GOLDBERG SEGALLA LLP

Professional Liability Monthly

A national professional liability newsletter

June 2012 Vol.4, No.6

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FEATURED ARTICLE

Contractors and the Growing Need for Professional Liability Insurance: Why Your General Liability Policy Is No Longer Enough

Constantly evolving technology not only makes our lives easier and faster, but many times complicates things in ways we could have never imagined.

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Brian R. Biggie
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DIRECTORS AND OFFICERS

Pennsylvania Federal Court Grants Motion to Dismiss in Favor D & O Insurers on Public Policy Grounds

FEDERAL INSURANCE COMPANY v. GERALD A. SANDUSKY
(M.D. Pa., June 4, 2012)

The defendant, Sandusky, was President and CEO of The Second Mile, a nonprofit organization providing services to minors. Federal Insurance Company provided Directors and Officers and Employment Practices Liability coverage to The Second Mile for the period of April 1, 2011 to April 1, 2012 on a claims made basis.

In November 2011, a Pennsylvania Grand Jury returned and indictment against Sandusky with 40 criminal counts relating to the alleged sexual abuse of eight minor male children. Therefore, Sandusky was also named in a civil action by one of the minors seeking damages based upon Sandusky's alleged sexual abuse. Sandusky denied any wrongdoing and sought coverage under the Federal D & O policy. Federal agreed to defend in both the criminal and civil actions under a reservation of rights and then commenced a declaratory judgment action.

Federal filed a motion for judgment on the pleadings pursuant to FRCP 12(c), arguing that permitting The Second Mile's insurance policy to afford coverage for losses stemming from sexual abuse of minors would violate the public policy of the Commonwealth of Pennsylvania. The court initially recognized that the Pennsylvania Supreme Court has held that insurance coverage for damages arising out of morally reprehensible, evil or illegal conduct is contrary to Pennsylvania public policy. However, the court noted that Federal's policy specifically covered defense costs as a covered loss separate and apart from damages.

Ultimately, the court granted the motion to dismiss insofar as declaring that Federal has no obligation to indemnify Sandusky for damages arising out of the alleged sexual abuse of minors based upon public policy grounds. However, the court denied the motion insofar as it sought a declaration that Federal has no duty to cover defense costs, observing that:

Although D & O policies that provide for defense costs in criminal cases are rare, it is possible to imagine valid public interest considerations that would favor the issuance of these policies. For example, it might be argued that such a policy enhances the ability of a non-profit organization to recruit volunteers and executives who might otherwise decline to serve because of the fear of vexatious lawsuits or even criminal prosecutions. It might also be argued that the presumption of innocence remains a bedrock principle of our Constitution makes insurance to cover defense costs in the public interest. These considerations may inform the Court in predicting how the highest court of Pennsylvania would decide this matter, but they are not presented here to the court's consideration.

Impact: Indemnification for damages flowing from morally reprehensible conduct are prohibited as against public policy in Pennsylvania, including under D & O policies. Whether affording a defense under an insurance policy is likewise prohibited remains an issue to be addressed by the Supreme Court of Pennsylvania.

Investor In Madoff Feeder Fund Cannot Assert A Viable Malpractice Claim Against Outside Auditors

STEPHENSON v. PRICEWATERHOUSE COOPERS, LLC
(2nd Cir. May 18, 2012)

In *Stephenson* an investor in a Madoff feeder fund attempted to recoup a portion of his $60 million investment by asserting a malpractice claim against PricewaterhouseCoopers (PWC). PWC acted as the outside auditor for the feeder fund between 2006 and 2008. During this timeframe, PWC issued the feeder fund "unqualified audit reports attesting to the accuracy of [the feeder fund's] financial statements." The investor attempted to withdraw his investment in the feeder fund upon the discovery of Madoff's Ponzi scheme, only to find that the entirety of his investment was gone. The investor asserted a malpractice against PWC founded upon the unqualified audit opinions it issued for the feeder fund's financial statements.

The Second Circuit Court of Appeals, relying upon New York law, dismissed the malpractice claim. Specifically, the court reasoned that "the complaint fails to demonstrate that PWC owed [the investor] a duty as a potential investor in the fund." At the time PWC issued the unqualified audit reports for the feeder fund, it had no knowledge of the investor or his intent to invest in the feeder fund. In the absence of a contractual relationship between the accountant and plaintiff, the tenuous relationship between a potential investor and an auditor, without more, is insufficient to establish the presence of a duty between the parties.

Impact: The *Stephenson* opinion reaffirms an important limitation on accounting malpractice cases under New York law. In particular, the ability of a non-client to assert a malpractice claim against an auditor is judicially curtailed and requires a relationship approaching that of privity between the parties. The fact that a potential investor relied upon the audit opinion in making an investment decision, standing alone, fails to establish that a legal duty exists between the parties; a plaintiff will be unable to assert a viable malpractice claim in the absence of a legal duty. The *Stephenson* decision confirms that a very common fact pattern in cases relating to the Madoff Ponzi scheme, feeder fund investor and outside auditor, generally will not give rise to a viable malpractice claim under New York law.

LEGAL MALPRACTICE

Defendant Attorney May Support His Motion for Summary Judgment with His Own Affidavit of No Negligence

MULERO v. SCHOENHORN
(Sup. Ct. Conn., May 9, 2012)

The plaintiff, a pro se litigant, sued the defendant attorney for damages in connection with the defendant's representation of the plaintiff on an appeal from his criminal conviction for forgery in the second degree.

The plaintiff filed a two-count complaint sounding in breach of contract and legal malpractice as the trial court's judgment and his conviction were affirmed by the Appellate Court. The defendant attorney moved for summary judgment arguing that he did not breach the standard of care in his representation of the plaintiff. In support of his motion, the defendant attorney attached his own affidavit in which he averred that "based on his training and experience, my representation of Mr. Mulero was well above the level of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the legal profession."

In his opposition, the plaintiff contended that the defendant attorney cannot serve as an expert in his own case. While there is no Connecticut law on point, the court relied on *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d1014, 1019 (5th Cir.), cert. denied, 508 U.S. 956 (1993), in which the court held that the fact that the expert witness is a party is properly considered when assessing the witnesses' credibility.

The court granted the defendant's motion for summary judgment as it determined that the defendant attorney's affidavit suffices to discharge his burden as showing the absence of material facts as to whether he breached the standard of care. Additionally, as the plaintiff provided no facts to prove a genuine issue of material fact, he did not sustain his burden of opposing the motion for summary judgment.

Impact: Serious consideration should be given to filing a motion for summary judgment soon after a pro se plaintiff files his complaint to see if the plaintiff can determine the need for an expert witness and retain a legal standard of care expert witness who will provide sufficient facts to oppose the defendant's summary judgment motion.

Non-Pecuniary Damages Are Not Recoverable in Legal Malpractice Action

DOMBROWSKI v. BULSON
(N.Y. Ct. of Appeals May 31, 2012)

The plaintiff was convicted of attempted rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. After his motion to vacate his conviction was denied, he then brought a writ of habeas corpus. There, the plaintiff urged that the defendant failed to investigate or present evidence concerning an allegedly meritorious defense, failed to interview certain potential witnesses, and failed to cross-examine the victim regarding discrepancies in his testimony.

An evidentiary hearing was held at which the defendant attorney explained the reasoning behind his professional decisions regarding the conduct of the trial. The magistrate found that errors by the counsel made it difficult for the jury to make a reliable assessment of the critical issue of the victim's credibility. The prosecution did not re-prosecute the plaintiff and the indictment was dismissed.

The plaintiff then commenced this legal malpractice action alleging that he had been incarcerated for over five and one-half years, and then served a period of post release supervision which terminated only after his habeas corpus petition was granted.

The Supreme Court granted the defendant's motion for summary judgment in this legal malpractice action finding inter alia that damages for non-pecuniary losses were not available in an action for attorney malpractice.

The Appellate Division modified and reinstated that portion of the complaint seeking non-pecuniary damages. The court recognized that non-pecuniary damages are not available for legal malpractice claims where the underlying claim was a civil matter, but found that an individual who had been wrongfully convicted in a criminal matter because of attorney malpractice could recover compensatory damages for loss of liberty and other losses that were a direct result of the imprisonment.

Rejecting the analysis that there is a parallel between actions for malpractice in a criminal action and claims for false arrest and malicious prosecution as these are intentional torts, the Appellate Court held that it sees no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages. The Court reasoned that allowing non-pecuniary recovery would have devastating effects for the criminal justice system: a chilling effect on the willingness of the defense bar to represent indigent accused, and would put an incentive on attorneys not to participate in post-conviction effects.

Impact: This decision assists those jurisdictions that have yet to adopt a firm rule regarding recovery of non-pecuniary damages in legal malpractice cases premised on an underlying criminal matter.

Sixth Circuit Upholds Dismissal of Legal Malpractice Action By Way of Judicial Estoppel

WATKINS v. BAILEY
(6th Cir. May 25, 2012)

In 2005, plaintiff Regina Watkins, on behalf of her minor-daughter, sued the Methodist Health Care Hospital and the doctors that cared for Watkins during her pregnancy. Watkins claimed that their negligence resulted in serious injuries to her daughter. One week before trial, the medical defendants offered a substantial settlement. Watkins declined the offer upon the advice of her attorney. The case proceeded to trial. During trial, the trial judge granted a mistrial based on the improper conduct of Watkins' attorney in open court. The trial judge subsequently held that attorney in criminal contempt.

After the mistrial order was entered, the defendants renewed settlement discussions, and Watkins agreed to accept a settlement offer that was roughly three percent less than the original one. The state trial court held a hearing to ensure that the settlement was in the daughter's best interest. At the hearing, Watkins testified that she believed that it would be in the best interest of her child to accept the settlement, and also stated that her attorney had "rendered valuable services." The settlement was eventually approved by the State.

Watkins later filed a lawsuit against her former counsel, asserting legal malpractice, breach of contract, and breach of fiduciary duty. Watkins alleged that because of her attorney's misconduct, she received less money in the settlement of her medical malpractice claim. The district court granted summary judgment in favor of the defendants, finding that the position Watkins was asserting in the legal malpractice action was contrary to the position she asserted at the settlement hearing. The court stated that because Watkins had stated contrary facts under oath in a prior judicial proceeding, judicial estoppel applied. Watkins appealed.

On appeal, the Sixth Circuit held that judicial estoppel was properly applied to dismiss the legal malpractice action. First, the court noted that Watkins' claim that her attorneys were negligent naturally led to the conclusion that she believed the medical malpractice damages were more than her settlement. This was a position which was clearly inconsistent with her earlier statement under oath at the hearing i.e. that it was in the best interest of her child to settle for the settlement amount. Second, there was clearly "judicial acceptance" of Watkins' testimony at the state court hearing which was a prerequisite for the application of judicial estoppel. Third, the court noted that Watkins would obtain an unfair advantage if the doctrine did not apply because it would allow the minor to potentially obtain recovery against another party arising out of the same transaction.

As a matter of policy, the court noted that one may not assert a particular position in order to serve one purpose, and then assert a wholly contrary position to serve another. This was what Watkins was doing by pursuing a legal malpractice action after testifying under oath that her attorney had rendered important legal assistance. The court noted that allowing the legal malpractice suit to proceed would undermine the state court's order confirming that the settlement was in the best interest of her daughter. For these reasons, summary judgment was affirmed.

Impact: This case illustrates how judicial estoppel may be applied to extinguish a legal malpractice claim. Clearly, judicial estoppel applies under a narrow set of facts and it would be rare to see it used with any frequency.

Court Upholds Disclaimer For Malpractice Action Premised Upon Allegation Attorney Acting As Unlicensed Real Estate Broker

RISSMAN v. WESTPORT INSURANCE CORP.
(11th Cir. May 25, 2012)

In *Rissman v. Westport Insurance Corp.*, 2012 U.S. App. LEXIS 10607 (11th Cir. May 25, 2012), a law firm and its employee attorney were named as defendants in a malpractice suit brought in connection with the sale of a piece of property. The plaintiff alleged that the attorney made misrepresentations about the property, and was acting as a licensed real estate broker in connection with the sale of the property when he was not one. It is not clear from the decision as to whether or not the defendant law firm knew, or consented to, its employee attorney's actions in the real estate transaction. Regardless, the law firm was sued because of its employee attorney's actions. The firm reported the loss to their malpractice carrier for both themselves and the employee attorney. The carrier declined coverage. The law firm and the attorney then filed suit seeking declaratory relief and damages for breach of contract. The district court held that there was no coverage and no duty to defend. Plaintiffs appealed.

In upholding the districts court's decision, the Eleventh Circuit held that the allegations of the complaint did not assert any allegations concerning that the attorney acted improperly as an attorney. The court reasoned that because the insurance contract provided coverage for wrongs committed in the rendition of professional services, and the term professional services was defined as "services rendered to others in the insured's capacity as a lawyer, and arising out of the conduct of the insured's profession as a lawyer … " (emphasis omitted), that a suit for malpractice in connection with allegedly acting as an unlicensed real estate broker was not covered.

Impact: A law firm needs to be mindful of assignments and projects that its lawyers are given and undertake which could give rise to liability beyond the scope of their malpractice insurance. Further, if a law firm routinely handles matters which could result in liability outside the scope of their malpractice policy, then the firm and/or the attorney should consider purchasing additional coverage. As this case shows, the Courts look to the allegations in the complaint for guidance as to whether or not the policy is in effect.

Suspended Attorney Precluded From Soliciting Potential Cases

FRANK v. TEWINKLE
(Sup. Ct. Pa. May 22, 2012)

The plaintiff is a former Pennsylvania attorney with a suspended license to practice law. However, through an advertising service, he solicited the claims of two individuals for a legal malpractice case against their former counsel. The defendants alleged the plaintiff was engaged in the unauthorized practice of law as evidenced by the advertisement and commencement of a legal action. Furthermore, the defendants filed preliminary objections to the complaint filed against them that sounds in breach of contract, for failure to attach the written agreement at issue. In addition, this motion argued the claim was champertous and void as against public policy. Specifically, the solicitation to which the claimants responded represented to injury victims that if their attorneys took more than 25 percent of recover received as a result of their injury, then they "got robbed." The trial court granted the preliminary objections dismissing the plaintiff's complaint.

The appellate court affirmed this order and stated champerty is still a valid defense in Pennsylvania. A champertous agreement is one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense in consideration of receiving a share of what is recovered. If an assignment is champertous, it is invalid. Thus, the trial court's ruling was proper because the plaintiff acquired the assignments at issue by paying cash for them. Moreover, the plaintiff essentially used his own money to finance the suits as a pro se plaintiff (he was not a licensed attorney).

Impact: An attorney with a suspended license may not solicit potential cases and enter into fee agreements because they are champertous and invalid.

MEDICAL MALPRACTICE

Court Addresses "Similar Health Care Provider" Statute

WILKINS v. CONNECTICUT CHILDBIRTH & WOMEN'S CENTER (App. Ct. Conn., May 22, 2012)

The plaintiff filed this medical malpractice action based on alleged negligence on the part of employees or agents of the institutional defendants during the delivery of the plaintiff's child and, subsequently, the plaintiff's post-partum visits. The plaintiff alleged that several certified nurse midwives, a registered nurse, and midwife in training, who were employees of the defendant, negligently failed to diagnose and treat a fourth degree tear of the plaintiff's vaginal tissue, perineal skin, and anal sphincter at the time of the plaintiff's delivery and during post partum checkups.

With her complaint, the plaintiff submitted a good faith certificate signed by her attorney, as required by Conn. Gen. Stat. § 52-190a, stating that good faith existed to believe that the defendants and their agents, servants or employees were negligent in their treatment of the plaintiff. The plaintiff submitted an opinion letter signed by a board certified obstetrician and gynecologist which opined that one of the certified nurse midwives who cared for the plaintiff departed from the acceptable standard of care when she failed to diagnose and repair the fourth degree tear following delivery of the fetus and at post partum visits.

The defendants moved to dismiss the plaintiff's complaint, arguing that the physician's opinion letter submitted pursuant to Conn. Gen. Stat. § 52-190a was not authored by a "similar health care provider" as required by the statute. The defendants argued that because the care rendered to the plaintiff was provided by certified nurse midwives or by a registered nurse, the plaintiff was required to submit an opinion letter authored by a certified nurse midwife or a registered nurse in order to satisfy the statute. The plaintiff argued in response that an obstetrician is a "similar health care provider" when rendering an opinion as to the standard of care applicable to certified nurse midwives and registered nurses engaged in supervising a patient's labor and delivery. The plaintiff also argued that the defendants were institutions to which the definition of "similar health care provider" set forth in Conn. Gen. Stat. § 52-184c did not apply, because that statute refers to individuals, not institutions. The trial court dismissed the plaintiff's action and the plaintiff appealed to the appellate court.

On appeal, the appellate court affirmed the trial court's dismissal of the action. Citing to *Bennett v. New Milford Hosp. Inc.*, 300 Conn. 1 (2011), the court noted that an expert's familiarity with or knowledge of the relevant standard of care, for purposes of authoring a pre-litigation opinion letter, was not a proper consideration in determining the adequacy of that letter if the author did not meet the statutory definition of "similar health care provider" set forth in § 52-184c. The plain language of §§ 52-190a and 52-184c require that a "similar health care provider" with respect to the plaintiff's health care providers would be someone who was trained and experienced in nurse midwifery or nursing and was certified in nurse midwifery or nursing. The author of the plaintiff's pre-litigation opinion letter was neither.

The appellate court also rejected the plaintiff's argument that the definition of "similar health care provider" set forth in 52-184c applies only to individuals, not institutions. The appellate court stated that this was a case of vicarious liability rather than institutional negligence. Therefore, the actions of the individual employees were relevant to the question of negligence, forming the basis for the inquiry as to whether there was a breach of the standard of care in the treatment of the plaintiff, for which the defendants, as their employer, would be vicariously liable. Therefore, the individual employees served as the health care providers for the purposes of determining who was a "similar health care provider."

Impact: This case illustrates that even a more credentialed health care provider may not constitute a "similar health care provider" for the purposes of the pre-litigation opinion letter required by Conn. Gen. Stat. § 52-190a. Counsel for health care providers must take care to scrutinize the training and experience of the author of the opinion letter as compared to the training and experience of the named defendants to ensure that the author meets the statutory definition of "similar health care provider."

AGENTS AND BROKERS

Plaintiff Need Not Assert Allegations of Fraud or Inequitable Conduct on the Part of an Insurance Agent to Allege a Cause of Negligence Against an Insurance Agent for Procuring Insufficient Insurance, Even When Plaintiff is Aware of the Amount of Insurance Procured

BYRD v. ORTIZ
(Conn. App. Ct. June 12, 2012)

The plaintiff contacted the defendant insurance agent about purchasing an automobile insurance policy for her two vehicles. The defendant's insurance agent advised the plaintiff to purchase an automobile insurance policy with bodily injury liability in the amount of $20,000 per person and $40,000 per accident, and uninsured/underinsured motorist coverage in the amount of $20,000 per person and $40,000 per accident. The plaintiff purchased this policy recommended by the defendant insurance agent.

Subsequently, while riding as a passenger, the plaintiff was involved in an automobile accident. She brought a claim against the owners of the other vehicle for injuries and damages she sustained as a result of the accident. The plaintiff settled her claims against the owners of the other vehicle for the owners' policy limits of $100,000. The plaintiff alleged that the value of her injuries and damages exceeded the $100,000 policy limit, and as a result of the defendant agent's negligence in failing to advise the plaintiff properly or to inquire of her about the appropriate amount of uninsured/underinsured motorist coverage, she was without sufficient underinsured motorist coverage to compensate her for her losses.

The plaintiff brought suit against the defendant insurance agent and defendant insurance company asserting various claims including claims of negligence. The defendants moved to strike the plaintiff's claims of negligence arguing that the plaintiff failed to state a claim for negligence because the plaintiff did not allege that the defendant agent engaged in fraudulent or inequitable conduct in advising and procuring insurance for her. The trial court agreed with the defendants and granted their motion to strike on that basis.

The plaintiff appealed the trial court's ruling and argued that the trial court, in granting the defendants' motion, inappropriately relied on the case of *Harlach v. Metropolitan & Liability Ins. Co.*, 221 Conn. 185 (1992), for the proposition that because the plaintiff alleged that she was aware of the amount of the policy she ultimately secured on the agent's advice, she needed to plead fraud or inequitable conduct on the part of the agent to state a cause of action for negligence against the defendant insurance agent. The plaintiff also argued that she had appropriately alleged a cause of action for negligence against the agent.

On appeal, the appellate court agreed with the plaintiff and overturned the trial court's ruling. In overturning the trial court, the appellate court first concluded that the trial court inappropriately relied on the *Harlach* case for the proposition that where the plaintiff is aware of the amount of the policy obtained on his or her behalf, the plaintiff must allege that the defendant insurance agent engaged in fraud or inequitable conduct to state a cause of action for negligence. The court reasoned that in *Harlach* case, the Supreme Court's discussion of the need to demonstrate fraud and inequitable conduct was confined to its consideration of whether the equitable principle of reformation was available to negate the policyholder's written request to the defendant insurance company, for a lesser amount of uninsured motorist coverage. The court further reasoned that the present case did not concern reformation, but, rather the defendant insurance agent's failure to inquire into or advise the plaintiff properly about the sufficient amount of insurance coverage. The court concluded that, therefore, the *Harlach* case was inapplicable and its holding that inequitable conduct and fraud was needed to assert a claim was not applicable to this case.

The appellate court then went on to conclude that the plaintiff, in alleging that the defendant agent breached his duty by failing to advise the plaintiff to obtain sufficient uninsured/underinsured motorist coverage, had sufficiently alleged a cause of action for negligence against the defendants. In so holding, the court rejected the defendants' second argument that the plaintiff did not state cognizable claims for negligence because an insurance agent has no duty to advise the insured of the sufficiency of insurance coverage. The court, citing to a Supreme Court case, found that as a matter of law, the defendant insurance agent has a duty to explain uninsured/underinsured motorist coverage to the plaintiff, to explain the consequences of not having a sufficient amount of such coverage, to recommend the proper amount of coverage based on the plaintiff's individual circumstances, and to attempt to procure the correct amount

of coverage and offer it to the plaintiff.

The court examined the plaintiff's complaint and found that she had alleged that the defendant insurance agent had a duty to exercise reasonable skill, care, and diligence: (1) in advising the plaintiff to purchase a policy with sufficient coverage which would secure all of her assets; (2) to provide sufficient uninsured/underinsured motorist coverage; and (3) to inquire of the plaintiff about any and all assets she needed to secure under said policy in order to provide sufficient uninsured/underinsured motorist coverage. The court noted that the plaintiff further alleged that the defendant agent breached the duty owed to the plaintiff by, among other things, failing to inquire of the plaintiff about any assets she needed to secure under said policy, and by failing to advise the plaintiff to purchase an insurance policy that would provide sufficient uninsured/underinsured motorist coverage. The court found that these allegations sufficiently set forth a cause of action for negligence against the defendants. The court overturned the trial court's ruling on the motion to strike and concluded that the plaintiff's complaint adequately stated a cause of action for negligence.

Impact: A plaintiff need not allege fraud or inequitable conduct on the part of a defendant insurance agent to state a cause of action for negligence even when the plaintiff is aware of the amount of the policy he or she has obtained. The appellate court also confirmed that a defendant agent does owe a duty to the plaintiff to advise the insured of the sufficiency of insurance coverage and allegations that an agent failed to do so will support a claim of negligence.

FEATURED ARTICLE

Contractors and the Growing Need for Professional Liability Insurance: Why Your General Liability Policy Is No Longer Enough

Constantly evolving technology not only makes our lives easier and faster, but many times complicates things in ways we could have never imagined. Indeed, with all of the benefit and growth that technology gives us, it has become apparent that as technology grows and evolves we must too. And the same is true for almost every industry, and more currently, very important for contractors. Indeed, the technological advances made in the construction industry are incredible. And with all of this growth, new liabilities have emerged. It seems apparent that the construction industry has not taken account of or provided for these risks, and it should.

Indeed, with all of the advances in the way buildings/homes are built, insulated, decorated and renovated, the once clear role of the contractor is now blurred. There have been several advancements in building design which has made the contractor more involved in the design aspect than ever before. As an example, programs such as Building Information Modeling (BIM) have revolutionized the way we design and build buildings, but they have also created new roles for contractors. Indeed, "BIM's most obvious legal concern is that it blurs the line between where design roles end, legally, and construction roles begin … ." BIM is so popular that many governmental organizations, such as the General Services Administration and the U.S. Army Corps of Engineers have started to adopt BIM standards for use on their projects. And thus, while programs such as BIM blur the roles of the major construction players, they are clearly popular enough to be here for a long time.

The implications for the construction industry have been sparse so far. To date only one lawsuit dealing with BIM has been filed and it already settled. Also, there are only a handful of other lawsuits dealing with these changing roles and the insurance implications that come with it. But like the calm before the storm, the need for more protection is apparent and has left the few contractors unlucky enough to be the targets of these lawsuits without coverage and inadequately protected.

The general liability policies that many contractors carry were meant to protect against very specific problems, namely personal injury and property damage. The risks meant to be protected from were inherent in what a contractor does, or at least they used to do. Indeed, with these new blurred roles, what a contractor used to do is no longer what he actually does. And while the contractor's role has changed, their insurance policy has not.

An example of this is *Yeager v. Polyurethane Foam Insulation, LLC*, 2012 WI App 11 (Ct. of Appeals of Wisconsin, Dist 3, 2011). In *Yeager*, a contractor was building a home. The contractor hired a subcontractor to insulate the home. The subcontractor used a sprayable foam insulation to perform the work. After the subcontractor was done, the general contractor alleged that he installed the insulation negligently and sued him. The subcontractor had a general liability policy with a "contractors error and omissions" endorsement. The endorsement only provided coverage up to $10,000.00 and held a limitation

that the duty to defend ended when the $10,000.00 was used up in settlements or judgments. The insurance company paid the $10,000 to the court and then disclaimed based on the terms of the policy. After doing this, they moved for summary judgment to confirm no other coverage available.

The contractor appealed and argued that the policy was applicable based on the claims he was asserting against the subcontractor, and that the remainder of the policy should be available. The court disagreed and held that the general liability policy was not triggered because the subcontractor was being sued for faulty workmanship, which was specifically not an "occurrence" which is what the policy provided for. (Id. at 14). Thus, the disclaimer was upheld.

While such a holding illustrates why it is important to have much more than an endorsement for such "errors and omissions," it also shows how the Court is using standard contract interpretation to declare these policies invalid on the bases of their strict terms. Indeed, without additional protection, and with the constantly blurred line between contractor and architect, it is easy to see how this will one day be a very hot area of litigation. Contractors need to recognize their new roles and provide for them accordingly, which may mean obtaining a professional liability policy in addition to the standard general liability policy.

Referenced articles include:

- First BIM Lawsuit Settled (Owner's Toolbox).
- Contractors professional liability demand rises (Business Insurance).
- Meeting the Needs for Governmental BIM Compliance while Avoiding Current Liability Obstacles (Reed Construction Data).

FEATURED ARTICLE

Goldberg Segalla Opens London Office

We are thrilled to announce Goldberg Segalla has expanded internationally with the opening of our London office, which is located in the heart of London's finance and insurance district at No. 1 Cornhill across from the Royal Exchange.

Our London team is led by Clive O'Connell and includes Eleni Iacovides and Tanguy Le Gouëllec de Schwarz. All three are widely recognized as leading reinsurance and insurance lawyers, and their collective and deep experience in the London and continental European markets significantly enhances our ability to counsel and act for clients in the US and EU.

To help you get to know these new partners at our firm, here is a bit of background on them:

Clive O'Connell's experience includes representing clients in some of the world's largest reinsurance disputes in recent years. He has acted for clients in disputes in a variety of forums including the Commercial Court and arbitration in England, the federal and state courts and arbitration in the United States, the Commercial Court and arbitration in France, as well as other jurisdictions such as Bermuda, Jamaica, Switzerland, Sweden, and Hong Kong. Clive has acted for clients on wording both of their general programs as well as unique transactions. He has also been involved in every aspect of run-off and exit strategies for reinsurers and insurers.

Clive is the former head of the Commercial Risk and Reinsurance Department at Barlow Lyde & Gilbert LLP in London. He is recognized as one of the world's leading insurance and reinsurance legal professionals in all major international legal ranking directories, including Chambers and Partners, Legal 500, Euromoney Expert Guides, Who's Who Legal, The International Who's Who of Insurance & Reinsurance Lawyers, and others. The Chambers and Partners directory has noted, "Clive O'Connell is deemed a formidable reinsurance lawyer by market sources." In 2011, Legal 500 called him "one of the best reinsurance lawyers in London."

Eleni Iacovides is a dual-qualified lawyer focusing on the resolution of insurance and reinsurance disputes. Called to the bar in her native Cyprus and admitted as a solicitor in England and Wales, she concentrates on offering insurance and reinsurance advice to the London and continental European insurance markets, with an emphasis on run-off portfolios. She was most recently Managing Partner of Riker Danzig London, the London affiliate of Riker Danzig Scherer Hyland and Perretti.

Eleni's equally balanced experience in private practice and in-house legal positions gives her an advantage in finding legal solutions that work within corporate strategic business objectives. Her experience includes representing clients in reinsurance disputes involving both London Market entities (including pools) as well as international companies both in London and in continental Europe as well as the United States. While serving in-house with two leading players in the run-off acquiring sector, she managed outside counsel representing company interests in court proceedings as well as

arbitrations involving well-known Market issues and disputes. Her ability to work closely with technical teams and find practical solutions is an attribute most appreciated by her clients.

Tanguy Le Gouëllec de Schwarz, who was previously London Legal Director at Clyde and Co., is dual-qualified in French and English law and focuses on the resolution of insurance and reinsurance disputes as well as domestic and international arbitrations. He has considerable experience in asbestos-related issues at both the insurance and reinsurance levels. Tanguy also advises on coverage issues in respect of directors and officers (D&O), property, and product liability policies (French and English) and was involved in a large litigation concerning financial institutions and brokers' duties.

Tanguy's experience also includes spending 11 months on secondment to the legacy team of a major UK composite insurer, where he advised on the treatment of asbestos losses at both the direct and reinsurance levels. Tanguy is a frequent author and presenter on topics in his areas of concentration, including reinsurance legal updates, jurisdiction issues, e-disclosure, and asbestos issues.

The London expansion and addition of Clive, Eleni, and Tanguy closely follow former New York State Superintendent of Insurance James J. Wrynn joining our firm as head of the Manhattan office and regulatory compliance practice.

Goldberg Segalla LLP is a Best Practices law firm with offices in Philadelphia, New York, Princeton, Hartford, Buffalo, Rochester, Syracuse, Albany, White Plains, Long Island, and London in April 2012. The Professional Liability Practice Group is comprised largely of seasoned trial attorneys who routinely handle all matters of professional liability claims and cases, with an emphasis in the areas of fidelity, directors and officers, insurance agents and brokers, nursing home defense, health care, and accountants' and lawyers' professional liability.

The Global Insurance Services Practice Group routinely handles matters of national and international importance for both domestic and foreign insurers, cedents and reinsurers. This includes: comprehensive audit, policy review, regulatory advice, and positioning disputes for resolution at the business level (either through interim funding or non-waiver agreements), negotiations among counsel, mediation or fully-involved arbitration or litigation. For more information on Goldberg Segalla's Professional Liability or Global Insurance Services Groups, please contact Richard J. Cohen or Daniel W. Gerber.

Our Global Insurance Services and Professional Liability teams consist of the following attorneys:

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