RECENT DEVELOPMENTS IN INSURANCE COVERAGE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
RECENT DEVELOPMENTS IN INSURANCE COVERAGE

I. WHO IS AN INSURED

A. Definition of Named Insured: National Cas. Co. v. White Mountains Reinsurance Co. of America

In National Cas. Co. v. White Mountains Reinsurance Co. of America, 735 F.3d 549 (7th Cir. 2013), White Mountain Reinsurance issued a policy that listed the “Edgar County Sheriff’s Department & Edgar County” as the Named Insured on the Declarations. The definition of “Named Insured” within the Policy stated: “NAMED INSURED Means the law enforcement agency named in Item 1 of the declarations.” The policy also had a definition of “Insured” which included: “the political subdivision in which the Named Insured is located . . . and elected or appointed officials or other personnel or units of the political subdivision of which the Named Insured is a unit thereof, with respect to their responsibilities to law enforcement.” National Casualty, 735 F. 3d at 557.

Edgar County and the former State’s Attorney for Edgar County were eventually sued in alleged wrongful conviction suits. A dispute arose between White Mountains Reinsurance and another insurer over liability for the defense costs for Edgar County and the former State’s Attorney. This insurer brought suit against White Mountains Reinsurance in federal court under a theory of unjust enrichment, arguing that White Mountains should compensate this insurer for defense costs that it had advanced for the defense of Edgar County and its former State’s Attorney. One of the primary disputes concerned whether Edgar County and its State’s Attorney qualified as an insured under White Mountains’ Policy.

After the district court ruled against White Mountains, it appealed. The Seventh Circuit Court of Appeals affirmed the district court, finding that both Edgar County and its former State’s Attorney qualified as an insured under the policy. First, the Seventh Circuit noted the conflict between the Declarations Page, which listed Edgar County as a Named Insured, and the definition of “Named Insured” which was limited to law enforcement agencies – which Edgar County is not. Id. at 557-58. According to the court, “‘[i]f two or more clauses within [an insurance] policy conflict or are inconsistent, then the clause affording greater coverage will govern.’” Id. at 557 (citation omitted). Because the inclusion of Edgar County within the definition would provide greater coverage than excluding it, the court ruled that Edgar County should be considered a “Named Insured.” Id. at 558. Second, they found that the former State’s Attorney qualified as an “insured” under the policy because the definition of “insured” was ambiguous and could be interpreted in such a way to include the State’s Attorney. Id. at 559.


In Menard, Inc. v. Country Preferred Insurance Co., 2013 IL App (3d) 120340, 992 N.E.2d 643, the Appellate Court, Third District, analyzed the circumstances where an individual can become an insured as a result of his or her “use” of a vehicle. In Menard, Inc., Ruby Bohlen drove to a
Menard’s store in Champaign, Illinois, where she purchased gravel and bricks. After she purchased the bricks, Menard’s employees loaded the bricks into her vehicle. While the Menard’s employees were loading the bricks into her vehicle, Bohlen’s foot became entangled, and she fell, hurting herself. After the accident, Bohlen sued Menard’s.

At the time of the accident, Bohlen’s vehicle was covered under a personal auto policy that defined “insured” as “anyone using an insured vehicle with your permission or the permission of an adult relative.” Menard, 2013 IL App (3d) 120340 at ¶8. The policy also contained an insuring agreement, providing coverage for bodily injury or property damage “caused by an accident resulting from the ownership, maintenance or use of an insured vehicle, including loading and unloading or of [sic.] any nonowned vehicle.” Id.

After Bohlen sued Menard’s, Menard’s requested a defense under Bohlen’s personal auto policy on the basis that Menard’s was a permissive user of her vehicle at the time of the accident because its employees were loading the vehicle. The appellate court agreed with Menard’s position and ruled that Bohlen’s personal auto insurer had a duty to defend Menard’s. In doing so, the appellate court “reject[ed] any argument that Illinois law equates ‘use’ of the vehicle with only operating or driving, as ‘use’ has a broad definition.” Id. at ¶21. Rather, according to the court, “the use of an automobile has been held to denote its employment for some purpose of the user.” Id. Additionally, the court noted that, in its insuring agreement, the policy itself contemplated that the “use” of the automobile would include loading and unloading the vehicle. As a consequence, because Menard’s employees were loading Bohlen’s vehicle at the time of the accident and had Bohlen’s permission to do so, Menard’s qualified as an insured on the policy.


In Pekin Ins. Co. v. United Contractor Midwest, Inc., 2013 IL App (3d) 120803, 997 N.E.2d 235, the Appellate Court, Third District, issued another opinion evaluating the scope of an additional insured endorsement in a construction setting. In United Contractor Midwest, Inc., a general contractor was named as an additional insured under a subcontractor’s CGL policy. The additional insured endorsement had the following conditions:

The Additional Insured is covered only with respect to vicarious liability for ‘bodily injury’ or ‘property damage’ imputed from [the subcontractor] to the Additional Insured [general contractor] as a proximate result of:

(1) Your ongoing operations performed for that Additional Insured during the Policy Period . . . .

* * *
C. With respect to the coverage afforded to the Additional Insured, the following additional exclusions apply:

This insurance does not apply to:

* * *

(2) Liability for ‘bodily injury’ or ‘property damage’ arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured, other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured.


The general contractor hired the subcontractor to clear trees from a worksite. Id. at ¶5. While clearing trees, one of the subcontractor’s employees came into contact with a power line and was electrocuted. After he sued the general contractor for negligence, the general contractor submitted the claim under the subcontractor’s CGL policy, requesting a defense. The subcontractor’s CGL insurer denied coverage on the basis that the suit did not allege that the general contractor was vicariously liable for the subcontractor’s negligence but alleged that the general contractor was independently negligent.

The appellate court agreed, holding that the subcontractor’s insurer had no duty to defend the general contractor under the additional insured endorsement. According to the court,

[The] complaint alleged [the general contractor], acting alone, negligently violated [general contractor’s] duty of care to [the employee] by failing to supervise and warn [the employee] of the dangers posed by the live, overhead power lines on or near the work site. The failure to specify a negligent act committed by [the subcontractor] not only fails to trigger coverage to an additional insured in [the subcontractor’s] insurance policy, but also defeats a theory of vicarious liability. Simply stated, we conclude a general contractor ... cannot be found to be vicariously liable for its own acts.

Id. at ¶28.

II. THE SCOPE OF INSURING AGREEMENTS

A. CGLs and Construction Defects: Hartford Cas. Ins. Co. v. Construction Builders in Motion, Inc.

In Hartford Cas. Ins. Co. v. Construction Builders in Motion, Inc., 966 F. Supp. 2d 777 (N.D. Ill. 2013), the Northern District Court addressed when an “occurrence” happens under a CGL policy.
in construction defect cases. In *Construction Builders*, related architectural design and general contracting companies (“contracting companies”) were insured under three different CGL policies. Each of these CGL policies only applied to bodily injury or property damage caused by an “occurrence,” and each defined “occurrence” as an “accident.” *Hartford*, 966 F. Supp. 2d at 782-86. After the contracting companies were sued by a property owner over a number of alleged defects within one of their developments, they submitted the suit to their CGL insurers, who then filed a complaint for declaratory judgment in federal court.

In their suit, the insurers argued that the suit did not allege property damage caused by an “occurrence,” and the federal court agreed. *Id.* at 790. According to the federal court, “damage to a construction project resulting from construction defects is not an ‘accident’ or ‘occurrence’ because it represents the natural and ordinary consequence of faulty construction.” *Id.* at 787 (citation omitted). As such, a construction defect does not qualify as an “occurrence” unless it “damage[s] something other than the project itself.” *Id.* Therefore, “[t]here is no coverage where the underlying suit alleges a scope of damages that extends only to the construction project itself as a result of construction defects or faulty workmanship.” *Id.* at 788. But, “[i]f the alleged damage to property [is] other than the property that was the subject of the construction project, coverage exists.” *Id.* In this case, because the federal court found that the underlying lawsuits only alleged damage to the construction project itself, it found that there was no property damage caused by an occurrence and, thus, no coverage.

**B. Business Torts & Occurrences: West American Ins. Co. v. Midwest Open MRI, Inc.**

In *West American Ins. Co. v. Midwest Open MRI, Inc.*, 2013 IL App (1st) 121034, 989 N.E.2d 252, an MRI provider plaintiff sued another MRI provider covered by a CGL policy. According to the allegations of the complaint against the insured, the insured engaged in “‘widespread solicitation and conspiracy to engage in kickback for referral arrangements’ with certain physicians or clinics and submitted false and deceptive billing records to patients and third-party payors.” *West American*, 2013 IL App (1st) 121034 at ¶4. The complaint further alleged that the MRI provider plaintiff was damaged because it was “‘restrained from capturing much of the outside MRI business in [the region] * * * because a substantial part of that market has been and is being illegally monopolized by [the insured]’ in conspiracy with those referring physicians and clinics.” *Id.* The CGL issued to the MRI insured provided coverage for bodily injury and property damage, but only if the bodily injury or property damage was caused by an “occurrence.”

In the ensuing coverage litigation, the appellate court found that there was no duty to defend because there was no “occurrence” alleged in the underlying complaint. According to the court, the policy defined “occurrence” as an “accident,” and, it “has long recognized that for purposes of insurance coverage claims, an accident is ‘an unforeseen occurrence, usually * * * an undesigned sudden or unexpected event of an inflictive or unfortunate character.’” *Id.* at ¶22 (citation omitted). Additionally, according to the court, “whether an occurrence is an accident depends on ‘whether the *injury* is expected or intended by the insured, not whether the *acts* were performed intentionally.” *Id.* (citation omitted) (emphasis in the original).
In this case, given the allegations against the insured, the court ruled that the underlying complaint “does not allege an occurrence because it makes no allegations of accidental conduct or consequences.” Id. at ¶23. In the Complaint, the insured allegedly “conspired” with physicians and clinics, engaged in an illegal monopoly, and “engaged in ‘predatory pricing schemes’ that had the effect of ‘pric[ing] other non-participating MRI facilities out of the market.’” Id.


In Jar Laboratories LLC v. Great American E&S Ins. Co., 945 F. Supp. 2d 937 (2013), the Federal District Court for the Northern District of Illinois interpreted the scope of Personal & Advertising Injury coverage provided by a CGL. In Jar Laboratories, a CGL provided coverage for “personal and advertising injury” which included coverage for “[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products, or services.” Jar Laboratories, 945 F. Supp. 2d at 939.

In Jar Laboratories, the insured was a manufacturer of an over-the-counter lidocaine patch (LidoPatch). When launching this product, the insured engaged in an advertising campaign that made a number of statements, including that the new patch was “[l]ike the prescription brand,” that it “contains the same active ingredient as the leading prescription patch,” and that a user of the patch can obtain relief “that lasts all day, without a prescription!” Id. at 940-41. The insured was eventually sued by the manufacturer of Lidoderm, a prescription lidocaine patch, for false and misleading advertising. According to the plaintiff manufacturer, the insured’s advertising campaign was misleading and false because it suggested that the OTC product LidoPatch was as effective as its prescription product Lidoderm when it was not.

After suit was filed, the insured submitted the claim to its CGL insurer for a defense under the “personal and advertising injury” coverage. The insurer filed a declaratory judgment action, asserting that the personal and advertising injury coverage was not triggered. The district court disagreed, finding a duty to defend. First, the district court found that the underlying complaint alleged that the insured’s advertising message referenced the plaintiff manufacturer’s prescription product, even if the insured’s advertisements never mentioned it by name. Id. at 943. Second, the court found sufficient allegations of “disparagement” in the underlying complaint to trigger coverage, even though the insured never asserted that its product was superior to the prescription drug. According to the court, “a statement equating a competitor’s product with an allegedly inferior one is logically indistinguishable from, and no less disparaging than, a statement describing one’s own product as ‘superior’ to the competitors’.” Id. at 944.
III. EXCLUSIONS WITHIN POLICIES


In Atlantic Cas. Ins. Co. v. Paszko Masonry, Inc., 718 F.3d 721 (7th Cir. 2013), a CGL policy contained an Injury to an Employee Exclusion, precluding coverage for “bodily injury” to any ‘contractor’ arising out of or in the course of rendering or performing services of any kind or nature whatsoever by such ‘contractor’ for which any insured may become liable in any capacity.” Atlantic Cas., 718 F.3d at 723. The definition of “contractor” included “any independent contractor or subcontractor of any insured, any general contractor, any developer, any property owner, any independent contractor or subcontractor of any general contractor, any independent contractor or subcontractor of any developer, any independent contractor or subcontractor of any property owner, and any and all persons working for and or providing services and or materials of any kind for these persons or entities mentioned herein.” Id.

In this case, while a potential caulking subcontractor was bidding for work on the construction of an apartment building, an employee of the caulking subcontractor went to the jobsite to demonstrate the company’s proficiencies. Id. at 722. While the employee was at the job site, a beam supporting masonry equipment fell on him and injured him. A half-an-hour later, the general contractor signed a contract with the caulking company. Id.

After the accident, the injured employee sued four companies for injuries caused by the falling beam. After these companies submitted a claim under the above-referenced CGL policy as either insureds or additional insureds, the insurer filed a declaratory judgment action, asserting that the Injury to Employee Exclusion precluded coverage. The Seventh Circuit Court of Appeals ruled that an ambiguity in the exclusion existed, creating coverage. According to the Seventh Circuit, a plausible interpretation of the exclusion includes an interpretation where “services are not provided until the contractor . . . begins to do compensated work on the project.” Therefore, because the injury occurred while the subcontractor was demonstrating proficiencies and before it was being compensated, coverage existed under the policy. Id. at 725.

B. Regular Use Exclusions: American Access Cas. Co. v. Griffin

In American Access Cas. Co. v. Griffin, 2014 IL App (1st) 130665, the Appellate Court, First District, determined whether the insurer presented sufficient facts to justify the application of a regular use exclusion. In Griffin, the insurer issued a personal auto policy to the insured with the following regular use exclusion:

[The policy] only applies with respect to the use of an ‘non-owned automobile’ and not any ‘owned automobile’ by the named insured ***.

1. ‘non-owned automobile’ means an automobile not owned by or furnished for the regular use of the named insured ***;
2. This policy does not apply to any automobile owned by or furnished for the regular use of the named insured.

American Access, 2014 IL App 130665 at ¶5. In 2008, the insured was involved in an accident while driving her mother’s 1995 Dodge Avenger. After the accident, the insurer filed a declaratory judgment action, asserting that the insured regularly used the Avenger. Therefore, no coverage was afforded under the policy’s regular use exclusion. At the trial court, the following facts were presented via affidavit:

- The insured “previously drove the 1995 Dodge Avenger on many occasions with her mother’s permission.”
- The insured “was the primary driver of the 1995 Dodge Avenger.”
- The insured’s mother “owned a second vehicle which [she] used as her primary vehicle.”
- Because of the insured’s “regular use of the 1995 Dodge Avenger she was familiar with its operation.”

Id. at ¶ 12. No other facts were submitted concerning the insured’s alleged use of the Avenger. On these facts, the trial court granted summary judgment in the insured’s favor.

The appellate court reversed, finding that a question of fact existed concerning whether the insured “regularly used” the Avenger. According to the court, “[t]he term ‘regular use’ is ‘not subject to absolute definition and * * * each case is dependent upon its own facts and circumstances.’” Id. at ¶21 (citation omitted). Analyzing the facts of this case, the court determined that an affidavit, by itself, was insufficient. For instance, the affidavit did not say that the insured could drive the Avenger “at will or often.” Id. at ¶22. It did not define or discuss the scope and duration of the insured’s permission to use the Avenger. It did not state how long the insured would be permitted to use the vehicle when her mother granted her permission or how long the insured “had been permitted to use the automobile at the time of the collision.” Without these details, summary judgment was inappropriate. Id.

C. Water Diversion Exclusion: Grinnell Mut. Reinsurance Co. v. Hubbs

In Grinnell Mut. Reinsurance Co. v. Hubbs, 2013 IL App (3d) 110861, 988 N.E.2d 761, the Illinois Appellate Court, Third District, interpreted the following exclusion within a farm policy:

We do not cover property damage resulting from diversion or obstruction of streams or surface water, or from interference with the natural drainage to or from the land of others.

Hubbs, 2013 IL App (3d) 110861 at ¶1. In Hubbs, a farmer dredged a retention pond and constructed a weir on his property. According to the farmer’s neighbor, the dredging of the retention pond and construction of the weir “caused a substantial elevation of the groundwater
After the neighbor sued the insured, the insured sought a defense under his farm policy. The insurer filed a declaratory judgment, and the appellate court found that the water diversion exclusion within the farm policy precluded coverage. First, the court rejected the farmer’s argument that the exclusion only applied to surface drainage, not to subsurface drainage. According to the appellate court, “In Illinois, the term ‘drainage’ applies to both surface and subsurface drainage patterns,” and, “[t]hus, as a matter of law, the term ‘drainage’ in the instant policy exclusion must be read to include both surface and subsurface drainage.”

Additionally, the court found that “no genuine issue of material fact exist[ed] regarding whether the construction of the weir and retention pond caused a substantial elevation of the groundwater table on [the neighbor’s] property which, in turn, impeded subsurface flow of water and caused 21 acres of [the neighbor’s] farmland to flood.”

**D. Expected or Intended Injury Exclusion: Empire Indemnity Ins. Co. v. Chicago Province of the Society of Jesus**

In *Empire Indemnity Ins. Co. v. Chicago Province of the Society of Jesus*, 2013 IL App (1st) 112346, 990 N.E.2d 845, a religious order was insured under a number of policies that contained an “expected or intended” injury exclusion. Among the policies, the exclusion precluded coverage for bodily injury “either expected or intended from the standpoint of the insured.”

The religious order was sued in a number of cases alleging that boys were molested by Donald McGuire, a former priest and member of the order, while he worked as a teacher and advisor at Loyola Academy in Chicago. According to the complaints against the religious order, the religious order knew or should have known about McGuire’s abuse because the religious order had “received numerous other complaints of sexual abuse of minors by McGuire, all of which took place prior to the time of the abuse” alleged by the plaintiffs. Furthermore, the complaints alleged that, “despite this knowledge of McGuire’s activities and propensity to abuse minors, the [religious order] did not report these allegations to law enforcement” but “transferred McGuire and allowed him to ‘remain in ministry and travel around the world’ solely to avoid scandal.” In the ensuing coverage litigation, the religious order argued that the “expected or intended injury exclusions” within the policies did not apply to these suits because the complaints were littered with assertions that the order knew or should have known – which was something less than actual knowledge.

The appellate court disagreed. It reasoned that “[i]t is well established . . . that the terms ‘intended’ and ‘expected,’ as used in similar insurance policy exclusionary clauses, are not synonyms: an ‘expected’ injury is merely one that should have been ‘reasonably anticipated’ by the insured.” Applying this test to the facts of the case, the appellate court reasoned:
Here, the factual section preceding the various counts of both John Doe and the John Doe parents’ complaints allege that [the religious order was] first apprised of McGuire’s abuse of minors in 1969 and had subsequently received numerous other complaints alleging McGuire’s sexual abuse of minors, all of which took place prior to the respective times of the John Does’ abuse. These allegations set forth that the [religious order] reasonably should have anticipated (or expected) McGuire’s abuse of the underlying John Doe plaintiffs after the Jesuits received [the initial report of abuse] in 1969 as well as numerous subsequent reports prior to the abuse of the underlying plaintiffs. Since these allegations were an expected injury from the Jesuits’ standpoint, the exclusion for “expected or intended” injuries barred coverage under the various policies.

*Id.* at ¶40.

**E. Pollution Exclusions: *Country Mut. Ins. Co. v. Hilltop View, LLC***

In *Country Mut. Ins. Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124, 998 N.E.2d 950, the Appellate Court, Fourth District, determined whether odors emitted from a hog farm constituted “traditional environmental pollution” within the meaning of an absolute pollution exclusion. In this case, a hog farm was covered by an umbrella policy with an absolute pollution exclusion, which stated that the policy did not apply:

M. to personal injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fume, acids, alkalis, chemicals, and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.

*Hilltop View*, 2013 IL App (4th) 130124 at ¶28. The hog farm was subsequently sued in a nuisance action that brought theories of negligence and nuisance “predicated on alleged odors associated with the operation of the confinement hog farm and the land application of manure from the confinement hog farm on property owned” by the hog farmers. *Id.* at ¶3. After suit was filed, a coverage action was filed to determine whether the suit against the hog farm fell within the umbrella policy’s pollution exclusion. The appellate court determined that it did not. *Id.* at ¶39.

The court first noted that the umbrella policy contained an absolute pollution exclusion that has been limited to “traditional environmental pollution.” *Id.* at ¶¶31-32. Quoting extensively from *American State Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997), the appellate court stated:
Our review of the history of the pollution exclusion amply demonstrates that the predominate [sic] motivation in drafting an exclusion for pollution-related injuries was the avoidance of the 'enormous expense and exposure resulting from the “explosion” of environmental litigation. . . . We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d’etre*, and apply it to situations which do not remotely resemble traditional environmental contamination. The pollution exclusion has been, and should continue to be, the appropriate means of avoiding “the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*.”

*Hilltop View, LLC*, 2013 IL App (4th) 130124, ¶32, quoting *Koloms*, 177 Ill. 2d at 493 (emphasis in original).

With these principles in mind, the appellate court then considered whether odors from a hog farm constituted “traditional environmental pollution” and concluded that it did not. The court reasoned that “[h]og farms have been around for a long time, and neighbors of hog farms have dealt with the smells created by hog farms ever since.” *Id.* at ¶39. Additionally, hog farms “have been traditionally thought of as a source of food, not pollution.” *Id.* Finally, the court noted that the certain Illinois laws, such as the Livestock Management Facilities Act, recognize that “the spreading of manure on farm fields is a traditional agricultural practice and would not constitute ‘traditional environmental pollution.’” *Id.* at ¶42.

**F. Liquor Liability Exclusion: *Netherlands Ins. Co. v. Phusion Projects, Inc.***

In *Netherlands Ins. Co. v. Phusion Projects, Inc.*, 737 F.3d 1174 (7th Cir. 2013), a manufacturer of a stimulant-enriched malt liquor product purchased CGL policies containing the following liquor liability exclusion:

This insurance does not apply to . . . “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
3. Any statute, ordinance or regulation relating to the sale, gift, distribution, or use of alcoholic beverages.

*Phusion Projects*, 737 F.3d at 1177. The manufacturer was sued in four lawsuits, all alleging that the plaintiff was injured or killed after he or someone else had become intoxicated on the manufacturer’s product. According to the lawsuits, the manufacturer was negligent and/or subject to strict liability for combining stimulants with alcohol in its products.
After the lawsuits were filed, the insurers filed a declaratory judgment action in the United States District Court for the Northern District of Illinois on the basis of the liquor liability exclusion within the policies. After the district court ruled in the insurers' favor, the Seventh Circuit Court of Appeals affirmed. First, the Seventh Circuit determined that the liquor liability exclusion within the policies was clear and unambiguous. \textit{Id.} at ¶1178. Furthermore, the Seventh Circuit ruled that the exclusion precluded a duty to defend. According to the court, it did not matter that the plaintiffs' negligence theory included an assertion that the manufacturer negligently included stimulants within its alcoholic drink because this assertion was not distinct and wholly independent from the manufacturer's act of furnishing alcohol. As the Seventh Circuit reasoned:

\begin{quote}
[B]ecause of the very nature of the Four Loko product, the stimulants and alcohol cannot be separated. The presence of energy stimulants in an alcoholic drink has no legal effect on the applicability of a liquor liability exclusion. The supply of alcohol, regardless of what it is mixed with, is the relevant factor to determine whether an insured caused or contributed to the intoxication of any person. While [the manufacturer's] choice of premixing energy stimulants and alcohol to make its Four Loko might not have been a very good one, it does not amount to tortious conduct that is divorced from the serving of alcohol.
\end{quote}

\textit{Id.} at 1180.

\textbf{IV. CONDITIONS OF POLICIES AND OTHER ISSUES}

\textbf{A. Duty of Additional Insureds to Give Notice: Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.}

In \textit{Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.}, 2013 IL App (1st) 112847, 994 N.E.2d 873, the Appellate Court, First District, considered whether the named insured’s failure to comply with the notice requirements under a CGL policy binds additional insureds. In \textit{Robinette Demolition, Inc.}, a subcontractor was covered under a CGL policy with the following notice provisions:

2. Duties In The Event Of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an 'occurrence'

b. If a claim is made or ‘suit’ is brought against any insured, you must:

\begin{enumerate}
\item Immediately record the specifics of the claim or ‘suit’ and the date receive; and
\item Notify us as soon as practicable.
\end{enumerate}
You must see to it that we receive written notice of the claim or ‘suit’ as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or ‘suit.’

The policy defined “You” as the “Named Insurer shown in the Declarations.” Robinette, 2013 IL App (1st) 112847 at ¶19.

Two general contractors were added to the subcontractor’s CGL policy as additional insureds on February 11, 2009. On February 25, 2009, while performing work for the general contractor, one of the subcontractor’s employees was injured. Id. at ¶6. The subcontractor, however, did not advise its CGL insurer of the incident. On November 3, 2010, the general contractor was sued. On November 23, 2010, one of the general contractors tendered its defense to the CGL insurer. Subsequently, the other defense was tendered as well. On January 12, 2011, the insurer responded to the tenders of defense by denying coverage, reasoning that the named insured violated the notice provisions because the insurer was first notified of the accident through the November 23rd defense tender – almost 2 years after the accident.

In the ensuing coverage litigation, the appellate court disagreed with the insurer’s analysis. First, it noted that the parties agreed that the named insured failed to comply with 2a. and 2b. of the notice provisions. Id. at ¶21 (The additional insureds were not required to comply with 2a and 2b because they did not fall within the definition of “You.”) The court also noted that the insurer also did not dispute that the additional insureds complied with 2c. Id. Then, it rejected the insurer’s argument that the named insured’s failure to comply with its notice provisions precludes coverage for the additional insureds, reasoning:

There is nothing in the notice provision of the policy making coverage for the additional insured contingent on the named insured’s compliance with its duty to notify. The court cannot import language into a policy that was not placed there by the parties but must determine what the policy is, not what a party argues it should be . . . .

The language of the notice provision does not evidence the parties’ intent to make the coverage for the additional insureds contingent on the named insured’s compliance with its duty to notify under the policy. Since the additional insureds complied with their duty under the notice provision of the policy, they are entitled to coverage as additional insureds.

Id. at ¶ 38-39.
B. Rescissions and The Innocent Co-Insured Doctrine: Illinois State Bar Ass’n Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas

In Illinois State Bar Ass’n Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas, 2013 IL App (1st) 122660, 1 N.E.3d 1186, the Appellate Court, First District, considered the application of the innocent co-insured doctrine to rescissions. In this case, Tuzzolino and Terpinas operated a law firm together bearing their names. Prior to April 2008, Tuzzolino mishandled some litigation and had even attempted to settle the claim himself. On April 29, 2008, Tuzzolino submitted a renewal application on behalf of himself, Terpinas, and the firm to their malpractice insurer. Law Office of Tuzzolino and Terpinas, 2013 IL App (1st) 122660 at ¶7. The renewal application asked: “has any member of the firm become aware of a past or present circumstance(s) which may give rise to a claim that has not been reported?” To this question, Tuzzolino answered “No.” Id. In June 2008, Terpinas first became aware of the potential malpractice claim stemming from Tuzzolino’s malpractice and reported it to the firm’s malpractice insurer. Id. at ¶9.

In March 2009, the firm’s malpractice insurer filed a declaratory judgment action for rescission, asserting that withholding information on the renewal application constituted a material misrepresentation. The malpractice insurer filed the claim against both Terpinas and Tuzzolino. The trial court granted the malpractice insurer’s motions for summary judgments, reasoning that the entire contract was void. On appeal, the appellate court reversed.

According to the appellate court, “[t]he common law innocent insured doctrine applies in a situation where two or more insureds have an insurance policy and one of the insureds commits an act that would normally void the insurer’s contractual obligations. In this situation, the innocent insured doctrine preserves coverage for the innocent insureds where ‘a reasonable person would not understand that the wrongdoing of a coinsured would prevent recovery under the policy.’” Id. at ¶27. In this case, the appellate court extended this doctrine to a situation “where a material misrepresentation was made during the formation of the policy” and ruled that, while the policy could be rescinded as to Tuzzolino, Terpinas was entitled to coverage. Id.

C. Ripeness: Byer Clinic and Chiropractic Ltd. v. State Farm Fire & Cas. Co.

In Byer Clinic and Chiropractic Ltd. v. State Farm Fire & Cas. Co., 2013 IL App (1st) 113038, 988 N.E.2d 670, the Appellate Court, First District, addressed the ripeness of a complaint for declaratory judgment. In Byer Clinic, after a plaintiff sued an insured in a class action for sending junk facsimiles pursuant to the Telephone Consumer Protection Act of 1991 (TCPA), its CGL insurer defended it under a reservation of rights.

The TCPA plaintiff then initiated a coverage action against the insurer, seeking a declaration that coverage existed under the CGL. The trial court dismissed the coverage action because it was not ripe, and the appellate court affirmed. The appellate court reasoned:

At the hearing on State Farm’s motion to dismiss, the trial court determined that the coverage issue raised by the complaint was not ripe for adjudication. The
court agreed with State Farm's position that since it was presently defending [the insured] under a reservation of rights, and it has not filed a declaratory judgment action contesting that defense, no controversy exists concerning its duty to defend. Furthermore, the trial court has made no finding of [the insured's] liability in the underlying class action suit. Therefore, a determination of State Farm’s duty to indemnify also is not ripe for adjudication. . . . . The trial court did not err in dismissing the declaratory judgment complaint because no justiciable controversy exists “at this time.”

Byer Clinic, 2013 IL App (1st) 113038 at ¶18.


Hunt v. State Farm Mut. Auto Ins. Co., 2013 IL App (1st) 120561, 994 N.E.2d 561, addressed the applicability of the estoppel doctrine when policies are canceled by the insurer. In Hunt, an insured's personal auto policy was canceled in April 2005. Hunt, 2013 IL App (1st) 120561 at ¶5. In October 2005, the insured was involved in an automobile accident and was subsequently sued. Id. at ¶6. When the insured tendered her defense to her personal automobile insurer, the insurer did not provide a defense and did not file a declaratory judgment action. After a stipulated judgment was entered against the insured, she assigned her rights to the personal injury plaintiff, who brought suit against the insurer. In the action against the insurer, the personal injury plaintiff argued that the insurer was estopped from raising its cancelation defense because it did not defend under a reservation of rights or file a declaratory judgment action. According to the court, where a complaint potentially alleges coverage, the duty to defend is triggered, and an insurer must either defend under a reservation of rights or file a complaint for declaratory judgment. Id. at ¶17. Otherwise, the insurer will be estopped from raising its coverage defenses. However, the estoppel doctrine only applies when the insurer breached its duty to defend. “If the insurer has no duty to defend because it was not given an opportunity to defend, there was no insurance policy in existence, or there was no coverage or potential for coverage, the estoppel doctrine does not apply.” Id. If a policy was canceled prior to the date of the accident, then no insurance policy existed, and no duty to defend existed – precluding the application of the estoppel doctrine. As a consequence, it was inappropriate to consider the estoppel doctrine until after the propriety of the cancelation was decided. Id. at ¶30. In this case, because the court ultimately found that the policy was properly canceled prior to the accident, the insurer never had a duty to defend and no policy was in force at the time of the accident. Id. at ¶46.
Patrick D. Cloud
- Partner

Patrick is a member of the firm’s Toxic Torts & Asbestos Practice, and Chair of both the firm’s Insurance Coverage Practice and Class Actions/Mass Torts Practice. Patrick has handled a broad range of litigation, including toxic tort matters, insurance coverage disputes, class action litigation, and products liability lawsuits.

As a member of the firm’s Toxic Torts & Asbestos Practice, Patrick plays a significant role defending clients in asbestos-related products liability and premises liability actions. He supervises day-to-day litigation activities, participates in the formulation and development of litigation and discovery strategies, has taken hundreds of depositions in asbestos-related matters (including depositions of plaintiffs, fact witnesses, and experts), and has prepared and argued a variety of briefs, ranging from issues such as the Illinois Frye doctrine, choice-of-law issues, summary judgment matters, and the doctrine of forum non conveniens. Patrick has also been an active member of trial teams when matters move from the pretrial stages to the trial stages.

In addition to playing an important role in the firm’s Toxic Torts & Asbestos Practice, Patrick has handled many insurance coverage cases, prevailing on a number of them through summary judgment proceedings. His advocacy on behalf of the firm’s insurance clients is not limited to pure coverage disputes. Patrick has also successfully defended breach of contract, bad faith, and Section 155 actions and other proceedings ancillary to coverage issues, such as interpleader actions. Patrick has written extensively on insurance coverage matters, including co-authoring a chapter appearing within the Commercial and Professional Liability Insurance Practice Handbook, published by the Illinois Institute for Continuing Legal Education. Patrick is a regular speaker on insurance coverage matters, including speaking at national insurance conferences. Patrick also defends clients in class action litigation. His experience includes the preparation of briefs at both the trial court and appellate court level, including successfully preserving a dismissal order of consumer fraud claims in a case before the Fifth District Appellate Court of Illinois. He also has taken part in the formulation of discovery plans and defense strategies and taken and defended depositions in class actions cases, including the depositions of named class representatives.

Since 2004, Patrick’s experience has also included handling products liability cases, auto and trucking cases, medical device products liability cases, and construction accident cases.

A native of the St. Louis area, Patrick joined the firm in its Edwardsville office following graduation from law school. He obtained his undergraduate degree from the University of Notre Dame, graduating summa cum laude and being elected to Phi Beta Kappa. He is a Washington University School of Law graduate, being elected to the Order of the Coif upon graduation. He was named a Super Lawyer Rising Star – Illinois in 2012, 2013 and 2014, and is a graduate of the International Association of Defense Counsel Trial Academy.

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