APPLIED SPECIALTY UNDERWRITERS

CASUALTY SPOTLIGHT™

OCTOBER 2022, VOLUME 7

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CALIFORNIA

Additional Insured Owed Defense as "John Doe" Defendant Where Extrinsic Evidence Clearly Tied it to Underlying Construction Project

In *McMillin Homes Construction, Inc. v. Lexington Ins. Co.*, 2022 U.S. Dist. LEXIS 158659 (S.D. Ca. September 1, 2022), McMillin Homes Construction, Inc. ("MHC") was the general contractor on several residential projects in Fresno, California. MHC employed several subcontractors on the projects, all of whom were required to carry general liability insurance naming MHC as an additional insured with respect to liability arising out of the subcontractor's work. Lexington Insurance Company ("Lexington") issued general liability policies to more than one of MHC's subcontractors. *Id.* at 2-3.

Sometime after the projects were completed, several homeowners brought an action against McMillin Rustic Oaks, LLC and "Doe Defendants" seeking damages for property damage caused by negligent and defective construction. The underlying action specifically reserved a segment of Doe defendants for "those entities that were hired, retained, employed or contracted with persons or entities to provide for labor or materials in the construction of the Projects." *Id.* at 3.

MHC made a demand of Lexington (among other defendants) for defense and indemnity within the underlying action, but they refused the tender. Ultimately, the underlying action was voluntarily dismissed after Lexington authorized a settlement on behalf of its insured (subcontractor) and MHC, but it refused to fund it unless MCH granted Lexington a release of its additional insured obligations to MHC. *Id.* at 4.

MHC filed a declaratory judgment action against Lexington and others seeking a ruling it was owed defense and indemnity for the underlying action. Lexington moved to dismiss MHC's complaint on the grounds that Rustic Oaks, LLC was the only named defendant and MHC could not be owed a defense. *Id.* at 1-2.

MHC argued that, under California law, (1)

the insured is entitled to a defense if the complaint can potentially be amended to cover them; and (2) Lexington was provided sufficient information to determine MHC could be added to the underlying action based upon how the "Doe Defendants" were defined. In denying Lexington's motion, the court relied heavily on California law that permits extrinsic evidence to be considered in deciding the duty to defend:

> [w]hile the "duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy," the duty also "exists where extrinsic facts know to the insurer suggest that the claim may be covered." Unlike states that have a so-called "eight corners rule" that limits the analysis to the insurance contract and the underlying complaint, "in California, facts "known" to the insurer and extrinsic to the third-party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy." ...

First, as currently pled, the homeowner's complaint in the Underlying Action gave rise to potentially covered claims, which in turn may trigger Lexington's duty to defend...While MHC is not specifically named as a defendant in the Underlying Action, which the court will address more fully below, the plaintiffs in the underlying action expressly reserved Does 201-400 "for the entities that were hired, retained, employee, or contracted with persons or entities for labor or materials in the construction of the Projects." MHC alleges it was "one of the entities that was hired, retained, and employed by McMillin Rustic Oaks, LLC for the construction of the Projects and served as general contractor on the projects." On a motion to dismiss, the Court "accepts as true all of the factual allegations set out in plaintiff's complaint, draw[s] inference from those allegations in the light most favorable to plaintiff" ...

Second, in addition to the language of the complaint in the Underlying Action, additional extrinsic facts known to Lexington suggest that the Underlying Action raises potentially covered claims against MHC. Plaintiff alleges that Lexington is the insurance company that provided a number of policies to Plaintiff's subcontractors for the Projects – the same Projects which were named and at issue in the Underlying Action. Given Lexington's knowledge of Plaintiff MHC's involvement in the Projects at issue in the Underlying Action through its additional insured coverage of Plaintiff MHC, it strains credulity to suggest that Lexington, having written policies for plaintiff's subcontractors that expressly contemplate MHC as an additional insured for work performed on a specific series of projects, would then claim that there is no potential for MHC to be implicated in the Underlying action. Id. at 9-13 (citing S*cottsdale Ins. Co. v. MV Transportation,* 36 Cal. 4th 643, 655 (2005) (further citations omitted)).

Lexington also argued the obligation to defend an unnamed defendant "would expose an insurer to the duty defend endless insureds that could theoretically become defendants through an amendment to the underlying complaint." The court rejected this plea as hollow in light of the facts and pleading pertinent to the underlying case:

> The Court disagrees [with Lexington]. As the *Gray* court notes, the "nature and kind of risk covered by the policy" is "a limitation upon the duty to defend."

Moreover, future policy holders must still establish that the language of the underlying action raises the potential for coverage for that specific policy holder, for an event covered by the policy. Finally, this is not a case where a seemingly entirely unrelated insured is seeking a defense because they might be added to a suit. The Court finds that Plaintiff's relationship with defendants in the underlying action is expressly described in the lawsuit and that plaintiffs in the Underlying Action have expressly reserved several of the Doe defendants for persons in MHC's capacity. *McMillin Homes*, supra. at 14-15 (citing *Gray v. Zurich Ins. Co.,* 65 Cal.2d 263, 275 (1966).

The district court also denied Lexington's motions to dismiss MHC's claims of indemnity and bad faith when read in conjunction with facts pled by MHC in its complaint. Fundamentally, *McMillin* demonstrates California's broad interpretation of the duty to defend, particularly where extrinsic evidence clearly places an insured among those intended to be included within the underlying lawsuit.

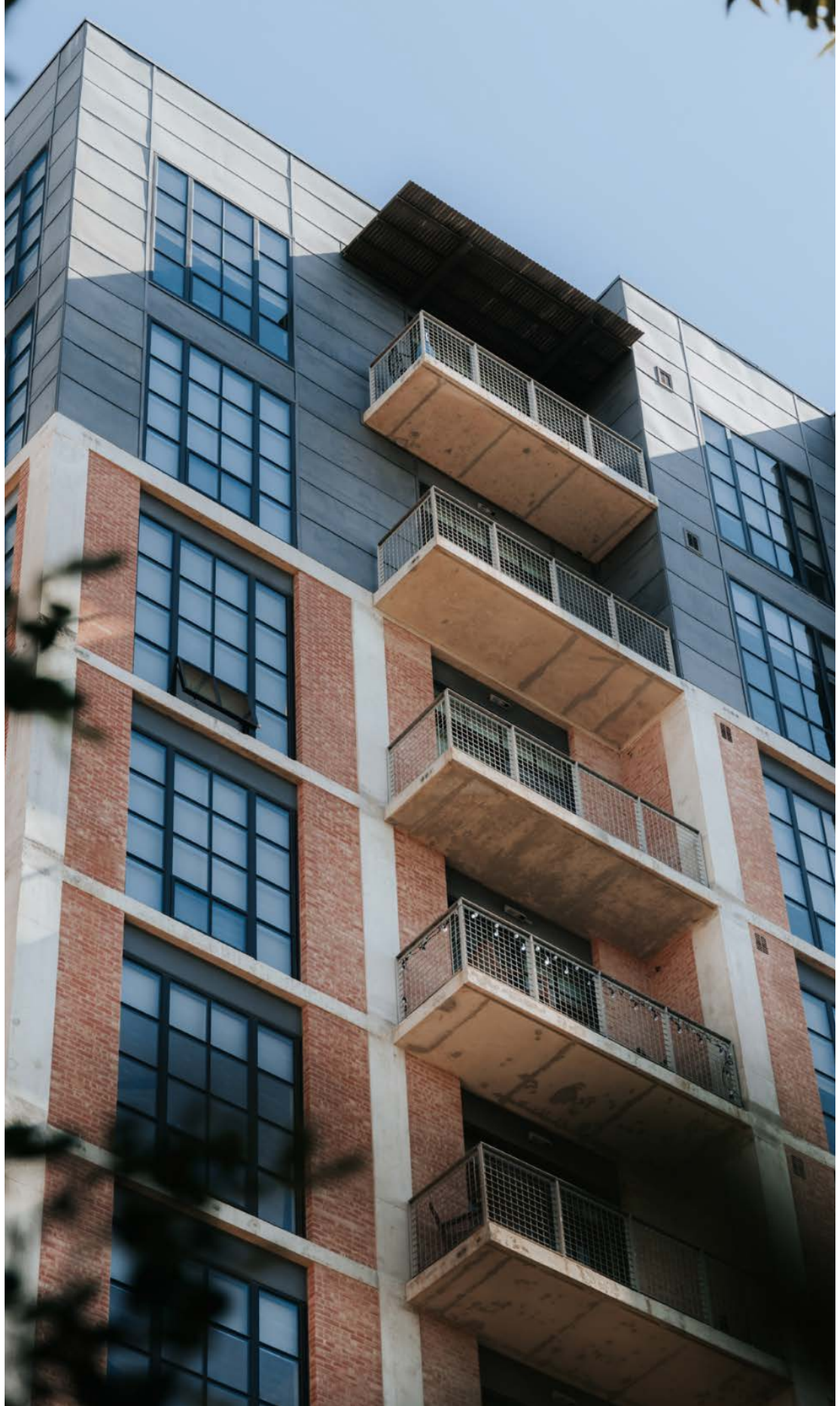
GEORGIA

Umbrella Carrier's Assumption of Defense Preceding Reservation of Rights Did Not Result in Waiver of Policy Defenses

In *Hernandez v. Great American Alliance Insurance Company,* 2022 Ga. App. LEXIS 465 (Ct. App. Ga., 3rd Div. October 4, 2022), Star Residential, LLC ("Star") and Terrace at Brookhaven ("Terrace") owned and/or operated an apartment complex in Georgia. In May of 2017, Hernandez, a tenant, was shot by assailants as he approached the door of his apartment. Star and Terrace provided notice to their primary insurance carrier, Associated Industries Insurance Company ("AIIC"). Shortly thereafter, Hernandez notified Star and Terrace he had retained counsel. At this point, Star and Terrace' s umbrella insurer, Great American Alliance Insurance Company ("GAAIC") had not received notice of a potential claim. *Id*. at 2.

In December of 2017, AIIC received a formal demand from Hernandez's counsel for $1,500,000. Star and Terrace then provided notice to GAAIC, which acknowledged the claim as "incident only," while reminding the insureds to provide notice to their primary insurer (AIIC). In March of 2018, Hernandez sued Star and Terrace for damages. *Id*. at 2-3.

In May of 2018, AIIC denied coverage to Star and Terrace based upon a firearms exclusion within its policy. In June of 2018, GAIIC initiated representation of the insureds and began paying for their defense. However, within 24 hours, GAAIC issued a reservation of rights letter, which (1) noted AIIC's denial, in part, based upon a firearms



exclusion within its policy; and (2) specifically "reserve[d] the right to rely upon all terms, provisions and exclusions in its umbrella policy and in the underlying primary policy." *Id.* at 4-5.

In May of 2019, GAAIC issued a supplemental reservation of rights letter after Hernandez amended his pleadings to add counts of nuisance and negligence per se. It reiterated GAAIC's reliance upon policy provisions within the AIIC and GAAIC policies and specifically addressed the GAAIC definitions of "bodily injury" and "occurrence." In May of 2020, GAAIC sent a second supplemental letter to the insureds noting (1) the GAAIC policy specifically stated "coverage applies only if the organization is included under coverage provided by the [underlying policies] … and then for no broader coverage than is provided under such underlying insurance"; and (2) specifically referencing the firearms exclusion within the AIIC policy. In August of 2020, GAAIC filed a declaratory judgment action and obtained a ruling that it owed no coverage to the insureds for the underlying claims. The insureds and the claimant (Hernandez) appealed. *Id.* at 5-6.

On appeal, claimants argued that GAAIC waived its rights by assuming the defense without timely and specifically reserving its rights to assert policy defenses. While noting GAAIC's reservation came within 24 hours of assuming the insured's defense, the appellate court quickly concluded that GAAIC's reservation was sufficient to maintain its coverage defenses:

> Here, it is undisputed that within 24 hours of a discussion about assuming the Insured's defense, GAAIC sent the Insureds its first reservation of rights letter. His letter was sufficiently prompt and quoted

the firearms exclusion in the underlying AIIC policy, as well as GAAIC's umbrella coverage provision triggered by an "occurrence," which is defined in GAAIC's policy as "an accident." Further, this letter explicitly stated:

> [GAAIC] reserves the right to rely upon all of the terms, provisions and exclusions in its Umbrella Policy *and in the underlying primary policy*. No present or subsequent action by GAAIC is to be construed as a waiver of any coverage issue or any rights available to you or GAAIC.

This prompt reservation of rights letter was sufficient to notify the insured that even though GAAIC had initiated its coverage of a legal defense, it would still rely on the terms, definitions and provisions of the umbrella policy; that the underlying insurance (quoted in the reservation of rights letter) likely did not cover injuries caused by firearms; and that GAAIC was not waiving its policy defenses implicated by the terms of the GAAIC policy or the underlying AIIC policy, which policy GAAIC quoted in the reservation of rights letter.

Although the language in the third reservation of rights letter sent in May 2020 more clearly spelled out the fact that the GAAIC policy "followed form" to the firearms exclusion in the underlying insurance, GAAIC's first reservation of letter quoted the firearms exclusion and reserved its right to rely on provisions in the underlying policy. Thus, this was more than a mere boilerplate recitation that GAAIC reserved the right to rely on some unidentified defense in the future… A reservation of rights should operate to inform the insured, not create a trap for the insurer by reforming the insurance contract to provide coverage never bargained for by the parties. In sum, the record shows that GAAIC was acting in good faith to provide a defense under a reservation of rights, and in light of the specific language in the initial reservation of rights letter, we decline to penalize GAAIC for further clarifying those positions in the supplemental reservations of rights." *Id.* at 8-9.

The appellate court also summarily rejected the claimant's argument that the AIIC policy did not qualify as "underlying insurance" for the purposes of interpreting the GAAIC policy. While the opinion is unclear as to the insured/claimants' basis for this argument, the court simply noted (1) the insureds specifically purchased the AIIC policy as underlying insurance for the umbrella policy; (2) the AIIC policy was on the Schedule of Underlying Insurance within the GAAIC policy; and (3) the umbrella policy plainly stated it was no broader than the policy purchased from AIIC. *Id.* at 10-11.

The *Hernandez* decision presents a fair analysis of how an insurer might reasonably manage its obligations to an insured while reserving its rights to deny coverage (even if it might have been more articulate in its original reservation). The argument that GAAIC "waived" its rights under the circumstances was weak, suggesting a "hail Mary" approach to securing a recovery for an injured plaintiff where no other resources were available.

NEW YORK

General Contractor Owed Defense Where "Reasonable Possibility" Existed That Subcontractor Was a Proximate Cause of Worker's Injuries

In *U.S. Specialty Ins. Co. v. Hudson Excess Ins. Co.,* 2022 U.S. Dist. LEXIS 180013 (E.D. N.Y. September 30, 2022), a construction worker (Nunez) was injured on a project in Brooklyn, New York. Promont was the general contractor on the project and CML Taping and Painting ("CML") was among the subcontractors on the project. *Id*. at 2.

Nunez filed a negligence action in state court against Promont and the owner of the project, alleging he tripped and fell on debris and other construction material. Nunez alleged that CML was a project manager/ contractor and was to provide "site safety management of the …premises." Nunez also filed a claim before the New York State Worker's Compensation Board, which determined Nunez was an employee of CML at the time of the accident. Promont and the owner filed a third-party complaint against CML in the state court action for indemnification and breach of contract. *Id*. at 3, 9-10.

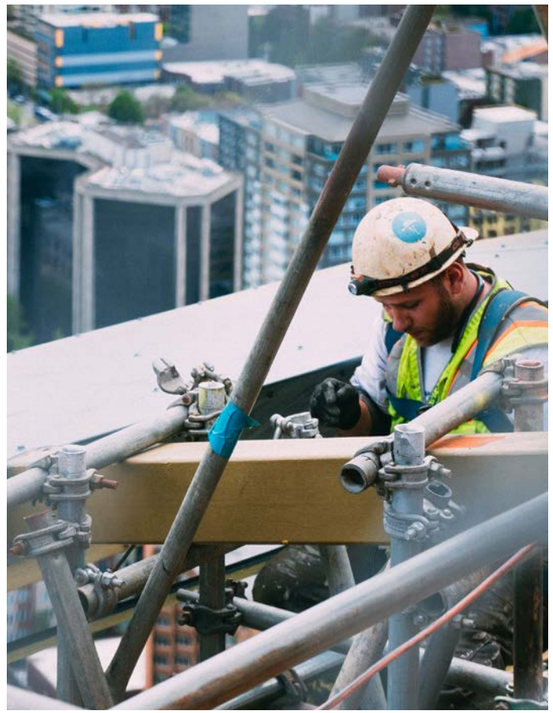
U.S. Specialty Insurance Company ("USSIC") issued a general liability policy to Promont at the time of the accident. CML was insured by Hudson Excess Insurance Company ("Hudson"), under whose policy Promont qualified as an additional insured. The additional insured endorsement in the Hudson policy provided coverage for liabilities arising from "bodily injury" that was:

1. "caused in whole or in part by,"

2. the "acts or omissions" of CML, or those "acting on its behalf,"

3. if those acts or omissions occurred "in the performance of [CML's] ongoing operations for the additional insured." *Id*. at 3-5.

USSIC defended Promont in the state court action, but tendered the lawsuit to Hudson pursuant to the additional insured endorsement. Hudson twice denied the tender on the grounds that it had not been established Nunez was its employee at the time of the accident (despite the decision of the Workers Compensation Board). USSIC filed a declaratory judgment action in district court and moved for summary judgment on the duty to defend and the reimbursement of defense costs to date. *Id*. at 5-6.



Hudson contended it did not owe Promont a defense because (1) Nunez was employed by Promont (and thus the accident was caused by Promont's operations); (2) Nunez was injured on the first floor of the project; and (3) per CML's contract, its "ongoing operations" were limited to the fourth floor of the project. USSIC asserted the allegations of the underlying complaint left open the possibility that Nunez was injured by CML's ongoing operations. *Id*. at 12.

After concluding there was a "substantial probability" Nunez was CML's employee based upon the decision of the Workers Compensation Board, the court focused on whether CML's ongoing operations could have caused Nunez's injuries. While noting that New York law requires a named insured be a proximate cause of the injury giving rise to additional insured liability (see, *Burlington Ins. Co. V. NYC Transit Authority*, 29 N.Y.3d 313 (N.Y. 2017), the court examined the subcontract Hudson believed eliminated the possibility that CML could be responsible for Nunez's injuries:

> Hudson mischaracterizes the factual record when it claims that CML's work was limited to demolition on the fourth floor. While the first item in the "scope of work" section of the Subcontract – "Complete demolition of interior 4th floor roofing material" – mentions the fourth floor specifically, none of the other types

of work listed are similarly limited to any floor… Hudson, for its part, has not explained why those types of work could not have involved work on the first floor.

Moreover, even if CML's work was initially limited to work on the fourth floor, USSIC has pointed to evidence suggesting that this scope may have expanded. The Subcontract contemplates this possibility, via change orders. "All additional work performed in additional apartments and/or floors will be considered change orders to the contract and be considered part of the scope herein." And CML's invoice to Promont for the day of Nunez's injury – which is designated a "change order" at the top of the document – specifies that is for "labor done on the 1st floor." The parties have not pointed to evidence that the change was submitted in writing and approved by Promont, as required by the subcontract, but there is also no evidence that it was not approved. The fact that the work was done creates an inference that is was approved prior to being done. *Hudson,* supra at 12-13.

Having considered the scope of CML's work as described by the subcontract, the court granted USSIC's motion on the duty to defend. In doing so, it offered clarity with respect to scope of additional insured coverage offered by the Hudson policy:

> The language of the Hudson policy does not restrict coverage for bodily injury to CML's employees and agents. Instead, it restricts coverage to the additional insureds for injuries *caused, in whole or in part,* by the acts or omissions of CML or its agents, regardless of who employs the injured victim. Hudson may mean to say here that Nunez caused the conditions that led to his own injury himself, and it matters for that reason who employed him. But Hudson's argument fails on its own terms there, for reasons stated above: The WC Board found, after hearing testimony from Promont's president and from Nunez, that Nunez was a CML employee. And that conclusion finds additional support here from the invoice from CML to Promont that indicates that CML did work on the first floor – the floor where Nunez was injured – on the day of Nunez's injury.
>
> For these reasons, even if this factual dispute may (down the line) affect Hudson's obligation to indemnify, it does not bear on its duty to defend… In sum, none of these factual disputes would "allow a court to eliminate the possibility that the insured's conduct falls within coverage of the policy." Even viewed in the light most favorable to Hudson, the evidence here established at least a reasonable possibility of coverage. *Id*. at 14-16.

The district court likewise concluded the Hudson policy was primary to the USSIC policy based upon the policies' Other Insurance provisions and the Primary and Non-Contributory language within the USSIC policy.

While Hudson was (curiously) adamant CML could not have been responsible for Nunez's injury, there is little to criticize about the *Hudson* court's reasoning that Hudson owed the general contractor a duty to defend. The allegations and documentary evidence suggested more than a "reasonable possibility" the subcontractor (CML) was a proximate cause of the worker's injuries.

UTAH

Defense Owed Insured Where Breach of Conditions Within Roofing Exclusion Needed to be Proven as "Established Facts"

In *Atain Specialty Ins. Co. v. R. White Construction, Inc.,* 2022 U.S. Dist. LEXIS 169129 (Dist. Utah September 16, 2022), R. White Construction, Inc. ("White"), a roofing contractor, purchased a general liability insurance policy from Atain Specialty Insurance Company ("Atain") for the relevant period. The policy contained an "Open Roof Conditions and Exclusion" ("Open Roof Exclusion"), which read as follows:

> Any insured seeking coverage under the Policy must do both of the following for any "open roofs" that are left unattended: (1) take all appropriate steps to determine adverse weather conditions; and (2) provide temporary waterproof covering able to withstand the elements. This insurance does not apply and there shall be no duty to defend or indemnify any insurance for any "property damage" to any building, structure, any contents within any building or structure, or any other resulting "property damage" ***unless both of the conditions above have been satisfied for any "open roofs."*** The term "open roofs" as used in this endorsement shall include any roof or section thereof where the protective covering (shingles, tar, felt paper or any other protective covering) has been removed. *Id.* at 7 (emphasis added).

In 2021, Travelers Insurance Company ("Travelers") filed a subrogation action against White seeking to recover damages to a home upon which White was hired to replace a roof. Travelers alleged that, "upon information and belief, during the roof construction, and after removal of at least a portion of the old roofing materials, the roof was negligently left exposed without any plastic tarping/Visqueen or other appropriate covering to protect against weather." It further alleged that, "while the roof was left negligently exposed, a heavy rainstorm occurred, which resulted in flooding in the Subrugor's residence, causing significant damage throughout." The suit included breach of contract and negligence claims against White. *Id.* at 8.

It appears White tendered the action to Atain and Atain filed a declaratory judgment action (against White and Travelers) seeking a ruling it had no duty to defend or indemnify White. Atain sought summary judgment arguing the

Open Roof Exclusion barred any obligation to defend or indemnify White for the Travelers lawsuit. Travelers opposed the motion as premature, arguing it could not present facts necessary to oppose the motion because it had not yet conducted discovery. *Id.* at 4.

Atain's argument was based largely on Utah's "eight corners rule", whereby the duty to defend is determined by comparing the allegations within the four corners of the complaint with the four corners of the insurance policy. Specifically, Atain argued the allegations of the complaint fell squarely within (and violated) the conditions required for coverage within the Open Roof exclusion. Travelers argued Atain's motion was premature given discovery had yet to identify what White knew about weather conditions and what efforts were made to protect the roof prior to the storm. *Id.* at 9-10.

In considering Atain's motion, the court first noted that, under Utah law, extrinsic evidence is permitted to determine the duty to defend where the insurance contract's terms require such a review:

> Whether extrinsic evidence is admissible to determine whether an insurer has a duty to defend an insured ***turns on the parties' contractual terms***. If the parties make the duty to defend dependent on the allegations against the insured, extrinsic evidence is irrelevant to a determination of whether a duty to defend exists. However, if, for example, the parties make the duty to defend dependent on whether there actually is a "covered claim or suit," extrinsic evidence would be relevant to a determination of whether a duty to defend exists. *Id.* at 13 (citing *Fire Ins. Exch. v. Est of Therkelsen,* 2001 UT 48 (2001) (emphasis added).

In concluding Atain's motion for summary judgment was premature, the district court found the language in the exclusion required that a breach of a condition be established before the duty to defend could be decided:

> Atain argues it has no duty to defend because, under the factual allegations in the Underlying Complaint, [White] violated one of the conditions of the Open Roofs Exclusion and triggered the application of the provision. ***However, the Open Roofs Exclusion is stated in terms of established facts***, not allegations in the complaint: "[a]ny insured seeking coverage under the policy must [satisfy the two conditions]," and coverage does not apply "unless both of the conditions above have been satisfied." The allegations in the Underlying Complaint, stating "upon information and belief" the roof was left open, do not "definitively indicate" whether the insured in this case actually satisfied the two conditions necessary for open roof coverage under the Policy. [White's] compliance or noncompliance with the Open Roofs Exclusion is an "objective fact", the truth or falsity of which is not determined solely by the allegations," and "an analysis limited to the eight corners of the [P]olicy and [Underlying Complaint] is incomplete and fails to resolve the central inquiry" of coverage under the Policy. Accordingly, extrinsic evidence is necessary to determine whether a duty to defend exists. *R. White Construction*, supra at 18-19. (emphasis added).

The *R. White Construction* decision is interesting, as custom language crafted by the insurer appears to have backfired - triggering the need for "established facts" (as opposed to mere allegations) in evaluating the duty to defend. While not explicit in the opinion, one presumes Atain was required to defend the insured in the subrogation action until discovery was complete.

Federal Appellate Cases

11TH CIRCUIT

Insurer Obligated to Defend Insured Where Professional Liability and Bodily Injury Exclusions in CGL Policy Did Not Bar Coverage for Sexual Assault

In *Westchester General Hospital, Inc. v. Evanston Ins. Co.,* 2022 U.S. App. LEXIS 25984 (11th Cir. September 16, 2022), Westchester General Hospital ("Westchester") operated a mental health facility in Miami-Dade County, Florida. On December 31, 2018, a female patient, while asleep and medicated, was sexually assaulted and raped by a Westchester employee. The patient's family sued Westchester and its employee, claiming Westchester was negligent in failing to adequately investigate, train and supervise its staff. *Id.* at 2-3.

Westchester was insured at the time of the incident by Evanston Insurance Company ("Evanston"). The policy it issued to Westchester included two coverage parts - a professional liability coverage part and a general liability coverage part. The package policy also included an umbrella policy, which provided excess insurance if either the professional liability coverage part or general liability coverage part applied to a loss. *Id.* at 3.

Westchester promptly tendered the lawsuit against it to Evanston, which issued a reservation of rights letter stating it would (1) provide a defense to Westchester under the professional liability coverage part; (2) not provide a defense under the general liability coverage part; and (3) not indemnify Westchester for any potential judgment under any part of the policy. Westchester thereafter sued Evanston seeking a declaratory judgment that it was owed a defense under the general liability portion of the policy. *Id.* at 6.

Both parties moved for summary judgment within the district court, disputing the applicability of a Professional Services Exclusion and Bodily Injury Exclusion within the general liability coverage part. The exclusions, in relevant part, read as follows:

> **Professional Services Exclusion:**
> [excludes any claim] based upon, arising out of, or in any way involving an act error or omission in the performance of services of a professional nature rendered or that should have been rendered by the Insured or by any person or organization for whose acts, errors or omissions the Insured is legally responsible.
>
> **Bodily Injury Exclusion:**
> [bars coverage for claims that are] based upon or arising out of Bodily Injury sustained by any patient, person, or resident of a facility receiving services of a professional nature or any such Claim brought by or on behalf of the spouse, child, parent, grandparent, brother, sister or partner of such patient, person or resident of a facility *Id.* at 4-6.

The district court adopted a magistrate's recommendation that Westchester be granted summary judgment on the duty to defend under the general liability coverage part. After both parties moved for entry of a partial final judgment, Evanston appealed. *Id.* at 6-7.

On appeal, Evanston first argued that the Professional Services Exclusion barred coverage for the underlying claims because (1) the scope of the exclusion was "extremely broad"; and (2) "services of a professional nature" (not otherwise defined in the policy) must bar coverage for any claim that is "tenuously" related to a professional service. Evanston reasoned that since the patient was assaulted *where* she was being treated, that was sufficiently "related" to professional services to bar coverage. *Id.* 9-10.

While agreeing with Evanston that the exclusion was "extremely broad in scope" and applied to any claim "even remotely" involving "services of a professional nature," the court of appeals rejected Evanston's argument that Westchester's failure to investigate, train and supervise its staff were "services of a professional nature":

> If we define the "act" as the alleged sexual assault, the reasoning in *Lindheimer* forecloses any argument that the sexual assault here involves the providing of services of a professional nature. [Employee] was not treating Jane Doe at the time of the assault as a medical physician or a nurse; neither party has identified any medical services that he was performing at the time. But even if [employee] had been Doe's treating physician, "the act causing the injury was the assault, not the [provision of treatment]. ...
>
> Alternatively, we could construe the "act" in question as Westchester's purported negligence in hiring, training and supervising its employees, and its failure to adhere to its internal policies and procedures. Indeed, the Doe's underlying state court suit against Westchester asserts the claim that Westchester negligently failed to reasonable train, control or supervise its staff. However, those activities do not fundamentally involve "services of a professional nature." They are administrative and human resource – related functions of the hospital, performed not in its role as a provider of medical treatment, but in its role as an employer and a business. As an illustration, restaurants, grocery stores, and gyms – entities that do not necessarily provide services requiring high levels of professional training and proficiency, - can still be held liable for failing to properly train or supervise employees that have committed intentional torts against their patrons. Westchester's alleged failure to

properly hire, train, or supervise employees is not inherently related to its provision of professional services. *Id.* at 15-6 (*citing Lindheimer v. St. Paul Fire & Marine Ins. Co.,* 643 So.2d 636 (3rd Fla. DCA 1994).

Alternatively, Evanston argued the Bodily Injury exclusion applied to any claim related to a patient generally receiving services of a professional nature - regardless of *how* a claimant suffered her bodily injury. *Westchester,* supra at 19. While ultimately declaring the exclusion ambiguous (thus ruling for Westchester), the court could not ignore the temporal and contemporaneous nature of exclusion:

> [T]he fact that the Bodily Injury Exclusion uses a present participle ("receiving services of a professional nature"), as opposed to a traditional relative clause that uses "who" or "that" to describe a noun (e.g. "[who] receiv[ies] professional services") further shows that introducing the word "while" in between "facility" and "receiving" would better accomplish the intent of the parties. A present participle is used to signal present and continuing action... Similarly, the Bodily Injury Exclusion would apply only to those patients who sustain a "Bodily Injury" contemporaneously with their receipt of "services of a professional nature." Because Jane Doe was not "presently and continuously" receiving medical treatment when she was assaulted, the plain text and grammatical rules – especially when construed against Evanston, the drafter of this exclusion yield the conclusion that the Bodily Injury Exclusion does not bar coverage. *Id.* at 21-23 (citations omitted).

The *Westchester* decision, while at times more an English tutorial than a legal opinion, is clearly the correct result. Evanston's attempts to wedge the insured's negligent training or supervision into a technical reading of "professional services" falls flat – both factually and legally. If it wished to exclude claims arising out of a sexual assault within a general liability policy, Evanston could easily have done so via a more explicit exclusion.

11TH CIRCUIT

No Defense Owed to Additional Insured Under Subcontractor's CGL Policy Where There Were No Allegations of Subcontractor Negligence

In *Cincinnati Specialty Underwriters Ins. Co. v. KNS Group, LLC*, 2022 U.S. App. LEXIS 27949 (11th Cir. October 6, 2022), Tutor Perini Building Corporation ("Tutor") was the general contractor hired to build a casino in Anne Arundel County, Maryland. Tutor hired GM&P Construction and Glazing Contractors ("GM&P") to provide exterior glazing for the building. GM&P, in turn, hired KNS Group, LLC ("KNS") to assist it by glazing glass and installing windows. *Id.* at 2-3.

KNS was insured for the relevant period via a commercial general liability policy issued by Cincinnati Insurance Company ("Cincinnati"). The policy included an additional insured endorsement, which stated that it would cover additional insured parties:

> [o]nly with respect to "bodily injury," "property damage," or "personal or advertising injury" caused, in whole or in part, by:
>
> 1.[the named insured's] acts or omissions in the performance of [its] ongoing operations for the additional insured;
>
> 2.The acts or omissions of those acting on [the named insured's] behalf in the performance of [its] ongoing operations for the additional insured. *Id.* at 3-4.

In June of 2020, the owner of casino sued Tutor and its subcontractors in Maryland circuit court for construction defects at the casino. The owner alleged GM&P installed a defective "Glass Façade" that had "loose gaskets between window panels, damaged sealants and panel frames, and misaligned window wall panels creating the risk of property damage." The owner asserted that GM&P's negligence in furnishing materials and installing the façade was a breach of GM&P's duty to complete the façade "in a safe manner and without causing property damage to [the project] or creating the risk of property damage." *Id.* at 4.

GM&P responded by filing a third-party action against KNS and two other subcontractors that played roles in the construction process. GM&P brought claims against KNS for breach of contract and negligence, as well as common law and contractual indemnity. Cincinnati thereafter filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify KNS or GM&P within the Underlying Action. Specifically, Cincinnati argued its policy could provide no coverage to an additional insured when it owed no coverage

to its named insured (and KNS was not owed coverage for its own faulty workmanship). *Id.* at 4-5.

After GM&P's own insurer (Gemini) intervened, the parties filed cross-motions for summary judgment. The district court ruled that KNS was owed a duty to defend by Cincinnati, but that Cincinnati owed no duty to defend to GM&P. GM&P and Cincinnati each appealed the rulings against them. *Id.* at 5.

GM&P argued that because the additional insured endorsement does not mention vicarious liability and provides coverage to an additional insured for injury caused, "in part by" [KNS], it should be afforded a defense given the potential that KNS was "in part" responsible for the damages alleged. The court of appeals flatly rejected this as contrary to the allegations against GM&P when compared to the policy language:

> Turning first to GM&P's appeal, we conclude that Cincinnati's additional insured endorsement does not provide coverage to GM&P. The Policy limits GM&P's coverage to "bodily injury", "property damage" and "personal and advertising injury" caused "in whole or in part by" KNS or KNS's agents. Relying on the "plain meaning" of the Policy, we read it to cover GM&P only for damages that KNS or KNS's agents completely or partially caused. The complaint in the Underlying Action alleges that GM&P was negligent in its furnishing of materials and installation of the Glass Façade. It alleges no negligence by KNS nor any of its agents. Without more, Cincinnati has no duty to defend GM&P in the Underlying action. Nor moreover, does Cincinnati have a duty to indemnify GM&P.
>
> Our interpretation of the Policy aligns with the Florida Supreme Court's decision in *Garcia*. There, the state answered "yes" to our certified question which asked: "Does an insurance policy providing coverage for an additional insured 'with respect to liability because of the acts or omissions' of the named insured limit coverage to instances in which the additional insured is vicariously liability for acts of the named insured?" The court explained that the policy's causal language "clearly indicate[s] that an additional insured is only entitled to coverage concerning liability that is caused by or occurs by reason of acts or omissions of the named insured." The court thus concluded that the insurance company did not owe coverage to an additional insured in *Garcia* because the plaintiff in the underlying lawsuit had sued the additional insured "for her own negligence," and "did not allege that [the additional insured] was liable for the [named insured's] acts or omissions."
>
> Applying *Garcia's* logic to this case, the allegations in the complaint make clear that Cincinnati does not owe GM&P a duty to defend in the Underlying Action because GM&P is being sued for its own negligence, not vicariously for any negligent acts or omissions on the part of KNS. *Id.* at 7-9 (citing *Garcia v. Fed. Ins. Co.,* 969 So.2d 288 (Fla. 2007).

The court of appeals otherwise affirmed the district court ruling in favor of KNS on the duty to defend, where (1) the Underlying Complaint alleged multiple entities were involved in the supply of materials and the installation of the Glass Façade; and (2) the third-party action alleged negligence against KNS, which, when read in conjunction with the Underlying Complaint, left open the possibility that KNS could have damaged a separate component of the property. The court further rejected Cincinnati's argument that exclusions j (5) and (6) within the CGL form conclusively decided the duty to defend, where one did not definitively know the scope of the insured's intended operations. *KNS*, supra at 10-12, 12-13.

The *KNS* decision represents a faithful application of Florida law in deciding the duty to defend. GM&P asked the court to infer that a subcontractor working on a project could be responsible for property damage without any allegations supporting such a conclusion. It was not difficult for the court to reject such an argument, while noting, hypothetically, that an allegation within the Underlying Complaint that KNS caused but one percent of the damage would have triggered a duty to defend.

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