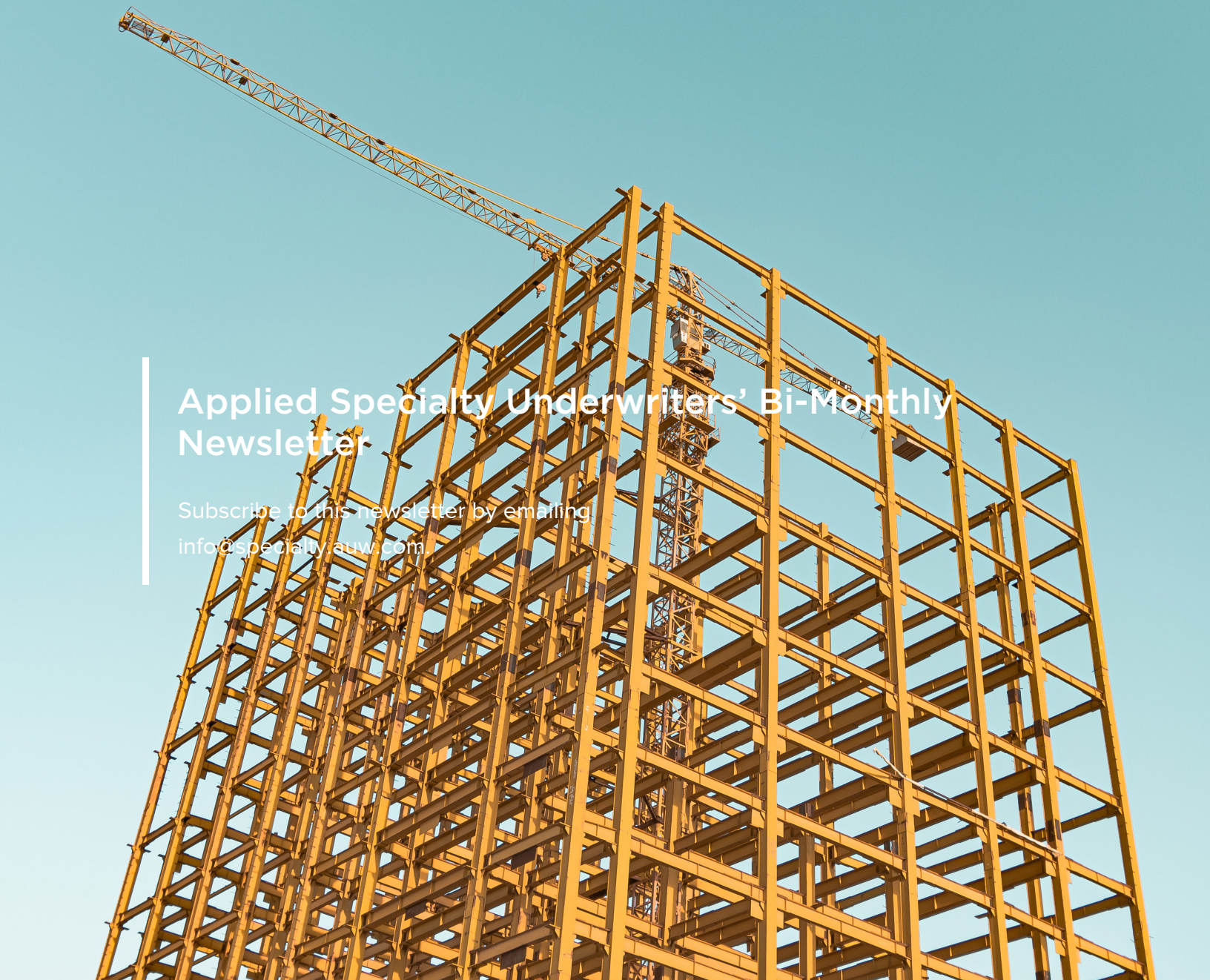
APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

JULY 2022, VOLUME 5



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CALIFORNIA

California – Duty to Defend Triggered Where Underlying Complaint Could Be Read to Allege Damage Caused by Unintentional Act During Policy Period

In *B&B Lamplighter Oceanside Mobilehome Park, LLC v. Wesco Ins. Co.*, 2022 U.S. Dist. LEXIS 104633 (S.D. Cal. June 10, 2022), the insured, B&B Lamplighter Oceanside Mobilehome Park, LLC ("B&B"), owned a mobile home park in Southern California. It was insured under a general liability insurance policy issued by Wesco Insurance Company ("Wesco") for the period July 1, 2018 to July 1, 2019. The policy provided coverage for "property damage" (defined as physical injury to tangible property) and "personal and advertising injury," including the invasion of a right of privacy. *Id.* at 2.

On September 20, 2018, Pacific Manufactured Homes ("PMH") and Lydia Miller ("Miller") sued B&B for property damage to a mobile home that B&B alleged removed from a space they had an interest in at the trailer park. They also alleged personal injury on the grounds that the removal of the mobile home amounted to an invasion of the right of private occupancy. Plaintiffs amended their petition on August 23, 2019, after what appeared to be a preliminary injunction prohibiting the removal of the mobile home was vacated on August 20, 2019. *Id.* at 2-3.

B&B sent Wesco the amended petition on October 17, 2019 and again on November 4, 2019. It received no response. It followed up in December 2019 and again after plaintiff's filed a second amended petition on January 14, 2020. AmTrust North America, the claims administrator handling the claim for Wesco, thereafter rejected a defense. B&B requested coverage three more times between February 10, 2020 and March 23, 2020. On March 26, 2020, it filed a declaratory judgment action seeking a defense from Wesco. *Id.* at 3.

Wesco filed a motion to dismiss, arguing (1) the complaint did not allege an "occurrence" because the removal of the mobile home was an intentional act; (2) the complaint did not allege "property damage" covered by the policy; and (3) the mobile home was not removed from the property (and could thus not have been damaged) during the policy period. B&B asserted one

could not presume that the mobile home was damaged during removal and/or after the policy period. *Id*. at 4-6.

While noting the duty to defend may be triggered by the allegations of a complaint and extrinsic evidence known to the insurer, the district court agreed with B&B that the allegations sufficiently alleged "property damage" triggering a duty to defend:

> However, unlike the case in *Collin*, the exact cause of the damage to the mobile home in this case is unknown. Even if the removal of the mobile home from the lot was conversion, as is alleged in the PMH action, B&B argues that the damage could have occurred from an accident in transit. While the possibility of the damage in *Collin* being caused by an occurrence could be eliminated here, the possibility of an occurrence causing the damage to the mobile home in transit has not been eliminated…
>
> Without evidence showing that the act of removing the mobile home from Spot # 35 was the cause of the damage, Wesco has not shown that the damage was definitively caused by an intentional act, and the potential intervening accident has not been definitively disproved…
>
> Wesco next argues that because the injunction preventing the mobile home from being moved was vacated on August 20, 2019, the mobile home was not moved until after that date. Because the policy expired on July 1, 2019, Wesco has argued that any property damage incurred during the removal from the lot must have occurred after the expiration of the policy and therefore was not covered.
>
> However, as B&B argues, there are no facts in the first amended complaint or the PMH Action that specifically alleged when the mobile home was moved. B&B argues that it is possible that the mobile home was moved during the policy period in violation of the injunction.
>
> The court must draw inferences in the light most favorable to the non-moving party. Because Wesco has not shown when the mobile home was moved, it is plausible that the mobile home was moved within the policy period. Therefore, the facts suggesting potential coverage have not been negated and there is a potential for liability. *Id*. at 9-10, 14-15 (citing *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 797-98 (1994).

The district court rejected the argument that a personal injury was pled against B&B because an occupancy interest in a mobile home was not accompanied by allegations that Miller ever physically occupied the mobile home or space upon which it was located. Regardless, the alleged damage to the mobile home was enough to trigger a duty to defend, resulting in the denial of Wesco's motion to dismiss. *B&B Lamplighter*, supra. at 10-11, 16.

The *B&B Lamplighter* opinion does not recite any of the underlying allegations, but suggests a generous interpretation favoring coverage. One might otherwise conclude that Wesco did not offer any extrinsic evidence proving how and when the alleged property damage actually took place.

ILLINOIS

CGL Insurer Estopped from Denying Coverage to Additional Insured Where It Failed to Defend Public Safety Allegation as a Cause of Motor Vehicle Accident

In *Nationwide Property & Casualty Ins. Co. v. State Farm Fire & Casualty Co*., 2022 Ill. App. LEXIS 213 (Ill. App. 1st Dist. May 10, 2022), a street rehabilitation project began in Burbank, Illinois in 2016. Crowley-Shepard Asphalt ("Crowley") was the general contractor, which subcontracted excavating and concrete services to Davis Concrete (Davis"). Davis in turn subcontracted some of its work to RJ&R Trucking and Excavating, Inc. (RJ&R"), specifically to haul debris and to provide dump trucks for the project. RJ&R was required to maintain commercial general liability insurance through which Davis was to be an additional insured. *Id*. at 3-4.

On June 3, 2016, an RJ&R dump truck driving back to the construction site struck and killed a 13-year-old boy crossing the street on his bicycle. Months later, the boy's mother filed a wrongful death action against RJ&R, its employee, Crowley and Work Zone Safety, Inc. ("Work Zone"), a contractor responsible for providing traffic control services for the construction project. Davis was added as a defendant shortly thereafter. *Id*. at 3-5.

At the time of the accident, RJ&R was covered through State Farm under a $1,000,000 automobile liability policy, as well as a $1,000,000 CGL policy and a $2,000,000 umbrella policy. Davis qualified as an additional insured under State Farm's CGL policy based upon the promise in its written contract with RJ&R. Davis was itself covered under a primary general liability policy issued by Nationwide Property & Casualty Insurance Company ("Nationwide"). *Id*. at 5-7.

Crowley tendered its defense to Nationwide, who in turn tendered it to State Farm, which defended Crowley absent a reservation of rights. The decedent's mother thereafter amended the complaint to add Davis as a defendant, alleging it was negligent for, among other reasons, "failing to take adequate precautionary measures to ensure public safety, including the use of a flagman at the aforementioned intersection." *Id*. at 7.

Davis tendered its defense to RJ&R and State Farm under RJ&R's general liability policy. State Farm failed to respond to multiple requests for a defense. As the trial date in the underlying action approached, the circuit court ordered State Farm to respond to the tenders, which State Farm failed to do. Ultimately, the underlying lawsuit settled for $3,500,000, with State Farm paying $3,000,000 on behalf of RJ&R, Nationwide paying $400,000 on behalf of Davis and Crowley's insurer contributing the last $100,000. The State Farm CGL policy issued to RJ&R paid nothing towards the settlement. *Id*. at 7-8.

Nationwide thereafter filed a declaratory judgment action against RJ&R and State Farm seeking the reimbursement of all attorney's fees paid on behalf of Davis and payment of the $400,000 contributed to the settlement. In response to Davis' demands, State Farm agreed to reimburse Nationwide for defense costs, but denied it owed any obligation to fund the settlement. It filed a counterclaim for declaratory judgment, relying exclusively upon the auto exclusion in its policy, which read, in part:

> [t]his insurance does not apply to:
>
> 8. Aircraft, Auto or Watercraft
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented to or loaned to any insured. Use includes operation and 'loading or unloading'.
>
> This exclusion applied even if the claims allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by an insured… *Id*. at 6, 8-9.

On cross-motions for summary judgment, State Farm argued there was no duty to defend or indemnify Davis because all allegations related to the use of an automobile. Nationwide argued the allegation that Davis failed to ensure "public safety" was not automobile related and, because State Farm failed to defend, it was estopped from asserting defenses to indemnity under Illinois' equitable estoppel rules. The trial court granted State Farm's motion and Nationwide appealed. *Id.* at 10.

In reversing the trial court's decision, the appellate court rejected the argument that the "public safety" allegation related to the use of an automobile and/or that it must be read in conjunction with those related to the operation of the dump truck:

> We agree with Nationwide that the underlying complaint alleged facts outside of the automotive exclusion that fell within, or potentially within, the CGL policy's coverage. As set forth above, Melissa's complaint alleged that Davis Concrete was negligent because it "[f]ailed to take adequate precautionary measures to ensure public safety, including use of a flagman at the aforesaid intersection." This allegation is separate and distinct from Melissa's other allegations concerning Davis Concrete's negligent operations and/or monitoring of the dump truck…
>
> [A] jury need not find that a defendant was negligent based upon every allegation asserted by a plaintiff, it may find that only one allegation of negligence was satisfied. Likewise, here, a jury could have found that Davis Concrete was negligent because it failed to ensure that public safety measures were in place near the construction site without necessarily finding that Davis Concrete was also negligent due to its operation of the dump truck…

Furthermore, in *Northbrook,* the underlying allegations of negligence all mentioned a motor vehicle, i.e. the word "bus." And the student's alleged injuries could not have occurred absent the school district's operation of the bus.

Contrarily, here, Brian could have been injured by something entirely other than a motor vehicle as a result of Davis Concrete's failure to ensure public safety measures were in place, including the use of a flagman, around the construction site. For example, Brian could have ridden his bike into a construction ditch or other hazardous materials near the site, sustaining injuries. Thus, we cannot say the public safety allegation was simply another way of saying that Brian's death was caused by the dump truck, particularly when the allegation itself did not even mention the dump truck or anything related to the truck. *Id*. at 15, 17-20 (citing *Northbrook Property & Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96 (2000)).

Having determined that State Farm breached its duty to defend Davis, the court briefly addressed the issue of equitable estoppel. Under Illinois law, an insurer which takes the position that a complaint may not trigger coverage must either (1) defend the suit pursuant to a reservation of rights; or (2) (timely) seek a declaratory judgment that there is no coverage. If an insurer takes neither action and is found to have wrongfully denied coverage, it is estopped from raising any policy defenses, even if they would have been successful in the absence of a breach. The appellate court found State Farm did neither:

> As set forth above, Davis Concrete tendered its defenses to RJ&R and State Farm on August 6, 2018. State Farm neither defended the suit under a reservation of rights nor sought a declaratory judgment that there was no coverage. And even though Nationwide had filed the present declaratory judgment action when the underlying suit settled, State Farm did not file is counterclaim in the declaratory action until almost a year after the parties settled the matter. State Farm's actions were clearly untimely as a matter of law. Further, State Farm has offered no explanation for its untimeliness in seeking a declaratory judgment that it owed no coverage to Davis Concrete or why it failed to respond to Davis Concrete's tender, despite a number of court orders requiring it to do so. State Farm's argument on appeal that it was not estopped from denying coverage all rest on the assumption that no duty to defend was triggered; State Farm has provided no legal argument that estoppel does not apply even if a duty to defend was triggered, as it was here. (*Nationwide,* supra at 23-24 (citing *Employers Ins. Of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127 (1999).

The *Nationwide* opinion is interesting given (1) the appellate court's nuanced review of the underlying complaint; and (2) State Farm's extended failure to respond to Davis' original tender. While State Farm may have been confident no duty to defend was owed Davis (in light of an auto exclusion applied to an auto accident), the real lesson in *Nationwide* is the significant consequences an insurer may face if it "guesses wrong" on the duty to defend.

ILLINOIS

No Additional Insured Status for Owner That Failed to Properly Incorporate Additional Insured Promise in Subcontractor's Statement of Work

In *Old Republic Ins. Co. v. YMCA*, 2022 IL App. Unpub. LEXIS 852 (Ill. App. 1st Dist. May 27, 2022), YMCA hired Air Comfort Corporation ("Air Comfort") as a contractor to perform maintenance at various facilities around Chicagoland. On September 17, 2012, Air Comfort entered into a Master Agreement, drafted by YMCA's counsel, which provided that "the Contractor's services consist of those services performed by the Contractor's employees and Contractor's consultants as enumerated in this Agreement and more particularly, in one or more Statements of Work." The Master Agreement required Air Comfort to obtain liability insurance and to name YMCA as an additional insured on its policy. Air Comfort thereafter began its routine maintenance work on various facilities. *Id*. at 1-2.

In early 2013, the YMCA began soliciting bid from HVAC contractors on projects to upgrade systems at various locations. On February 11, 2013, YMCA and Air Comfort entered a new contract to upgrade the HVAC at its Irving Park facility. This Agreement was also drafted by YMCA's counsel and required Air Comfort to name YMCA as an additional insured. *Id.* at 2.

In April of 2013, YMCA hired Air Comfort to complete an upgraded HVAC project at its Indian Boundary facility. On April 30, 2013, YMCA and Air Comfort entered into a Statement of Work Agreement for the Indian Boundary facility ("Indian Boundary Agreement"), which did not include a provision requiring Air Comfort to add YMCA as an additional insured under its insurance policy. In relevant part, the Indian Boundary Agreement stated:

> This Statement of Work ("SOW") is entered into as of this 30th day of April 2013, pursuant to that certain Standard Form [sic] of Agreement Between Owner and Contractor, dated February 11, 2013. (the "Agreement") between YMCA of Metropolitan Chicago, an Illinois not-for-profit corporation, as owner ("Owner") and Air Comfort Corporation, an Illinois corporation ("Contractor"). The Project performed as set forth below shall be governed by the terms of the Agreement unless expressly modified herein. Capitalized terms not otherwise defined will have the meaning set forth in the Agreement. *Id.* at 3-4.

On May 13, 2013, an Air Comfort employee was injured while working on the Indian Boundary project. He filed suit against YMCA, alleging it was negligent in failing to inspect and maintain the premises on which he was injured. YMCA tendered the suit to Air Comfort's general liability insurer, Old Republic Insurance Company ("Old Republic"), which denied coverage. Old Republic then filed a declaratory judgment action against YMCA and its own insurer seeking a ruling that YMCA did not qualify as an additional insured under its policy. *Id*. at 4.

Old Republic asserted that YMCA was not entitled to additional insured status under its policy because (1) such status was provided only when required by a written agreement entered into by Air Comfort; and (2) there was no written contract that required Air Comfort to provide additional insured status to YMCA on the Indian Boundary project. In its counterclaim, YMCA asserted it was owed additional insured coverage because the Indian Boundary Statement of Work incorporated the Master Agreement dated September 17, 2012 and the Irving Park Agreement dated February 11, 2013 (both of which required Air Comfort to name YMCA as an additional insured). The trial court granted Old Republic's motion for summary judgment and YMCA appealed. *Id*. at 4-9.

In affirming the trial court's ruling, the appellate court focused on the unambiguous nature of the Indian Boundary Agreement, including what was (and wasn't) present in the contract:

> Significantly here, YMCA and [its insurer] do not contend that the Indian Boundary Statement of Work is ambiguous. We agree that the Indian Boundary Statement of Work is, an unambiguous contract, as the language is clear; and the general meaning is easy to ascertain. The Indian Boundary Statement of Work does not provide, anywhere or in any way, that the parties intended for Air Comfort to add YMCA as an additional insured on its insurance policy with Old Republic. In fact, the word "insurance" is not even mentioned in the Indian Boundary Statement of Work. Under these facts and circumstances, for this court to interpret the Indian Boundary Statement of Work to mean that the parties intended for YMCA to be an additional insured would be contrary to the contract's plain language…
>
> The Indian Boundary Statement of Work does reference a contract entitled "MASTER SERVICES AGREEMENT DATED FEBRUARY 11, 2013" and "Standard Form [sic] of Agreement between Owner and Contractor dated February 11, 2013." But as the trial court pointed out, no such contract document exists. Further, YMCA and (its insurer) do not claim that they can produce the document. And they do not offer any other explanation regarding the discrepancies in the description of the referenced, non-existent, contract document.
>
> Rather, YMCA and (its insurer) ask us to look to the Master Agreement and the Irving Park Agreement to demonstrate the parties' intent for the Indian Boundary Statement of Work. But, as already discussed, it is not in dispute that the Indian Boundary Statement of Work is an unambiguous contract. Consequently, our analysis is strictly limited to the language contained within the Indian Boundary Statement of Work, and we will not look to extrinsic evidence, including other contracts and documents to determine the parties' intent. *Id*. at 13-15 (citations omitted).

The YMCA decision appears to be a harsh result for the owner, as one presumes Air Comfort understood additional insured coverage was part and parcel of their business relationship. To the reader, it appears clear YMCA made an error in failing to properly incorporate other contracts by reference into the relevant Statement of Work. Ultimately, it paid the price that accompanies enforcing an unambiguous contract as written.

INDIANA

State Supreme Court Finds Liquor Liability Exclusion Bars Coverage for All Claims "Efficiently and Predominantly" Caused by Intoxication

In *Ebert v. Illinois Cas. Co.,* 2022 Ind. LEXIS 352 (Ind. June 16, 2022), Daniel Parks owned two show clubs, Big Daddy's and Little Daddy's, in Kokomo, Indiana. On July 5, 2015, William Spence ("Spence") drank alcohol at Big Daddy's and later drove away in his truck. Shortly thereafter, he failed to stop at an intersection and collided with another vehicle, injuring its passengers (the Eberts). Around the time of the accident, Spence had a blood alcohol level of .195 percent (well above the legal limit to drive). The Eberts sued the clubs and owners for their injuries. *Id*. at 1-2.

Evidence presented showed that police removed Spence from Big Daddy's earlier in the evening. A bouncer from Little Daddy's stopped by Big Daddy's to see if they needed any assistance and encountered Spence lingering in the parking lot. Spence grabbed a pipe from his truck and stepped towards the bouncer, who threatened Spence with bodily harm if he did not leave the premises. Spence drove off and collided with the Eberts' vehicle. *Id.* at 2-3.

Illinois Casualty Company ("ICC") issued separate businessowner's liability and liquor liability policies to Big Daddy's and Little Daddy's. ICC agreed to defend all of the defendants under the businessowners and liquor liability policies issued to both clubs. It thereafter filed a declaratory judgment action seeking a ruling that the only policy that needed to respond to the lawsuit was the liquor liability policy issued to Big Daddy's. The businessowners policies issued to both clubs included the following liquor liability exclusion:

> This insurance does not apply to:
>
> **c. Liquor Liability**
>
> "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> This exclusion – c.(1), c.(2), and c.(3) applies even if the claims allege negligence or other wrongdoing in:
>
> (a) The supervision, hiring, employment, training, or monitoring of others by an insured; or
>
> (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;
>
> If the "occurrence" which caused the "bodily injury" or "property damage involved that which is described in Paragraph (1), (2), or (3) above. *Id.* at 8-9.

The insureds argued the liquor liability exclusion was ambiguous and could not apply to every factual scenario occurring at a bar. ICC asserted the exclusion was

unambiguous and absolved it of any duty to defend based upon the facts presented. ICC was granted summary judgment as to as to all policies except the liquor liability policy issued to Big Daddy's. On appeal, the insureds (and the underlying plaintiffs) secured a ruling that all policies owed the insureds a duty to defend. ICC sought a transfer to the Indiana Supreme Court, which was granted (vacating the opinion of the Court of Appeals). *Id*. at 5-6.

The Indiana Supreme Court restated that the primary issue on appeal was whether the liquor liability exclusion absolved ICC of a duty to defend under the businessowners' policies. It began by rejecting the argument that the exclusion was ambiguous:

> We disagree that the language of the exclusion is ambiguous, and we do not infer ambiguity simply because it is broad in scope. Of course, insurers have the right to limit their coverage of certain risks and, therefore, their liability, by imposing exceptions, conditions, and exclusions. In this matter, Illinois Casualty clearly did so. Like other courts, we do not find that reasonable people would honestly differ as to the meaning of the term "intoxication" or the phrase "under the influence." Instead, the policy plainly and unambiguously excludes coverage for claims of bodily injury for which any insured may be liable by reason of causing or contributing to the intoxication of any person or furnishing alcohol to a person under the influence, even if the claims allege negligence or other wrongdoing in the supervision or monitoring of others by an insured or in failing to provide transportation to a person who might be under the influence of alcohol. *Id*. at 9-10.

In ruling for ICC, the court applied a "predominant and efficient" proximate cause analysis to the underlying allegations:

> In concluding whether the liquor liability exclusion applies to the Eberts' remaining claims, we apply the efficient and predominant cause analysis, originally set forth by our Court of Appeals. See *Prop-Owners Ins. Co. v. Ted's Tavern, Inc*., 853 N.E.2d 973 (Ind. Ct. App. 2006). …After determining the policy [in *Ted's Tavern*] was unambiguous, the Court of Appeals concluded the allegations within the claims of negligently hiring, training, and supervising employees and nuisance "are general 'rephrasings' of the core negligence claim for causing/contributing to Wickliff's drunk driving," and the claims were "so inextricably intertwined with the underlying negligence that there [was] no independent act that would avoid [the] exclusion." …
>
> In resolving the case at bar, we find the efficient and predominant cause analysis instructive.… [W]e restate the Ebert's allegations as follows: Big Daddy's served Spence alcohol, and he subsequently drove his vehicle from the premises while intoxicated and collided with the Eberts' vehicle. Thus, the efficient and predominant cause of the collision was Spence's drunk driving after he was served alcohol at Big Daddy's….
>
> Here, the claims that the Parks defendants were negligent in allowing Spence to leave Big Daddy's in his vehicle and failing to call police "are so inextricably intertwined with the underlying negligence," and could not have resulted in injury but for Spence's driving while intoxicated after Big Daddy's served him alcohol. Plainly, the Eberts essentially claim the Parks defendants were negligent for failing to intervene. But we cannot ignore the circumstance necessitating intervention in the first place: the service of alcohol to an intoxicated Spence. Therefore, like the trial court, we find that Spence's intoxication was the efficient and predominant cause of the Eberts' injuries. *Ebert,* supra. at 12-17.

The owner also attempted to secure a defense under Little Daddy's businessowner's liability policy because the bouncer who confronted Spence in the parking lot was a Little Daddy's employee. The court rejected this position where the underlying pleading clearly alleged that (1) Little Daddy's contributed to Spence's intoxication; and (2) Little Daddy's failed to obtain alternate transportation for him. These allegations fell squarely within the liquor liability exclusion in Little Daddy's liability policy. *Id.* at 18-19.

The *Ebert* decision is significant, in that the Indiana Supreme Court felt compelled to (1) validate the legitimacy of a broad exclusion; and (2) refocus the coverage analysis on allegations that spoke to the "efficient and predominant" cause of the plaintiff's injuries. Conjecture and hypotheticals that are neither pled nor "predominant" should not prevail.

Federal Appellate Cases

SECOND CIRCUIT

Two Year Delay in Disclaiming Coverage for Bodily Injury Claim Was Unreasonable as a Matter of Law

In *Golden Ins. Co. v. Ingrid House*, LLC, 2022 U.S. App. LEXIS 16343 (2nd Cir. June 14, 2022), Golden Insurance Company ("Golden") issued a liability policy insuring a construction project for Ingrid House, LLC ("Ingrid") in New York City. In December 2015, a wall collapsed at the project, causing a worker to fall to his death from the fourth floor of the building. In December of 2017, the worker's estate filed a lawsuit against Ingrid seeking damages. The lawsuit was tendered to Golden in January of 2018. *Id*. at 1-3.

Golden's policy was to provide coverage for bodily injury and property damage arising out of or occurring at the project site. A separate section of the policy contained various exclusions, including Endorsement No. 10, which barred coverage for:

> subsidence, settling, expansion, sinking, slipping, falling away, caving in, shifting, eroding, consolidating, compacting, flowing, rising, tilting or any other similar movement of earth or mud or expansion of soils, regardless of whether such movement is a naturally occurring phenomena or is man-made. *Id.* at 2-3.

Endorsement No. 30 further barred coverage for "bodily injury or property damage arising out of [Ingrid's] work on the exterior of any building which at its highest point is over three stories in height." *Id*. at 3.

Upon receipt of the tender in January of 2018, Golden agreed to defend Ingrid while reserving its right to disclaim coverage under Endorsement 10 and/or 30. More specifically, its letter to Ingrid noted the construction project was over three stories, but that it was "unknown" whether the injury arose out of the exterior of the building. It also noted the accident may have been caused by a "full or partial building collapse." *Id*. at 3-4.

Over two years later, Golden filed a declaratory judgment action seeking a ruling that (1) it owed no coverage for the accident in light of the two exclusions;

(2) it be allowed to withdraw its defense; and (3) Ingrid must reimburse Golden for all fees and costs associated with its defense. Ingrid argued Golden's disclaimer was untimely under New York law, thus precluding it from denying coverage for the claim. The district court ruled in favor of Ingrid and Golden appealed. *Id*. at 4-5.

New York Insurance Law §3420 (d)(2) governs the timeliness of a disclaimer of coverage for a bodily injury claim arising from a New York accident under a New York policy. It provides, in part:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant. *Id.* at 4-5.

The purpose of Section 3420 (d)(2) is to expedite the disclaimer process to enable a policyholder to pursue other avenues expeditiously. *Id*. at 4-5 (citing *First Fin. Ins. Co. v. Jetco Contracting Corp*., 1 N.Y. 3rd 64, 68 (2003). Golden raised several arguments, but principally asserted that its disclaimer was not late due to "uncertainty" over the cause of the accident.

In affirming the district court's decision, the 2nd Circuit closely tracked the language of the statute and the facts that were (or should have been) long known to Golden:

> Here, Golden waited two years after learning of the underlying lawsuit to disclaim coverage for damages arising out of the accident, even though the record reflects that the "basis for the disclaimer was, or should have been, readily apparent" by January 2018 – if not earlier. Golden Insurance was first notified of the accident in January 2016 and had ample time to investigate the facts relevant to coverage. By the time it learned of the underlying lawsuit in January 2018, it knew that the construction project involved the exterior of the building and that the building was over three stories high. It also knew that the accident "may have been cause[d]" by a wall collapse. Moreover, following the accident in December 2015, the New York City Buildings Department issue a public violation report, stating that the accident resulted from the failure to "adequately secure [a] portion of [a] parapet wall during demolition work." The United States Occupational Safety and Health Administration ("OSHA") also investigated the accident and stated, in a publicly-accessible citation issued on June 21, 2016, that workers were "demolishing a masonry wall along the west side of the building" when a portion of the wall fell onto a temporary work floor on which Mr. Chicaiza was working, breaking the floor and causing Mr. Chicaiza's fatal fall. Indeed, Golden Insurance relies on New York City's violation report to support its argument that coverage is clearly barred by Endorsements #10 and #30.
>
> Golden Insurance maintains that there was still uncertainty over whether Mr. Chicaiza's accident arose from work on the exterior of the building, but it fails to explain "why anything beyond a cursory investigation was necessary to determine" this crucial but straightforward – fact. There is no evidence in the record that Golden Insurance diligently investigated the relevant facts, and Golden Insurance offers no reason as to why such an investigation should have taken two years. *Ingrid House*, supra at 7-8.

The court likewise rejected Golden's argument that it continued to defend Ingrid based upon ambiguity in the underlying complaint:

Casualty Spotlight

> Golden Insurance nonetheless contends that, even if it was aware of the facts supporting disclaimer based on an outside investigation, it was nonetheless obligated to defend the lawsuit at its initial stages because the allegations in the underlying complaint were ambiguous as to coverage. It is true that the duty to defend is "exceedingly broad" and that an insurer must provide a defense "whenever the allegations of the complaint suggest a reasonable possibility of coverage". But "the insurer's duty to defend is not an interminable one, and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy." "Where the issue is clearcut, the insured or the insurer [is] entitled to obtain a prompt judicial determination, whether by summary judgment, declaratory judgment or otherwise that, contrary to the allegations of the personal injury in plaintiff's complaint… the insurer is not obligated by its contract of insurance to furnish a defense to the [insured]." Again, Golden Insurance fails to sufficiently explain why it could not have brought this declaratory judgment action to disclaim coverage and terminate any duty to defend years earlier. *Id*. at 8-9 (citations omitted).

The *Ingrid House* decision highlights the importance of an early and thorough investigation of a claim, but also a timely decision based upon those facts under §3420(d)(2). It was not a difficult decision for the court to conclude the insurer's disclaimer was untimely when it relied upon (1) government reports issued over three years before the disclaimer; and (2) deposition testimony taken more than six months before the disclaimer.

FIFTH CIRCUIT

Insurer's Duty to Defend Not Triggered Unless Insured Requests A Defense

In *Moreno v. Sentinel Ins. Co.*, 2022 U.S. App. LEXIS 15253 (5th Cir. June 2, 2022), Moreno worked as a painter for N.F. Painting ("NFP"). NFP contracted with Beazer Home Texas, L.P. and Beazer Homes Texas Holdings, Inc. (collectively "Beazer") to work on one of its developments. As part of a "Master Construction Agreement,", NFP was to name Beazer as an additional insured under its general liability policy. *Id.* at 2.

While on site, Moreno fell from a ladder and was injured. In November of 2016, he sued NFP and Beazer alleging negligence in connection with his fall. NFP was insured under a business owner's liability policy issued by Sentinel Insurance Company ("Sentinel") for the relevant period. The Sentinel policy included standard exclusions related to injuries to an employee of the Named Insured and any obligations owed under workers' compensation or similar laws. *Id*. at 2-4.

Upon being served with the lawsuit, Beazer tendered the suit to NFP and Sentinel for defense and indemnity in April of 2017. Sentinel agreed to defend Beazer without a reservation of rights. Upon receipt of the lawsuit in March of 2017, NFP did not contact Sentinel about coverage or a defense and did not respond to several

inquiries from Sentinel to discuss the lawsuit. *Id*. at 6-9.

Eventually, Sentinel spoke with counsel for NFP, who confirmed he was hired by NFP to defend the suit because NFP did not believe there was coverage given "plaintiff was an employee of NFP." Despite not ever having requested Sentinel defend or indemnify NFP, Sentinel sent NFP a disclaimer based upon Moreno's status as an employee of NFP injured during the course and scope of his employment (thus triggering the workers' compensation and employee exclusions). The disclaimer letter closed by stating:

> Our analysis is based on the facts as we presently understand them. If there are new allegations or additional information that you feel may alter our position as to the coverage, please forward that information to us for consideration. *Id.* at 9-12.

Over a year later, Beazer settled with Moreno. In October of 2018, Moreno filed an amended petition, alleging for the first time that he was injured as an "independently contracted painter" and not as an employee of NFP. It was undisputed that Sentinel was not notified when the petition was amended nor requested to respond to it by NFP. *Id*. at 12.

Nearly seven months later, the underlying litigants submitted a "Proposed Agreed Judgment" to the state court judge. Despite a trial date having previously been set for August 2019, the proposed judgment represented the cased proceeded to trial on April 15, 2019 and "at the conclusion of the evidence," the court made the following determinations: (1) Moreno was an independent contractor and not an employee at the time of the accident; (2) Sentinel provided liability coverage to NFP with a $1,000,000 limit of liability; (3) NFP placed Sentinel on "proper" notice of Moreno's claims; and (4) Moreno was entitled to recover $1,627,541 from NFP. The court signed the "Proposed Agreed Judgment" on May 20, 2019. *Id*. at 13-14.

On June 26, 2019, Moreno commenced a declaratory judgment action against Sentinel seeking recovery as a third-party beneficiary to the insurance contract. After the case was removed to federal court, the parties filed cross-motions for summary judgment, where Sentinel argued (1) it never breached any duties to NFP given NFP never requested a defense; and (2) Sentinel owed NFP no coverage based the above-referenced policy exclusions. Conversely, Moreno argued Sentinel (1) could have provided coverage to NFP upon learning of the state court action; and (2) was collaterally estopped from denying Moreno was an independent contractor based upon the May 20, 2019 judgment. The district court granted Sentinel's motion and Moreno appealed. *Id.* at 14-16.

The Court of Appeals quickly noted that Moreno's claims against Sentinel were premised on the assertion that Sentinel wrongly refused to defend NFP in the liability action. In affirming the district court's ruling, the court plainly noted that an insured must request a defense before an insurer can breach such a duty:

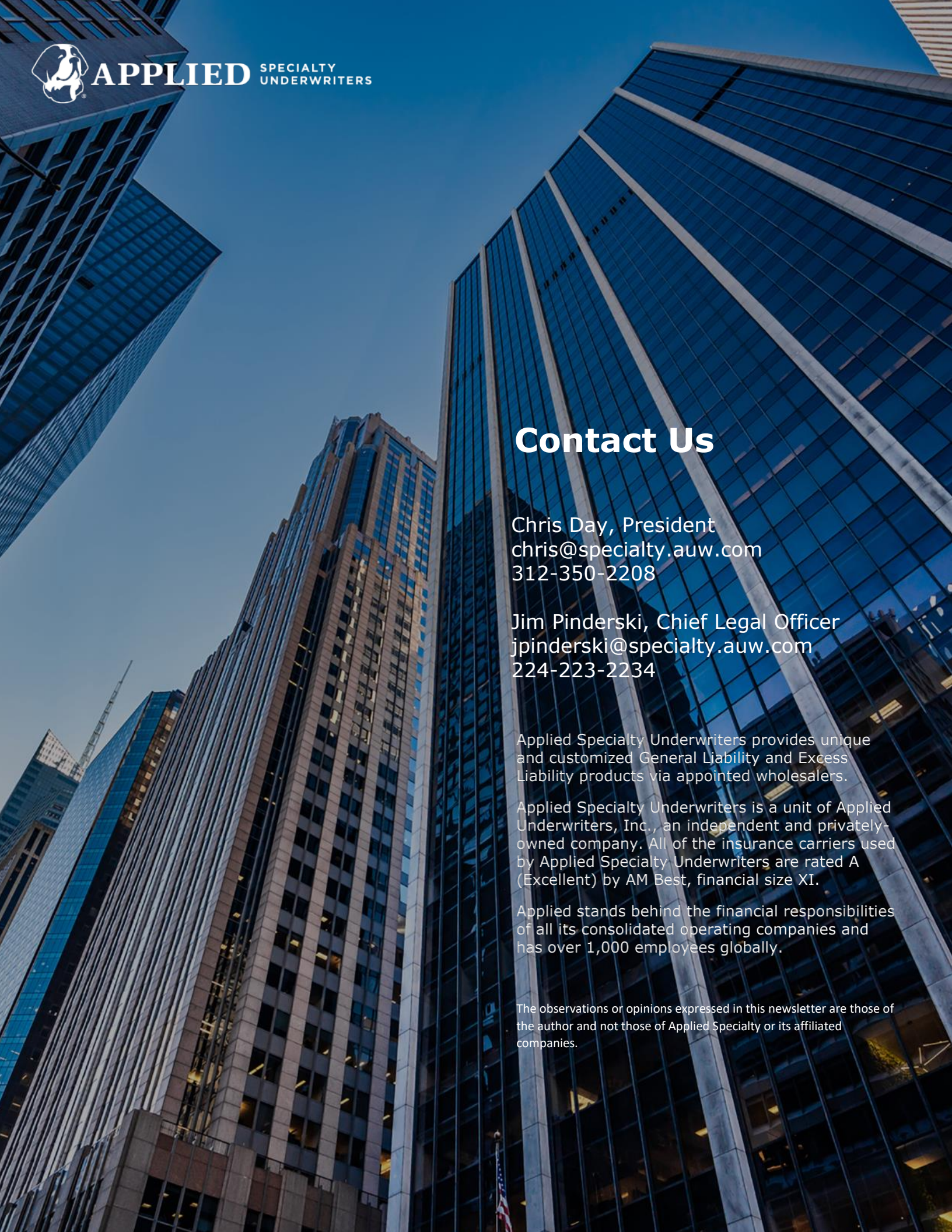
> [I]t is clear that, under Texas law, an insurer's duty to defend is not triggered unless and until the insured requests that a defense be provided.
>
> Here, as stated, N.F. Painting did not seek defense or coverage from Sentinel when it was served with Moreno's original state court petition; nor did it forward the suit papers that it received to Sentinel for that purpose. Rather, because N.F. Painting's owner, Flores, reportedly did not think Moreno's claim would be covered by the Sentinel policy – and so represented in its responses to Moreno's discovery requests - N.F. Painting hired its own counsel, Lopez. Indeed, N.F. Painting never sought to discuss the matter with Sentinel at all, and seemingly never would have, if Sentinel would not have initiated contact, in late May 2017, after receiving a copy of Beazer Homes' demand for defense and indemnity from Beazer Homes, *not* its insured, earlier that month.

Even after Sentinel assumed defense of Moreno's claims against Beazer Home, in June 2017, N.F. Painting did not tender (to Sentinel) defense of the claims that Moreno had asserted against it, or request coverage from Sentinel for the claims. Rather, Lopez's representation of N.F. Painting continued without further request, or inquiry, by N.F. Painting regarding Sentinel's duty of defense or coverage. This remained true even when Moreno amended his complaint, in October 2018, to allege independent contractor (rather than employee) status; and N.F. Painting agreed, in May 2019, to entry of the Agreed Judgment against it for approximately $1.6 million in damages. *Id*. at 20-23 (citations omitted).

The court further rejected Moreno's assertion that an insurer's "awareness" of an underlying suit triggered Sentinel's duties in this case:

> As the notice of suit and delivery-of-suit papers policy provisions have been construed by Texas courts, an insured's transmittal of suit papers to the insurer triggers the duty of defense because, in *the ordinary case*, the documents are sent with the expectation that having the documents will enable and cause the insurer to promptly provide (or at least fund) the insured's defense against the claims asserted against it. This, however is not the *ordinary* case.
>
> Rather, on the summary judgment record before us – given N.F. Painting's initial determination that the Sentinel policy did not cover Moreno's claims, Attorney Lopez's continued representation of N.F. Painting, and the absence of any contemporaneous communications regarding N.F. Painting's defense, Lopez's role as counsel, possible substitution of counsel, or even costs of defense – Lopez's June 19 transmittal of Moreno's petition to (Sentinel) cannot reasonably be construed to convey an expression of expectation, intent or desire by N.F. Painting to have Sentinel assume its defense…
>
> In short, the undisputed facts before us show that N.F. Painting chose, with the assistance of counsel, to handle Moreno's personal injury claims in its own way, without involving Sentinel in its defense, as it was entitled to do. And Moreno has put forth no evidence suggesting that Sentinel was not entitled to rely on that decision. Having made that decision, it is N.F. Painting, and thus Moreno, as third-party beneficiary, *not* Sentinel, who must bear responsibility for any resulting adverse consequences. In other words, the law will not permit a third-party beneficiary to simply disregard an insured's litigation decisions, i.e., essentially re-write history, merely because he has no other means of satisfying his judgment against the insured. Thus, because no defense ever was sought, it was not owed. *Id*. at 24-25, 28.

While the *Moreno* case highlights the importance of clearly tendering a claim to an insurer for defense and indemnity, the underlying facts suggest NFP knew the lawsuit was not covered (and acted accordingly). There are hints of collusion within the underlying judgment suggesting an effort to manufacture coverage, which the court did not need to address in making its decision.



APPLIED SPECIALTY UNDERWRITERS

Contact Us

Chris Day, President
chris@specialty.auw.com
312-350-2208

Jim Pinderski, Chief Legal Officer
jpinderski@specialty.auw.com
224-223-2234

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