APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

MAY 2023, VOLUME 10

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MAY 2023, VOLUME 10

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CASUALTY SPOTLIGHT

Recent Decisions and Relevant Insights

Spotlight Alert

Florida Enacts Sweeping Tort Reform and Bad Faith Legislation

On March 24, 2023, Florida Governor Ron DiSantis signed sweeping tort reform and bad faith legislation (CS/CS/HB837) that, on its face, will have far reaching implications for litigants and insurers. The law became effectively immediately and was preceded by the filing of tens of thousands of lawsuits seeking to avoid the application of the new rules.

Among the most consequential parts of the act for defendants in tort litigation include:

- Shortening the statute of limitations in general negligence cases from four years to two years;
- Replacing Florida's "pure" comparative negligence system with a "modified" comparative system that precludes a plaintiff from recovering any damages if found to be more than 50% responsible for his or her injuries;
- Requiring the disclosure of letters of protection for medical treatment while creating new standards with respect to evidence a fact finder can consider in calculating medical damages;
- Instituting a presumption against liability of the owner or operator of a multifamily residential property if it can prove it "substantially implemented" certain security measures; and
- Severe limitations on the use of contingency-fee multipliers.

The act contains new rules and restrictions with respect to bad faith claims against liability insurers, which:

- Unambiguously declare that negligence alone is insufficient to support a bad faith claim;
- Impose a duty upon insureds and their representatives to act in good faith when furnishing information, making demands, setting deadlines and negotiating with insurers;
- Insulate an insurer from bad faith if it tenders the lesser of its limits or

the amount demanded by a claimant within 90 days of receiving any notice accompanied by "sufficient evidence to support the amount."

- Create limitations on the recovery of attorney's fees when an insured prevails in an insurance related dispute (liability policies only); and

- Create procedures for insurers confronted with multiple claims arising out of the same occurrence which may collectively exceed policy limits.

The tort reform package in Florida is among the most comprehensive ever assembled. Parts of it are certain to be litigated and one can expect plaintiff's attorneys will adapt where they can. Regardless, the new law should have a substantial impact in limiting frivolous lawsuits while creating greater transparency in proving actual damages.

State-by-State Cases

LOUISIANA

"Single Business Enterprise" Doctrine Does Not Give Members Rights Under Another Member's Insurance Policies

In *Endurance American Ins. Co. v. Cheyenne Partners, LLC,* 2023 U.S. Dist. LEXIS 43172 (W.D. La. March 14, 2023), a small Piper aircraft crashed shortly after takeoff In Lafayette, Louisiana on December 28, 2019. The pilot and four of five passengers were killed. A lawsuit was filed on behalf of the decedents, their family members and the injured passenger to recover for their losses. Among those sued was the Southern Lifestyle Development Company and related persons/ entities (collectively "SLD defendants"), all of which allegedly co-owned and/or operated the aircraft. *Id.* at 10.

SLD defendants thereafter filed a cross-claim alleging they qualified as insureds under primary and excess liability policies Travelers Indemnity and Travelers Property ("Travelers") issued to Global Data Systems, Inc. ("GDS"). GDS was another entity that allegedly co-owned and/or co-operated the Piper aircraft. Neither Travelers policy identified or otherwise defined any SLD defendant as an insured. *Id.* at 11.

Travelers moved for summary judgment on the grounds that no SLD defendant qualified as an insured based upon the terms within its policies. SLD defendants did *not* dispute this fact. However, they asserted they qualified as insureds under the Travelers policies because SLD and GDS were members of a "single business enterprise" (i.e. joint ownership and/ or operation of the Piper). SLD defendants argued the "legal effect" of the "single business enterprise" rendered them insureds under the Travelers policies. *Id.* at 9, 14-15.

The district court began its analysis by noting the "single business enterprise" doctrine was a theory of imposing *liability* where two or more business entities act as one. "Generally, under this doctrine, when corporations integrate their resources in operations to achieve a common business purpose, each business may be held liable for wrongful acts

done in pursuit of this purpose." *Ames v. Ohle*, 219 So. 3d 396, n. 9 (La. App. 2017).

In ruling in favor of Travelers, the court noted the "single business enterprise" theory does not allow one to secure rights to another's liability insurance:

> While a judgment entered pursuant to the single business enterprise theory results in vesting title to the assets of all the single business enterprise entities into a single pool for liability purposes, it does not change the ownership of each affiliated corporation or entity making up the business enterprise. In other words, a single business enterprise finding cannot be used as a means for one member of the SBE to gain rights allotted to another.

Moreover, while there is no Louisiana case directly on point in the insurance setting, courts in Texas have uniformly rejected the argument that a finding of a single business enterprise creates insured status for all members of that enterprise under an insurance policy issued only to one of its members.

Louisiana's single business enterprise doctrine does not reform insurance contracts. Additionally, this Court finds the reasoning and rationale set forth in the aforementioned Texas cases to be persuasive and further notes that the SLD defendants – who bear the burden of proving they qualify as insured under the Travelers policies – do not explain how Texas' law on single business enterprise is substantially distinctive from Louisiana's to warrant a dissimilar outcome. For these reasons, the SLD defendants' claims against Travelers premised upon them being insureds pursuant to the single business enterprise doctrine are misplaced. *Cheyenne Partners*, supra at 15-17 (citing *Ford, Bacon & Davis, LLC v. Travelers Ins. Co.*, 2010 WL 1417900 (S.D. Tex. Apr. 7, 2020), aff'd sub nom., 6535 F.3d 734 (5th Cir. 2011); *Acceptance Indem. Ins. Co. v. Maltez*, 619 F. Supp. 2d 289, 301-302 (S.D. Tex. 2008), aff'd, 2009 WL 2748201 (5th Cir. June 30, 2009).

Cheyenne Partners presents the situation where an interesting legal theory runs squarely into bedrock legal authority. The "single business enterprise" doctrine was never intended to create rights among members to access coverage under another member's insurance policy. An insurance policy governs who does (and does not) qualify as an insured - not any particular theory of liability. This is the decision one would expect most (if not all) courts would render under similar circumstances.

NEW YORK

Insurer Estopped from Denying Coverage to Insured Based Upon Sixty-Nine Day "Delay" in Issuing Disclaimer - But Disclaimer Effective as to Co-Insurer Seeking Reimbursement of Defense Costs

In *Harleysville Ins. Inc. v. United Fire Protection Inc.*, 2023 N.Y. Misc. LEXIS (Sup. Ct., New York County March 13, 2023), Commercial Construction Management, Inc. ("CCM") was hired as the general contractor on a construction project for Lululemon USA ("Lululemon") on 5th Avenue in New York City. CCM entered a subcontract with United Fire Protection, Inc. ("United Fire") to supply labor and material for various sprinkler work. *Id*. at 1-2.

On September 17, 2015, Jose Molina, an employee of United Fire, was seriously injured when he was struck by a falling pipe. He later sued the owner of the property, Lululemon (tenant) and CCM for negligence and Labor Law violations. CCM filed a third-party action against United Fire seeking indemnification and contribution. *Id*. at 3.

Harleysville Insurance Company ("Harleysville") issued a general liability policy to CCM for the relevant period. Everest Indemnity Insurance Company ("Everest") issued a general liability policy and commercial catastrophe (excess) policy to United Fire for the same period. Everest's policies expressly excluded coverage for injuries to employees of "the insured." The Harleysville policy's "other insurance" provision stated that "this insurance is excess over ... [a]ny other primary insurance available to [CCM] covering liability for damages arising out of the premises or

operations, or the products or completed operations, for which you have been added as an additional insured by attachment of an endorsement." *Id.* at 2.

On November 15, 2016, United Fire's broker forwarded CCM's demand for defense and indemnity for itself, Lululemon and the owner, to Everest. On January 23, 2017, Everest disclaimed coverage under both policies based upon the employer's liability exclusion. Harleysville defended CCM, Lululemon and the owner and thereafter filed a declaratory judgment action against Everest seeking defense and indemnity for these entities within the underlying action. *Id.* at 3-4.

Initially, Everest moved for summary judgment on the grounds that Lululemon and the owner did not qualify as additional insureds under the Everest policies. The trial court granted the motion, noting that (1) the contract was entered between CCM and United Fire; (2) the Everest policy only provided additional insured status to those whom United Fire had "agreed in writing" to include as additional insureds; and (3) United Fire's contract with CCM (apparently) did not reference Lululemon and the owner for that purpose. *Id.* at 4.

The court thereafter focused on whether CCM was owed coverage as an additional insured under the Everest policies. While noting that the duty to defend is "exceedingly broad," the court focused on the plaintiffs' allegations and evidentiary support for the conclusion that United Fire's conduct was a proximate cause of Molina's injury. After examining the record before it, the court held that documents and testimony supported the conclusion that Molina's injury was potentially caused by United Fire (and thus additional insured coverage was available to CCM). *Id.* at 5-6.

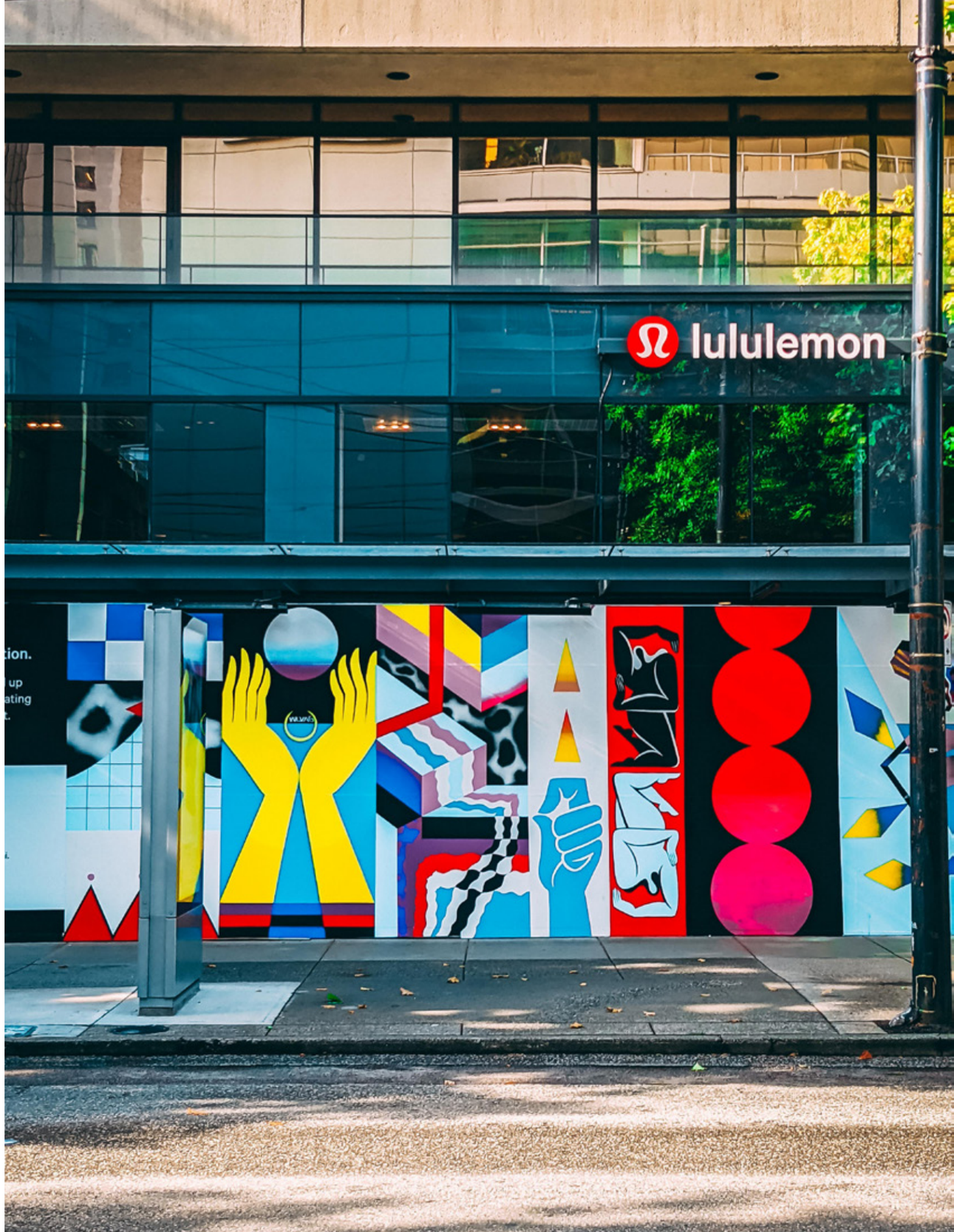
The court then addressed the effectiveness of Everest's disclaimer by citing New York Insurance Law §3420 (d)(2), which states:

> 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.

It further noted that the timeliness of a disclaimer is measured "from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage," while noting that an insurer's delay may be excused when it is the result of a "prompt, diligent and good faith investigation of a claim." Id. at 8-9 (citing *First Fin. Ins. Co. v. Jetco Constr. Corp.*, 801 N.E.2d 835 (2003); and 2540 *Assoc. v. Assicurazoni Generali*, 271 A.D.2d 282, 284 (1st. Dept. 2000)).

Factually, the court noted that (1) the parties agreed the employee exclusion would ordinarily apply to bar coverage for Molina's injury; (2) sixty-nine (69) days elapsed between the date of CCM's tender and Everest's disclaimer; and (3) there was no dispute that Everest knew as of the date of tender that Molina was United Fire's employee. In granting summary judgment to CCM, it rejected Everest's argument that it needed time to conduct an adequate investigation:

> Everest, however, argues that its delay in disclaiming was reasonable because it was unable to contact the purported insureds as part of its coverage investigation until December 12, 2016. But Everest does



not explain why its investigation into the purported insureds' entitlement to coverage was pertinent to its disclaimer when the ground on which it could disclaim – Molina's employment with United Fire – was readily apparent based upon Commercial's tender demand. This court, thus, concludes that Everest's explanation for its delay is "insufficient as a matter of law." Plaintiffs' summary judgment motion is granted to the extent that it seeks to preclude Everest from disclaiming coverage to Commercial under the employer-liability exclusion of the commercial general liability and commercial catastrophe Everest policies. *United Fire*, supra at 10-11 (citations omitted).

Finally, while Everest was estopped from asserting the employer's liability exclusion against CCM, the court noted it was *not* responsible for reimbursing Harleysville's costs in defending CCM. The court found that §3420(d)(2) does *not* apply to coinsurers and (therefore) Everest's disclaimer *was valid as to Harleysville*. *Id.* at 11.

The *United Fire* decision presents a lot to "unpack." First, one might take issue with the parties' "agreement" that the employer's liability exclusion applied against an additional insured if truly limited to injury to employees of "the insured." Second, it probably isn't lost on the reader that CCM's tender took place over a year after the underlying litigation was filed, suggesting the underlying complaint did not sufficiently allege United Fire could be responsible for its employee's injury.

Ultimately, *United Fire's* conclusion (that 69 days to issue a disclaimer was unreasonable) appears sound based upon the facts presented. The greater takeaway relates to the fact that Harleysville must swallow over a year's worth of legal fees because it chose not to challenge the substantive validity of the disclaimer as applied to CCM.

NEW YORK

City of New York Owed Additional Insured Coverage for Injury Caused by All Work Subject to Permit Regardless of Who Was Issued Permit

In *Travelers Prop. Cas. Co. of Am. v. Hudson Excess Ins. Co.*, 2023 U.S. Dist. LEXIS 39076 (S.D.N.Y March 8, 2023), Richards Plumbing and Heating, Co. ("Richards") was hired by the New York City Department of Homeless Services ("City") to provide plumbing services. To that end, it received a permit from the City's Department of Buildings to perform work at 22 East 119th Street in Manhattan. Richards subsequently entered into a subcontract with RVS Construction Corporation ("RVS"), through which RVS agreed to replace a sewer line at the project site. By contract, RVS agreed to procure general liability insurance that would include the Department of Homeless Services and Richards as additional insureds. *Id.* at 2.

While working on site, an employee of RVS (Keys) was injured when he fell into an uncovered trench while walking backwards with a wheelbarrow. He sued the City and Richards in state court seeking to recover for his injuries based upon negligence and Labor Law violations. Richards and the City filed a third-party claim against RVS, which the court refused to dismiss given there was no evidence that anyone but RVS was working in the area at the time of the accident. *Id.* at 2-3.

Travelers Property Casualty Company of America ("Travelers") issued a general liability policy to Richards for the relevant period. It did not dispute the City qualified as an additional insured on its policy.

Hudson Excess Casualty Insurance Company ("Hudson") issued a CGL policy to RVS in place at the time of the accident. The Hudson policy extended additional insured status to "any organization that [RVS] agrees in writing in a contract … be added as an additional insured. It likewise included the City of New York, "with respect to operations performed by you [RVS] or on your behalf for which the state or governmental agency or subdivision or political subdivision *has issued a permit or authorization*." *Id*. at 5-6 (emphasis added).

Upon receipt of the lawsuit, Travelers tendered it to Hudson on behalf of Richards and the City. Hudson denied the tender, which Travelers re-tendered after the state court refused to dismiss the third-party claim against RVS. Travelers proceeded to defend both entities and accumulated over $112,000 in defense costs. *Id*. at 6-7.

Travelers thereafter filed a lawsuit against Hudson seeking a declaration that (1) Hudson owed the City and Richards a duty to defend and indemnify the underlying lawsuit; (2) the Hudson policy was primary to the Traveler's policy; and (3) Hudson owed Travelers reimbursement for all defense costs. Travelers moved for summary judgment (and was opposed) on all issues. *Id.* at 7.

Initially, the district court noted that additional insured coverage under the Hudson policy was only owed were bodily injury is "caused, in whole or in part by" the acts or omissions of RVS. Such an inquiry was governed by whether the underlying complaint or extrinsic evidence established the possibility the injury was proximately caused by RVS. In finding this possibility existed, the court stated:

> [t]he underlying complaint's failure to level allegations against RVS is not dispositive of the duty to defend. That is because an insurer may have a duty to defend irrespective of what is contained in the complaint if there is extrinsic evidence showing that "the insurer 'had actual knowledge of facts establishing a reasonable possibility of coverage." Travelers argues that Hudson had such knowledge as a result of the state court's order which concluded that there are factual issues, stemming from Keys' deposition testimony, regarding whether RVS "failed to direct, supervise, guide, and assist plaintiff as he pulled the wheelbarrow down the narrow hallway; provide him adequate equipment to perform the task, and keep the trench covered or barricaded." *Id.* at 9-11 (citations omitted).

In response, Hudson relies on a single argument: given Keys' testimony that an employee of Richards removed the plywood from the trench before his fall, it must have been Richards, and not RVS, that proximately caused the injury. But the fact that Richards may have also proximately caused the injury does not alter the analysis. It is well settled, after all, that "there may be multiple proximate causes for an injury" and that fault by one does not necessarily absolve another of liability. Here, the Court finds it dispositive that the state court, which is undeniably closer to the underlying lawsuit, considered all the available evidence and nonetheless denied RVS's motion to dismiss the third-party complaint. Such a ruling establishes that there is at least a possibility that RVS proximately caused the injury suffered by Keys, and that, once Travelers re-tendered the defense to Hudson after the state court ruling, Hudson had knowledge of this possibility. *Id.* at 11-12 (citations omitted).

While Richards clearly qualified as an additional insured under the Hudson policy, Hudson continued to dispute the City qualified as an additional insured. First, it noted that because the contract between Richards and RVS only required RVS to name the New York City Department of Homeless Services as an additional insured, the City itself did not qualify as an "organization that RVS agreed in writing in a contract … to be added as an additional insured." The district court (while amused by the argument that a City Department does qualify as the City itself), ultimately relied upon another provision in granting such coverage.

As noted above, the Hudson policy included a separate endorsement identifying the City of New York as an additional insured "with respect to operations performed by you or on your behalf for which the state or governmental agency or subdivision or political subdivision has issued a permit or authorization." Hudson argued that the endorsement only applies to the extent the operations were performed by RVS *and* RVS was issued the permit. Because the permit for such work was issued to Richards, the City could not qualify as an additional insured. *Id.* at 14.

The district court summarily dismissed Hudson's argument as contrary to the plain wording within the endorsement:

> In the endorsement, the prepositional phrase "for which the [the government] has issued a permit" clearly modifies the phrase "operations performed by you [RVS]." Thus, all that matters is whether a permit was issued *for* the operations being performed by RVS. There is no requirement that the permit was issued *to* RVS. Here, Richards was issued a work permit to perform operations on the sewer line at 22 East 119th Street in Manhattan, and it then entered into a subcontract in which RVS agreed to perform certain permitted operations (i.e. sewer line replacement) at that location. Under the circumstances, the Hudson policy potentially provides coverage to the City for the underlying lawsuit and, as a result, Hudson has a duty to defend the City in that action. *Id.* at 14-15.

Hudson did not present an argument with respect to priority of coverage, such that the Hudson policy was required to respond on behalf of its additional insureds ahead of the Travelers policy. Travelers was deemed entitled to reimbursement of all defense costs that post-dated the second tender to Hudson (i.e. after the state court determined the possibility existed that RVS may have been a proximate cause of the accident). *Id.* at 16-17.

While Hudson's arguments in denying the City was as an additional insured were novel (and somewhat odd), the real story in Hudson is the spade work an additional insured (and/or its carrier) may need to do to secure AI coverage. In many cases involving a subcontractor employee injury, the underlying complaint may not include sufficient allegations to trigger the subcontractor's insurer's duty to defend. Tracking underlying rulings, following discovery, re-tendering a claim and (if necessary) presenting such evidence in a coverage action may be the only way to secure the intended risk transfer.

NORTH DAKOTA

Waiver and Estoppel Cannot Create Coverage for Person Not Personally Insured Under CGL Policy

In *Secura Supreme Ins. Co. v. Differding*, 2023 N.D. LEXIS 55 (N.D. March 31, 2023), Secura Supreme Insurance Company ("Secura") issued a general liability policy to Oxbow Golf and Country Club ("Oxbow") for the relevant period. Aaron Greterman sued Oxbow and some of its board members, in their official and individual capacities, for slander arising out of an incident at a golf tournament at the club. Differding, a board member, was not among the original defendants in the lawsuit. *Id.* at 2.

The Secura policy extended coverage to Oxbow's directors, " only with respect to their duties as ... officers and directors." Upon receipt of the complaint, Secura issued a reservation of rights letters to Oxbow's directors and agreed to defend them, but specifically reserved the right to deny coverage based upon other policy provisions. The letter further advised the board to report the matter to any other insurer through which each board member might have coverage available to it. *Id.*

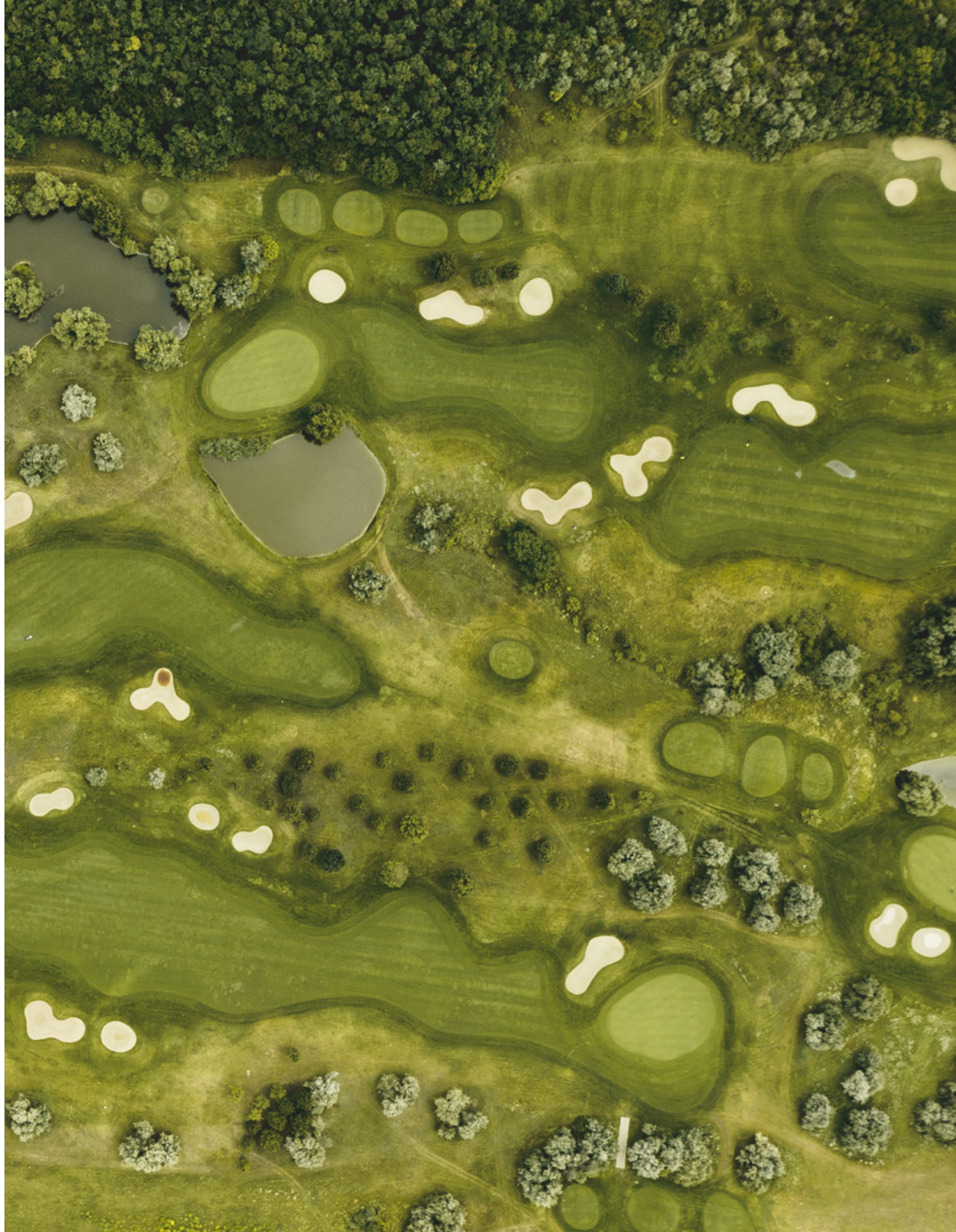
Gretermen later amended his complaint and added Differding by name, both individually and in his capacity as a board member. Secura retained counsel to represent Oxbow and its board members (including Differding). Such representation was not limited to the board members' individual capacities. The case proceeded to trial. *Id.* at 2-3.

During trial, Secura issued another reservation of rights letter, addressed to the board of directors and each board member individually (including Differding). It largely set forth the same reservations. The jury thereafter returned a special verdict against the board for $432,258 and against Differding individually for $540,320. Secura satisfied judgment against the board and Nationwide Insurance Company ("Nationwide"), Differding's homeowner's insurer, satisfied the judgment against him. *Id.* at 3.

Secura filed a declaratory judgment action seeking that a ruling that owed no coverage to Differding for his individual liability. Differding and Nationwide counterclaimed arguing that Secura was barred from denying coverage based upon waiver and estoppel. The trial court ruled in favor of Differding and Nationwide, holding:

> Secura's policy did not provide coverage for the individual liability assessed against Differding in the underlying case, but Secura provided Differding's defense, did not properly reserve its right to deny coverage to Differding, has waived its right to deny coverage, and is equitably estopped from denying coverage.

The court entered judgment ordering Secura to indemnify Differding (thus reimbursing Nationwide) for the judgment against him in the underlying action. Secura appealed. *Id.* at 3-4.



The North Dakota Supreme Court began its analysis by describing the differences between the doctrines of waiver and estoppel:

> [E]stoppel requires (1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on faith of such admission, statement , or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act. Waiver is founded upon the intentional relinquishment of a known right. If waiver is implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the right. Id. at 6 (citing *D.E.M. v. Allickson*, 555 N.W.2d 596, 600 (N.D. 1996).

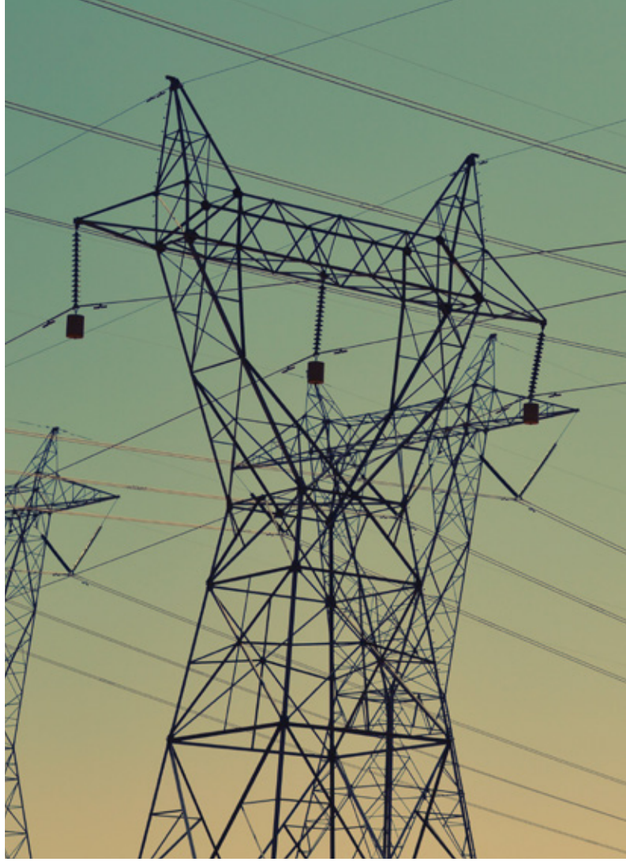
The court noted that North Dakota follows the majority rule that waiver and estoppel cannot extend coverage to risks that are not included within the terms of an insurance policy. It noted that some courts have carved out exceptions from this rule, including that where an insurer unconditionally assumes an insured's defense. Differding sought to invoke this exception by arguing Secura assumed his defense without reserving its rights to deny coverage for his personal liability. *Id.* at 6-9.

In reversing the trial court's ruling, the court did not need to decide it North Dakota should adopt the exception promoted by Differding:

> Unlike the parties invoking waiver and estoppel in those cases, Differding is not a party to the insurance policy or person insured by it. An insurance policy is a contract. Litigants cannot claim estoppel based on policies to which they are not a party; nor can they claim waiver of a provision in a policy they have no right to enforce. As we have noted, estoppel for purposes of insurance "involves that act or conduct or *both parties to a contract*."

In this case, Differding is not personally a party to the insurance policy in question. The CGL policy is between Secura and Oxbow Golf and Country Club. Although coverage under the CGL policy may extend to Oxbow's directors in their official capacities, as the district court determined, and the parties do not dispute. Differding is not individually insured. As a matter of law, Differding cannot invoke waiver and estoppel to create coverage under an insurance policy to which he is not a party and as no right to enforce. We thus conclude the district court erred as a matter of law when it applied the doctrines of waiver and estoppel to require Secura to indemnify Differding for his personal liability. *Id.* at 9-10 (citations omitted).

The *Differding* decision outlines a "bright line" test as to who may (and may not) seek coverage under an insurance policy independent of the policy's terms. Waiver and estoppel are not available to a non-party regardless of the insurer's conduct. One is left to wonder if Differding questioned the quality of the defense he was provided as much as the insufficiency of any reservation of rights.



WEST VIRGINIA

No Coverage Available to Insured for Interference with and Trespass Upon with Leased Property

In *Scottsdale Ins. Co. v. Solwind Energy,* LLC, 2023 U.S. Dist. LEXIS 42645 (S.D. W.Va. March 14, 2023), Geoex, Inc. ("Geoex") was the lessee of active oil and gas leases together with a right of way and pipeline easement obtained from property owners known as the Mont Stepp heirs. Sometime prior to August of 2021, Solwind Energy, LLC ("Solwind") erected structures and power lines on the Mont Stepp properties, allegedly obstructing Geoex's free and unrestricted access to its leases. *Id.* at 1-2.

In August 2021, Geoex filed a lawsuit against Solwind asserting Solwind trespassed upon its leased property. Geoex alleged that, in light of Solwind's conduct, it lost the ability to drill two planned wells on the property and incurred damages in excess of $2,000,000 per well. Upon receipt of the complaint, Solwind tendered the claim to its general liability insurer, Scottsdale Insurance Company ("Scottsdale"), which issued consecutive annual policies between June 23, 2020 and June 23, 2022. *Id.* at 2-3.

Coverage A under the Scottsdale policies provided coverage for "bodily injury" and "property damage" taking place during the policy period caused by an "occurrence." An "occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" was defined to include "physical injury to tangible property, including all resulting loss of use," and "loss of use of tangible property that is not physically injured." *Id*. at 15.

Scottsdale agreed to defend Solwind pursuant to a reservation of rights and thereafter filed a declaratory judgment action seeking a ruling it had no duty to defend or indemnify Solwind under Coverage A or Coverage B. After denying Solwind's motion to dismiss based upon improper jurisdiction, the court addressed Scottsdale's motion for summary judgment with respect to coverage. *Id.* at 3-11.

Scottsdale argued the underlying complaint did not allege "property damage" because Geoex's damage or injury was not to "tangible property." Solwind countered by asserting the allegations in the complaint stated a claim for "waste" of Geoex's property rights (and thus "property damage"). In ruling for Scottsdale, the court focused almost entirely on how one characterizes a "leasehold" under the law:

> The policies do not further define "tangible property," and so I use the term's plain meaning: "capable of being touched, able to be perceived as materially existent esp. by the sense of touch, palpable, tactile." (Webster's Third New International Dictionary 11 (Merriam – Webster, Inc. 1995).). The Fourth Circuit has likewise equated the terms "tangible" and "physical" to defeat any ambiguity.
>
> Taking the facts of the underlying complaint as true, Solwind's interference with the Mont Stepp properties does not implicate tangible property. Neither an easement, right of way, nor leasehold qualify as tangible property. Any damages resulting from the Mont Stepp incident are the result of Solwind's interference with Geoex's intangible property rights, and do not constitute "property damage" as defined in the policies.

Defendant Solwind, in its Cross-Motion, argues that the Geoex complaint states a claim for waste, triggering coverage under Coverage A. That argument is unpersuasive. Waste is a property damage tort consisting of an injury to a freehold by one rightfully in possession of land. Nowhere in the underlying complaint is Solwind's interest in the property explained. Nor does the complaint establish that the purported waste was committed by one "rightfully in possession of land."

> The underlying complaint likewise fails to demonstrate how any action by Solwind resulted in a "permanent and lasting injury" to the property, "done or permitted to be done by [the] holder of [a] particular estate." Moreover, the Geoex complaint features the word "waste" only once and does not establish even the most basic elements of the tort. The underlying complaint does not state a claim for waste and fails to allege any "property damage" necessary to trigger Coverage A. *Solwind*, supra at 16-17 (citing *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 94-95 (4th Cir. 2003); *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 294 (1923); *Green Line Terminal Co. v. Martin*, 122 W. Va. 483 (W. Va. 1940); and (*Cecil v. Clark*, 49 W.Va. 459 (W.Va. 1901).

Scottsdale further argued that any allegations of trespass within the underlying complaint did not amount to a "personal or advertising injury" under Coverage B. The only applicable definition of "personal and advertising injury" included the following offense:

> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor. *Solwind*, supra at 18-19.

Rejecting Solwind's premise that its trespass fit within definition c., the court focused on the plain language within the Scottsdale policy:

> Seeing no material ambiguities, I too give this language its plain meaning. Importantly, the offense allegedly committed by Solwind against Geoex (trespass) is not included in this provision. For a "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises" to constitute a "personal and advertising injury" under Coverage B, it must be "committed by or on behalf of its owner, landlord or lessor." The Geoex complaint contains no fact suggesting that Solwind was the owner, landlord, or lessor of the Mont Stepp properties. Rather, the underlying complaint indicates that the Mont Stepp heirs, not Solwind, own the properties at issue. Nor does the complaint indicate Solwind was acting at the request of the property owner, landlord or lessor when erecting certain structures and pipelines on the property. Solwind has failed to address this issue in its briefing, despite Scottsdale's contention that Coverage B cannot apply as Solwind is "not the owner of the property that is the subject of the Geoex complaint." While I disagree with Scottsdale's limited reading of Provision C – which explicitly triggers coverage when an entity acts *on behalf of* an owner, landlord or lessor – I cannot determine that coverage is triggered where the complaint fails to indicate, and Solwind has failed to clarify, the connection between Solwind and the property at issue. Because there is nothing in the underlying complaint to suggest that Solwind was either (1) the owner, landlord or lessor of the property at issue; or (2) acting on behalf of the owner, landlord or lessor when the alleged conduct took place, Geoex's purported injuries do not constitute a "personal and advertising injury." *Id*. at 19-21.

The *Solwind* decision highlights the legal obstacles when one claims that interference with a lease equates to "property damage" in West Virginia. Past that, the more interesting question is whether a better crafted complaint (i.e. one with specific allegations of trespass) could have triggered a duty to defend under Coverage B. It ultimately begs the question of how and why Solwind was operating on the land in the first place.

Federal Appellate Cases

5TH CIRCUIT

Underwriter's Confirmation of Coverage Available Under Policy Was Not Misrepresentation Where Policy Exclusions Barred Coverage for Claim

In *Massachusetts Bay Ins. Co. v. Neuropathy Solutions, Inc.*, 2023 U.S. App. LEXIS 7813 (9th Cir. April 3, 2023), the underling plaintiff (Bernal) was allegedly rendered a paraplegic as a result of "stem cell" injections he received from defendant Neuropathy Solutions, Inc. ("NSI") or its agent, Elite Medical Group ("EMG"). Bernal sued NSI to recover for his injuries, alleging, in part, that such injuries were based upon a "series of falsely advertised, recklessly administered, non-FDA approved 'stem cell' injections Mr. Bernal received that nearly killed him..." *Id*. at 5.

Massachusetts Bay Insurance Company ("MBIC") issued a general liability company to NSI for the relevant period. MBIC agreed to defend NSI pursuant to a reservation of rights, largely based upon a professional services exclusion which barred coverage for:

> "Bodily injury," "property damage", [and] "personal and advertising injury" caused by the rendering of or failure to render any professional service, advice or instruction:
>
> (1) By [the insured]; or
> (2) On [the insured's] behalf; or
> (3) From whom [the insured] assumed liability by reason of a contract or agreement,
>
> Regardless of whether ay such service, advice or instruction is ordinary to any insured's profession. Additionally, the insurance policy provides that professional services include, among other things, "legal accounting or advertising services," "medical...or nursing services treatment, advice or instruction," and "[a]ny health or therapeutic service treatment, advice or instruction." *Id*. at 3-4.

MBIC filed a declaratory judgment action seeking a ruling that it owed no defense or indemnity to NSI for the underlying action. The district court held that MBIC had a duty to defend and indemnify NSI and was thus not entitled to any reimbursement from NSI. *Id.* at 1.

MBIC later wrote to NSI informing it of MBIC's intention to settle the *Bernal* matter for $2,000,000, subject to (1) NSI's approval; and (2) MBIC's reservation of rights to seek reimbursement. MBIC noted that it would not seek reimbursement of defense costs and offered NSI the right to assume the defense of the underlying matter if NSI did not wish MBIC to settle the claim for $2,000,000. NSI signed the settlement agreement shortly thereafter and MBIC pursued its appeal seeking reimbursement on indemnity. *Id*. at 2.

The 9th Circuit began by its analysis by noting the scope of California law in defining "professional services" as applied to CGL policies. "Professional services" are defined as those arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual"... "[t]he 'unifying factor' is ' whether the injury occurred during the performance of the

professional services, not the instrumentality of injury." Id. at 4-5 (citing *Tradewinds Escrow, Inc. v. Truck Ins. Exch.*, 118 Cal. Rptr.2d 581, 568 (Ct. App. 2002).

In reversing the district court's decision, the court of appeals found the underling complaint plainly mandated the application of the professional services exclusion:

> Based upon California law, the insurance policy's text, and the operative complaint in the *Bernal* action; Neuropathy's liability to Bernal fell within the "Professional Services" exclusion. Starting from the very first sentence of the *Bernal* complaint, it is evident that Neuropathy incurred liability as a result of the professional services it provided. "This complaint arises from a series of falsely advertised, recklessly administered, non-FDA approved "stem cell" injections Mr. Bernal received that nearly killed him and left him a permanent paraplegic from the waste down." The entire gravamen of the *Bernal* complaint was that Neuropathy engaged in deceptive and illegal advertising and business practices in connection with the provision of medical services. Neuropathy was thus liability for "advertising services," "[m]edical...or nursing services treatment, advice or instruction," or "[a]ny health or therapeutic service treatment, service or instruction" all of which are excluded under the 'Professional Services' Exclusion.

It does not matter that Elite Medical Group (EMG), not Neuropathy, alleged employed the medical professionals who performed the injection, nor does it matter than Neuropathy's contract with EMG purported to assign to Neuropathy only administrative duties. As we noted, the "Professional Services" exclusion extends to wrongdoing in the supervision and monitoring of others in the provision of professional services, and Neuropathy incurred lability because of its provision of professional advertising and medical services, not inadequate recordkeeping or poor customer service. Finally, the complaint's allegation that Neuropathy engaged in discriminatory, "marketing techniques and high-pressure sales tactics," falls within the "Professional Services" exclusion for advertising services and health advice or instruction. Id. at 5-6

The *Neuropathy* decision is curious, highlighting the sharp contrast between the trial court's view that defense and indemnity were clearly owed NSI with the 9th Circuit's unvarnished view that *no* coverage (defense or indemnity) was owed based upon the allegations within the underlying complaint. Regardless of whether one thinks the district court's decision was charitable, the larger lesson of *Neuropathy* is that insurers in California have an explicit right of reimbursement if they properly reserve their rights to seek such a remedy.

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